LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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SWEEPING CHANGES FOR ARBITRATION IN MICHIGAN

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A substantially revised Michigan Uniform Arbitration Act (UAA) took effect on July 1, 2013. The new UAA "governs an agreement to arbitrate whenever (that agreement was) made," but "does not affect an action or proceeding commenced or right accrued" before July 1. A separate enactment has repealed the former Michigan arbitration statute as of July 1.

The changes are less momentous than they might have been a few decades ago, before the U.S. Supreme Court embarked on a series of pro-arbitration decisions that have greatly expanded the reach and usage of the Federal Arbitration Act (FAA). The FAA can apply whenever an arbitration agreement involves interestate commerce, and both federal and state courts must follow it. Still, Michigan's previous arbitration statute had been in effect for over 50 years, and Michigan has now become the 14th state to adopt the revised UAA (originally published in 2000 by the National Conference of Commissioners on Uniform State Laws).

One point of special interest to labor law practitioners is that the new UAA, unlike its predecessor, applies to Michigan public sector labor arbitrations. The former statute expressly excepted arbitrations that arose from collective labor contracts. MCL 600.5001(3). the new act has no corresponding exception, and its broad definition of "person" includes governmental subdivisions and public corporations. The definition's catch-all clause "any other legal or commercial entity" would extend to labor organizations as well. In addition, the new act contains far more procedural detail than its predecessor. Here are some of the significant changes.

Restrictions On Waiving Key Terms. Section 4 of the revised UAA, MCL 691-1684, imposes two tiers of limits on parties' ability to waive its requirements. Some statutory provisions may not be waived at all, such as the right to ask a court to compel or stay arbitration, the right to ask a court to confirm or vacate an award, and the immunity from suit of arbitrators and sponsoring organizations such as the American Arbitration Association. Parties are prohibited from waiving other statutory provisions before a dispute arises, though they may be waived in the context of a particular dispute. These include the right to be represented by counsel, the right to disclosure of facts that could impact the partiality of a neutral arbitrator, the right to have the arbitrator issue subpoenas or permit the taking of depositions for use as evidence at the hearing, and the right to appeal from certain orders.

Who Decides Arbitrability Of A Particular Dispute? The new UAW defines the roles of courts and arbitrators in resolving the common question of whether a given dispute is arbitrable under a particular arbitration agreement. In keeping with current case law, courts are to determine (1) whether an agreement to arbitrate exists and (2) what issues fall within its ambit. Arbitrators are to decide procedural issues — such as timeliness, notice, laches, and estoppel — that may affect whether arbitration of the dispute can proceed to the merits. MCL 691.1686.

Provisional Remedies To Preserve The Status Quo. Arbitration is frequently viewed as ineffective for parties to obtain prompt interim relief to preserve the status quo, as in situations that involve the alleged violation of a covenant not to compete or the misuse of trade secrets. (For this reason, many arbitration agreements between employers and key employees exclude these controversies from the range of arbitrable issues.) The new UAA authorizes an arbitrator, once appointed, to issue orders for provisional remedies necessary to protect the effectiveness of the arbitration proceeding, including interim awards, to the same extent as a court could do. A party may also seek provisional relief in court until an arbitrator is appointed. MCL 691.1688.

Consolidation Of Proceedings. Sometimes parties to the same dispute, or connected disputes, have signed several different arbitration agreements, but not all parties have signed the same document. Because arbitration is a matter of contract, courts have generally been reluctant in these circumstances to order consolidated arbitration over a party's objection. Under the new UAA a party can petition a court for consolidation of separate arbitration proceedings, and consolidation may be ordered if the claims arise from the same or related transactions, there is a common issue of law or fact, and consolidation meets a basic fairness test. A term explicitly prohibiting consolidation will, however, be honored. MCL 691.1690.

[This is one more incentive for employers who use mandatory predispute arbitration agreements to include in those agreements a provision limiting any arbitration proceeding to the claims of a single employee. Such a provision might, of course, be attacked by the National Labor Relations Board as an impermissible restriction on employees' right to engage in concerted activity, as the Board decided in D.R. Horton, 357 NLRB No. 184 (2012). D. R. Horton's appeal from that decision remains pending in the U.S. Court of Appeals for the Fifth Circuit, but in the meantime the Second and Eighth Circuits and numerous federal district courts have rejected the NLRB's position and held that the Federal Arbitration Act requires enforcement of such waivers. *Sutherland v. Ernst & Young LLP,* __F.3d __ (2d Cir., August 9, 2013); *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013). At the same time, Board ALJs, who are bound by Board precedent, continue to find that such waivers violate the NLRA.]

Discovery. The new UAA empowers arbitrators to allow or limit discovery as they find appropriate in the circumstances of

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STATEMENT OF EDITORIAL POLICY

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

SWEEPING CHANGES FOR ARBITRATION IN MICHIGAN

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the case, balancing the needs of the parties, the arbitration agreement, and "the desirability of making the proceeding fair, expeditious, and cost effective.": MCL 691-1697(3). The arbitrator may also order parties to comply with discovery-related orders, may issue subpoenas, and may take any action against a non-complying party that a court could take in a civil lawsuit. Michigan courts may enforce such orders upon the application of a party or the arbitrator, and the courts may also enforce orders for the production of records and other evidence issued in arbitrations being conducted in another state. MCL 691-1697(7).

Mandatory Pre-Dispute Arbitration. No provision of the new UAA specifically addresses predispute arbitration agreements like those required by many employers as a condition of employment. The view that such agreements should presumptively be treated as unenforceable contracts of adhesion, once widely held, has lost its force after years of pro-arbitration decisions in both federal and state courts.

U.S. Supreme Court Update. As its 2012-13 term ended, the Supreme Court decided two significant arbitration cases.

Three terms ago the Supreme Court ruled in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662 (2010), that, under the FAA, arbitration of claims brought on behalf of a class may proceed only when the parties' arbitration agreement specifically allows class arbitration — something few arbitration agreements do. *Stolt-Nielsen* was widely viewed as effectively ending the prospect of class-wide arbitration. But the Court's unanimous June 10, 2013 decision in *Oxford Health Plans LLC v. Sutter,* 133 S. Ct. 2064 (2013) added a new twist: this rule could be trumped by the bedrock principle that an arbitrator's decision "even arguably construing or applying [a] contract" must stand, even when the arbitrator is obviously wrong.

Oxford Health involved an arbitration proceeding and then a lawsuit against Oxford on behalf of a class of physicians. The parties had agreed — before the U.S. Supreme Court's decision in *Stolt-Nielsen* — that the arbitrator should decide whether the arbitration clause in Oxford's standard contract for payment of the physicians' fees allowed for class arbitration. The arbitration proceeded and, although the clause did not specifically authorize class arbitration, the arbitrator interpreted the agreement (pre-*Stolt-Nielsen)* as permitting it. After the award issued, Oxford invoked *Stolt-Nielsen* in seeking to vacate the arbitrator's decision as "exceeding his powers" under the FAA. The trial court and the Third Circuit disagreed. Oxford's argument fared no better in the U.S. Supreme Court, which disagreed with the arbitrator's conclusion, but affirmed the arbitrator's right to be wrong:

> "All we say is that convincing a court of an arbitrator's error — even his grave error — is not enough. So long as the arbitrator was 'arguably construing' the contract — which this one was — a court may not correct his mistakes under [the FAA].. The potential for those mistakes is the price of agreeing to arbitration... The arbitrator's

construction holds, however good, bad, or ugly." *Id.* at 2070-71.

That's quite a statement of the power of an arbitrator (and of the risks of arbitration).

On June 20, 2013, however, the U.S. Supreme Court issued another decision that may be the real epitaph for class arbitration. In *American Express Travel Related Services Co. v. Italian Colors Restaurant,* 133 S. Ct. 2304 (2013), a 5-3 majority of the Court held in emphatic terms that a class arbitration waiver in the standard agreement between American Express and merchants who accept its credit cards was enforceable. The majority was not troubled by the argument that this result effectively precluded any member of the class from pursuing the Sherman Act antitrust claim at issue, because the cost to any individual merchant of developing the necessary expert evidence would far exceed the value of any individual claim. As Justice Scalia bluntly put it, "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of lower-value claims." The majority also declared: "[T]he fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Id.* at 2311 (emphasis in original). Justice Kagan's dissent accused the majority of ignoring prior holdings of the Court that, to the extent an arbitration agreement prevents the effective vindication of federal rights, it may not be enforced.

At this writing in late August, the Second and Ninth Circuits have held that *Italian Colors* required reversal of district court rulings that refused to enforce arbitration agreements barring class or collective action proceedings in the context of FLSA cases because pursuit of an individual FLSA remedy would be impracticable. *Sutherland v. Ernst & Young LLP, supra; Richards v. Ernest & Young LLP,* __ F.3d __ (August 21, 2013). *Italian Colors* may prove to be as powerful an impediment to employment class actions as *Wal-Mart v. Dukes.* ■

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WHISTLEBLOWERS' MOTIVATION FOR PROTECTED CONDUCT IS IRRELEVANT AND PROOF OF MOTIVATION IS NOT REQUIRED

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The Michigan Supreme Court issued a decision holding that the Whistleblowers' Protection Act (WPA),[1] which protects an employee against an employer's retaliatory employment actions, does not require an employee engaging in protected conduct to have, as his or her primary motivation, a desire to inform the public on matters of public concern. In *Whitman v. City of Burton*, 493 Mich 303 (May 1, 2013), the Court clarified that a plaintiff's primary motivation is not relevant to the issue of whether a plaintiff has engaged in protected activity and that proof of primary motivation is not a prerequisite to bringing a claim.[2]

Under *Whitman*, individuals suing under the WPA are no longer required to offer proof of motivation in order to prevail. Prior to this decision, many courts required employees to demonstrate that their primary motivation in pursuing a WPA claim was a "desire to inform the public on matters of public concern, and not personal vindictiveness."[3] By rejecting the notion that an employee must "act out of an altruistic motive of protecting the public,"[4] the Court's decision will likely make it more difficult for employers to defend WPA claims.

Plaintiff Whitman, was employed by defendant city of Burton as the chief of police until November 2007 when codefendant Charles Smiley, the mayor of Burton (the Mayor), declined to reappoint him. Whitman subsequently sued under the WPA claiming that the Mayor's decision not to reappoint him was prompted by Whitman's repeated complaints regarding a refusal to pay out accumulated unused sick and personal leave time in violation of a Burton city ordinance. The Mayor and the city department heads made a "gentleman's agreement" to forgo payments of unused sick, personal, and vacation time as a budget-cutting measure. Nevertheless, Whitman repeatedly claimed that the failure to pay out the accumulated unused time was in violation of Burton's city ordinance. The city relented and made payment to Whitman. The Mayor subsequently declined to reappoint Whitman claiming dissatisfaction with Whitman's performance.

Whitman sued the city of Burton and the Mayor in his individual capacity under the WPA, and a jury awarded Whitman total damages in the amount of $232,500. The Court of Appeals reversed (in a split opinion) holding that Whitman's WPA claim was not actionable because, "[h]e did not pursue the matter to inform the public on a matter of public concern."[5] The Michigan Supreme Court reversed and remanded holding that nothing in the language of the WPA addresses "an employee's motivation for engaging in protected conduct, nor does any language mandate

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WHISTLEBLOWERS' MOTIVATION FOR PROTECTED CONDUCT IS IRRELEVANT AND PROOF OF MOTIVATION IS NOT REQUIRED

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that the employee's primary motivation for pursuing a claim under the act be a desire to inform the public of matters of public concern." Therefore, a plaintiff's motivation is irrelevant to the issue of whether a plaintiff has engaged in protected activity, and proof of any specific motivation is not a prerequisite to bringing a WPA claim.

Employers' Bottom Line: This decision is not good news for employers because it removes a previously accepted basis (*i.e.*, improper primary motivation) for defending WPA actions. Before taking any adverse employment action, employers must be diligent in analyzing whether any "causal connection" may be implied when an employee has previously engaged in protected action (*i.e.*, complained of illegal activity).

— END NOTES —

1 MCL 15.361 *et seq*

2 Opinion by Justice Kelly, joined by Chief Justice Young and Justices Cavanagh, Markman, and Zahra. Justices McCormack and Viviano took no part in the decision.

3 *Shallal v. Catholic Social Services of Wayne Co,* 455 Mich 604, 621-622 (1997)

4 *Id*. at 621-622.

5 *Whitman v City of Burton*, 293 Mich App 220, 228-229 (2011). ■

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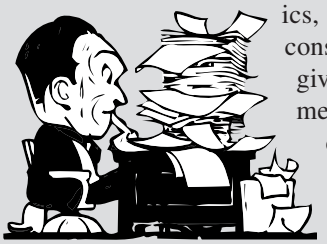

MICHIGAN FEDERAL COURT ENFORCES NON-COMPETE

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A U.S. District Judge in the Western District of Michigan recently enforced Stryker Corporation's covenant not to compete with its former Senior Director of Marketing, James Bruty, and enjoined him from engaging in competitive activity though his new employer, Blue Belt Technologies, Inc. The court rejected the defendants' arguments that Bruty's position with Blue Belt substantially differed from what he had been doing for Stryker, and found that the non-compete agreement he had signed with Stryker applied to his employment with Blue Belt.

Bruty had been with Stryker for about eight years and was its Senior Director of Marketing when, in December 2012, he gave Stryker notice that he had accepted employment with 4WEB, a startup company owned by a family friend and non-competitor of Stryker. But before his last day of employment with Stryker, he accepted a position with Blue Belt as its Vice President of Sales and Marketing. When Stryker learned that Bruty was working for Blue Belt (and not 4WEB) it sought to enforce the non-compete agreement Bruty had signed in 2007, and so notified Bruty and Blue Belt. They responded that Bruty's employment with Blue Belt was substantially different from his employment with Stryker, and committed that Bruty would not violate his agreement. Not satisfied, Stryker filed a lawsuit to enjoin Bruty from engaging in competitive activity.

In its May 10, 2013 opinion, *Stryker Corporation v. Bruty, 35 I.E.R. Cas. (BNA) 1161 (W.D. Mich. 2013),* the court noted at the outset that Bruty had received stock options from Stryker, valued at approximately $50,000, in exchange for the Stryker non-compete agreement. The court then focused on the language of the agreement, finding that Bruty had acknowledged that Stryker's business is "extremely competitive," that he had access to Stryker's confidential and proprietary information, that Stryker had a legitimate interest in protecting its confidential information and its relationships with existing and potential customers, and that the agreement, which prohibited Bruty from engaging in competitive activity for one year, was reasonable.

The court next addressed whether Stryker and Blue Belt were competitors, so as to trigger the agreement. Stryker invents, designs, manufactures, and sells a range of instruments and devices used in surgical procedures. Blue Belt is also engaged in the medical/surgical business and recently brought to market a robotic surgical tool used in partial knee replacements. In finding that the two companies compete, the court rejected Blue Belt's argument that they are in "adjacent" markets. The court noted that both companies target the same customers, that the technologies are common to both companies, and that Blue Belt's 2013 business plan identified Stryker as a company in its "competitive landscape." The court rejected Blue Belt's argument that they are not competitors because Stryker's robotics product (which would compete with Blue Belt's similar product) is currently in the development stage.

The court then granted Stryker's requested relief and entered a preliminary injunction prohibiting Bruty from engaging in competitive activity. In granting relief to Stryker, the court noted the public's interest in the enforcement of contractual obligations, and that the Michigan legislature has specifically endorsed reasonable non-competition covenants and the protection of proprietary information.

This ruling is a good reminder that a well-drafted non-compete agreement is worth a lot more than the paper it is written on. But it must be written so as to be reasonable in duration, scope, position, and the business interest to be protected. These are not "one size fits all" criteria, and form agreements often prove problematic. Stryker's agreement satisfied the test. Many do not. ■

SUPREME COURT DEFINES "SUPERVISOR" STATUS FOR PURPOSES OF IMPOSING VICARIOUS LIABILITY ON EMPLOYERS UNDER TITLE VII

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Butzel Long

Background

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Supreme Court explicated the circumstances that establish vicarious liability on an employer under Title VII for a supervisor's discriminatory conduct.

Applying principles of the law of agency, the Court held that an employer is "strictly liable" when a supervisor's discriminatory conduct culminates in a tangible adverse employment action against a subordinate employee, such as discharge, demotion, discipline, or undesirable reassignment. *Burlington* ante 762-763.

If a supervisor engages in discriminatory conduct that creates an actionable hostile work environment (e.g., racial harassment, sexual harassment, etc.) but no tangible adverse employment action is taken, the employer can be vicariously liable, unless the employer can establish an affirmative defense. Specifically, an employer can mitigate or avoid liability by showing (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities that were available. *Burlington* ante 765.

If the harasser is a non-supervisor co-worker, the employer may be liable under a negligent standard. To satisfy that standard, a plaintiff must show that the employer knew or should have known about the discriminatory conduct, but failed to take any corrective action. *Burlington* ante 758-759.

While the Court addressed the question of an employer's vicarious liability for a supervisor's discriminatory conduct in *Burlington* and *Faragher*, it did not address the question of who qualifies as a "supervisor" under Title VII.

In the Title VII context, whether an individual is a "supervisor" or only a co-worker is significant since it can make the difference between no liability or strict liability on an employer.

Differing Definitions For Supervisor

The term "supervisor" has varying meanings in the context of colloquial usage and the law.

The National Labor Relations Act (NLRA) has an expansive definition for supervisor. A supervisor is a person with authority to take tangible employment action (e.g., hire, fire, discipline) or to effectively recommend such action or to responsibly direct other employees if the exercise of such authority requires the exercise of independent judgment. 29 U.S.C. § 152(ii).

The EEOC Guidelines defining supervisor are also expansive. An individual qualifies as a supervisor if (a) the individual has the authority to undertake or to recommend tangible employment decisions affecting the employee or (b) the individual has the authority to direct the employee's daily work activities. *Mack v. Otis Elevator Co.*, 326 F.3d 116, 127 (2nd Cir. 2003).

The Circuit Courts of Appeal have divided on the definition of "supervisor." The Second, Fourth, and Ninth Circuits have held that the term supervisor includes those persons whom an employer vests with authority to direct and oversee other employees' daily work.

The First, Seventh, and Eighth Circuits hold that the term "supervisor" is limited to those persons who have the power to "hire, fire, demote, promote, transfer, or discipline" other employees.

Supreme Court Opts For A Narrow Definition Of "Supervisor" Under Title VII

In granting certiorari in *Vance v. Ball State University*, No. 11-566 (June 24, 2013), the Court stated that the question presented is whether "the *Faragher* and *Ellerth* 'supervisor' liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline their victim."

In *Vance*, ante, Maetta Vance, an African-American woman who worked in the University's banquet and dining division, alleged that Saundra Davis, who worked in the same location, racially harassed her by use of racial epithets and threats. Vance claimed that Davis had the authority to direct her work, was her supervisor, and subjected her to a hostile work environment in violation of Title VII.

The District Court granted summary judgment for Ball State. The Court held that because Vance's co-worker did not have the authority to "hire, fire, demote, promote, transfer, or discipline other employees, she was not Vance's supervisor. The District Court further held that Ball State was not liable in negligence because it had responded reasonably to the racial incidents of which it was made aware. The Seventh Circuit Court of Appeals affirmed.

In a majority decision, the Supreme Court stated that "[W]e hold that an employee is a supervisor for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim and we therefore affirm the judgment of the Seventh Circuit."[1]

The Court rejected the position of the EEOC (and the four dissenting justices) that any employee who has the authority to exercise significant direction over the daily work of other employees should be deemed a supervisor for purposes of Title VII. The Court said that such a standard is vague and would require juries and courts to delve into specific facts around the working relationship to determine supervisory status.

The Court held that supervisory status is established when an employee can take tangible employment actions against the victim "to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significant different responsibilities, or a decision causing a significant change in benefits."[2]

Whether an alleged workplace harasser is a supervisor or merely a co-worker is a significant issue. The majority opinion states that a definition of supervisor which ties supervisory status to the authority to exercise significant direction over another employee's daily work assignment is "nebulous" and "vague."

For instance, under the EEOC guidelines, the authority to direct the daily work assignment of another employee must be more than occasional and must include more than directing only a limited number of tasks or assignments of another employee. The majority said that applying these standards in determining who is a supervisor would present "daunting problems" for lower federal courts and juries because it would make the determination of supervisor status depend on a highly fact based evaluation of numerous factors.

"Under the definition of 'supervisor' that we adopt today, the question of supervisor status, when contested, can very often be resolved as a matter of law before trial," the Court said. "After discovery, supervisor status will generally be capable of resolution at summary judgment."[3]

The decision makes it clear that employers can still be liable for harassment by co-workers who do not qualify as a supervisor.[4] In those situations, employees can prevail if they show that the employer knew or should have known about the harassment and failed to take appropriate action.

Impact Of The Decision

The decision, by holding that the authority to take tangible employment actions, is the defining characteristic of a supervisor raises the bar for prevailing on harassment claims under Title VII.[5]

—END NOTES—

1. This case defines "supervisor" for purposes of Title VII. Given the Court's rationale, it would seem likely that the same definition would also be applicable in harassment cases under other Federal non-discrimination laws, such as the ADEA, 42 U.S.C. § 1981, et al.
2. State and local governmental non-discrimination laws may define "supervisor" more broadly.
3. The opportunity for summary judgment for defendants will be enhanced by this decision. The Court stated that "supervisory status can usually be readily determined generally by written documentation." Employers should review their documentation and job descriptions to make sure they delineate those employees who are empowered to take tangible employment actions.
4. Employers should further bear in mind that regardless of what a job description says, if the employer empowers an employee to make a tangible employment decision, the employer will be held vicariously liable under the theory that the employer in such instance delegated the decision making authority.
5. Under the so-called "cat's paw" theory of liability, an Employer may be held liable for employment discrimination based on the discriminatory animus of a supervisor who did not make the discriminatory ultimate employment decision, but whose influence was the proximate cause for the decision. *Staub v. Proctor Hospital,* 131 S. Ct. 1186 (2011). ■

RECENT FEDERAL COURT ADA DECISIONS OF INTEREST

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The federal courts continue to decide factually and legally challenging cases under the Americans with Disabilities Act (ADA). Here are recent examples.

Mentally Disordered Worker Is Not Disabled Or Entitled To Accommodation. In *McElwee v. County of Orange*, 700 F.3d 635 (2nd Cir. 2012) the U.S. Court of Appeals for the Second Circuit considered a developmentally disabled man's claims against a nursing center under the ADA and the similar Rehabilitation Act. McElwee had worked at the center as a janitor and housekeeper for 13 years. Administrators investigated his conduct after a number of female staff members, nursing students, and visitors complained that he stared at them and made sexually suggestive remarks. He essentially admitted the conduct, and the center dismissed him. He sued, claiming that the center should have reasonably accommodated his mental impairment. The trial court did not reach the question of accommodation, ruling that McElwee failed to show that his diagnosed disorder substantially impaired his ability to have appropriate contact with others – i.e., he was not "disabled" and therefore not protected. On appeal, the Second Circuit assumed that McElwee met the broad definition of "disability," but held that his conduct rendered him unqualified for his position. The court further concluded that the center could not have reasonably accommodated him, reasoning that an employer need not exclude past conduct as an accommodation and that McElwee's requested accommodation (special therapy to allow him to interact better with co-workers) was unreasonable. McElwee's additional proposed accommodation (educating staff about his disability) was also unreasonable. The court reasoned that demanding that others tolerate misconduct of this nature is not the type of accommodation contemplated by the ADA or Rehabilitation Act.

Is A Deaf Individual Qualified To Be A Lifeguard? In *Keith v. Oakland County*, 2013 U.S. App. LEXIS 595 (6th Cir. 2013) a deaf individual sued under the ADA and Rehabilitation Act, alleging that he had been wrongfully denied a lifeguard position. Keith had received lifeguard certification through the County during which he used a sign language interpreter. The County originally offered him a lifeguard position, but withdrew it after a medical exam and consultation with an aquatic safety company. When Keith sued, the trial court granted summary judgment to the County, ruling that Keith's deafness disqualified him from the position. On appeal, the U.S. Court of Appeals for the Sixth Circuit concluded that the County had made the required individualized inquiry as to whether Keith could perform the essential functions of lifeguard duties – by assessing ways he could use a whistle and signs – but the County had then improperly deferred the ultimate decision to consultants who had not considered whether Keith could perform the job with accommodation. The Sixth Circuit also considered whether the ability to hear is an essential function of a lifeguard job, concluding that this was a jury question. The case was remanded to the trial court.

Is A Juvenile Detention Worker Entitled To Light Duty? In contrast, in *Wardia v. Department of Justice and Public Safety*, 509 Fed. Appx. 527 (6th Cir. 2013) another panel of the Sixth Circuit considered the essential functions of a juvenile detention facility worker who alleged failure-to-accommodate claims. Wardia was a youth worker who supervised and monitored detained juveniles. After a non-work-related neck injury, the facility temporarily accommodated Wardia with light duty tasks in a control room where he monitored the movement of people and documents in and out of the facility. Eventually, Wardia's doctor diagnosed him as permanently disabled. Wardia then requested a permanent assignment to the control room. The facility concluded it could not continue him in the temporary light duty assignment, and terminated his employment. Wardia sued under the ADA. The trial court granted summary judgment for the employer. The Sixth Circuit affirmed, reasoning that physically restraining juveniles – despite the rarity of need for restraint – is an essential function of the youth worker job. Consequently, the facility was not required to eliminate that duty (as a reasonable accommodation) because the ADA does not require shifting an essential duty to another employee. Nor was permanent assignment to the control room a reasonable accommodation since the employer was not required to convert a rotating or temporary position into a permanent one.

Post-Discharge Diagnosis Dooms Narcoleptic's ADA Claim. In *Spurling v. C&M Fine Pack, Inc.*, 2013 U.S. Dist. LEXIS 23803 (N.D. Ind. 2013) the plaintiff alleged that she had been fired because she suffered from narcolepsy. Spurling had worked several years as a night shift packer and inspector. Supervisors found her sleeping on the job on multiple occasions and eventually suspended her pending recommended termination. Spurling then obtained a doctor's note stating that she "may have a medical condition causing the issue." Despite the note, C&M discharged her. Spurling was later diagnosed with narcolepsy. She sued, claiming that she had been discriminated against based on her disability. The U.S. District Court for the Northern District of Indiana granted summary judgment to C&M, ruling that Spurling could not show she was terminated based on an undiagnosed disability. The court observed that firing a person because of symptoms of a disability does not equate to a firing due to a disability, and that C&M was not required to stop its normal termination process based on the vaguely worded doctor's note. ■

SIMPLY IRRESISTIBLE: THE LIMITS OF SEX DISCRIMINATION LAW

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The Iowa Supreme Court has received more publicity than it wanted as it sorted out the case of what the media labeled as the termination of the "irresistible" dental assistant. In reality, the focus was on the relationship between the assistant and the dentist and not on the assistant's appearance. On two occasions, the court addressed the issue of whether a male employer can terminate a long time female employee because the employer's wife is concerned about the nature of the relationship and viewed her as a threat to their marriage in *Nelson v. Knight*.[1] To say that Dr. Knight's wife was concerned is to put it lightly; she demanded that he fire Nelson because she was "a big threat to our marriage."[2] The couple consulted with the senior pastor of their church who agreed with the decision.

The Iowa court struggled with addressing Nelson's argument that she did not do anything to get herself fired except exist as a female. The court stated the question it must answer is whether an employee who has not engaged in a flirtatious conduct may be lawfully terminated simply because the boss's wife views the relationship as a threat to her marriage. On two occasions, it answered the question with a "yes."

The court stated that the federal and state discrimination laws are not general fairness laws and noted the lack of relevant authority to assist it. The court found a distinction between an isolated employment decision based on personal relations (assuming no coercion or *quid pro quo*), even if the relations would not have existed if the employee had been of the opposite gender, and a case based on gender itself. In the first example, the decision is driven entirely by individual feelings and emotions regarding a specific person and is therefore not a gender based nor based on factors that are a proxy for gender.[3] The court was concerned that adopting Nelson's position would potentially allow any termination based on a consensual relationship to be challenged as discriminatory because the relationship would not have existed but for her or his gender.

The court acknowledged that the U.S. Supreme Court had held that a decision based on a gender stereotype can amount to unlawful discrimination in *Price Waterhouse v. Hopkins*.[4] Employment decisions cannot be predicated on mere stereotyped impressions about the characteristics of males and females.

In support of its decision, the court relied upon the Michigan court of appeals decision in *Barrett v. Kirkland Cmty. Coll.*[5] In *Barrett*, the plaintiff was a male employee who proceeded on a theory of romantic jealously. He alleged that his termination was motivated by an administrator who found out that the plaintiff was dating a female employee at the time the administrator had asked her out. Subsequently, the administrator became aware of the dating relationship, and according to the plaintiff, engaged in a course of conduct that resulted in the plaintiff's termination.

The court of appeals said it was beyond reason to conclude that plaintiff's status as the romantic competition to the woman the administrator sought to date placed him within the class of individuals the legislature sought to protect by prohibiting sex discrimination. At most, plaintiff established at trial that the administrator's adverse treatment of him was based on his relationship and not his gender. The court stated that since the administrator's motive was to win the affection of the employee; it would not matter if the person the administrator perceived to be standing in his way was male or female. Plaintiff's gender was merely coincidental to that conduct.[6]

Barrett was decided after the Michigan court of appeals decision in *Hickman v. W-S Equipment Co.., Inc.*[7] The plaintiff was a female employee who alleged she was fired so that her job could be given to the president's girlfriend. In affirming the summary disposition granted to defendants, the court stated that the president discharged her to give the job to his girlfriend which had nothing to do with plaintiff's gender. Indeed, the court observed that the discharge would have likely occurred regardless of plaintiff's sex.[8]

The Iowa court also relied on an 11th Circuit decision involving the termination of a female employee by the owner whose daughter in law was jealous of a relationship that existed with her husband (the owner's son) and the employee. *Platner v. Cash & Thomas Contractors, Inc.*[9] affirmed the district court's decision that Platner was not fired for a reason that that was actionable under Title VII. The district court had repeatedly emphasized that the owner's motive was to protect his son. To resolve a conflict within the family, the owner had to choose which employee to keep and the ultimate basis for his decision was his favoritism for his son. The court held that nepotism was not a violation of Title VII.

"A consensual personal relationship" with an "irrresistable" co-worker.

The Chief Justice and another justice filed a concurring opinion in *Nelson*. The concurring opinion took a different approach and found that under *Price Waterhouse,* Nelson had stated a claim of sex discrimination. The concurrence stated that both men and women are responsible for their own sexual desires and responses to the attributes of the other sex, neither is responsible to monitor or control the desires of the other sex. Accordingly, an employer cannot legally fire an employee simply because the employee is too attractive or not attractive enough.[10] Under the analysis in the concurrence, Nelson could not prevail because the facts did not support her claim.

The concurring opinion found that the dentist and the assistant had developed a "consensual personal relationship." While the dentist made comments that certainly would be considered inappropriate, including comments about tight shirts and tight pants, the concurring opinion stated that they were a part of the consensual personal relationship. The chief justice wrote that ultimately the question comes down to whether a reasonable fact finder could find that Knight's reasons for firing Nelson were, even in light of the relationship, responses motivated by Nelson's status as a woman.[11] The answer was no.

So what is a "consensual personal relationship?" It is legalese for the friendship between employees; hardly a rare or unique phenomenon, but one that is common in today's workplace. The concurring opinion concluded that in light of the undisputed evidence of a consensual personal relationship, there was insufficient evidence offered to establish that Nelson was terminated by the dentist due to her status as a woman.

It appears that both the main and concurring opinions lost sight of the fact that the decision to terminate Nelson was made by the dentist's wife. The main opinion distinguished the circumstance that where the isolated employment decision was driven *entirely* by the feelings and emotions concerning a person and one driven by gender. The concurring opinion referred to Knight's reasons for firing Nelson. Both explanations ignore that the reason for firing Nelson was the ultimatum for Dr. Knight's wife.

What was the wife concerned about? Her husband was a friend of a *female* employee at work. It was Nelson's status as a female

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SIMPLY IRRESISTIBLE: THE LIMITS OF SEX DISCRIMINATION LAW

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that was a threat to the marriage. The discussion about a party to a consensual relationship ending that relationship is irrelevant. The record seems clear that the dentist was very content with the *status quo*. If the friend had been a male, would that employee have been fired as a perceived threat to the marriage? Is there the basis of a claim? It certainly seems under the specific facts here, there is. The ultimatum from Knight's wife was basically for him to get rid of that woman. If the dentist had decided on his own that the relationship was not appropriate and decided that he not only had to end it but no longer would work with the employee, the facts would be aligned with those cases dealing with consensual relationships.

How would Nelson do in Michigan? Unless she could convince a court that her case is not a "jealousy" case like *Barrett*, she would have a difficult time prevailing. There are facts in *Barrett* that distinguish it from her situation. The college asserted that it had cause for plaintiff's termination—insubordination and abandonment of position. Unlike Nelson, the plaintiff was not considered to be a good employee. The court stated that if the administrator's motive was "to win the affection" of the employee, it would not matter if the person who the administrator perceived as standing in his way was male or female. The plaintiff's gender was not the impetus for the alleged conduct; it was merely coincidental to that conduct. Apparently, under the court's perception, if the administrator found out a female employee was discouraging the employee from dating him and fired that employee, it would not be discrimination—just the elimination of an obstacle. A court could apply the *Barrett* rationale say that the wife was concerned with anyone who was a threat to her marriage. This finding would make the gender of the person irrelevant.

The *Barrett* court stated that the Michigan civil rights act was enacted to prevent discrimination because of classifications specifically enumerated by the legislature and to eliminate the effects of offensive of demeaning stereotypes, prejudices, and biases. Status as romantic competition is not within the class sought to be protected. It did not have difficulty limiting the reach of the prohibition against sex discrimination.

The Iowa court, on the other hand, clearly struggled with the facts and the law. It looked at the case twice and reached the conclusion that there was no violation of the Iowa statute. As courts consider facts that reach the outer limits of what is generally thought to be sex discrimination, they will consider whether the conduct in issue is something that was intended to be prohibited by the legislature or by Congress. As the facts in *Nelson* demonstrated, this consideration will not be an easy matter.

—END NOTES—

1_Iowa_, (Iowa 2013).

2 *Nelson* slip p. 4.

3 *Nelson* slip pp. 11-12.

4 *Nelson* slip. P. 13.

5 245 Mich App. 306, 628 N. W. 2d 63 (2001).

6 245 Mich. App. At 323.

7 176 Mich. App. 17, 438 N.W.2d 872 (1989).

8 176 Mich. App. at 21.

9 908 F.2d 902 (11th Cir. 1990).

10 *Nelson* slip p. 26.

11 *Nelson* slip p. 28.. ■

EMPLOYER'S "NO RETURN" POLICY AFFECTING ALCOHOLIC COMMERCIAL DRIVER VIOLATES THE ADA

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I. Introduction

While alcoholism has long been considered an impairment[1], plaintiffs have had limited success establishing that alcoholism is a protected disability under the Americans with Disabilities Act (ADA). However, the Americans with Disabilities Amendments Act (ADAAA) significantly expanded the number of protected individuals under the Act. Instead of focusing on whether an individual qualifies as "disabled" under the Act, the new focus has been whether the employer made a reasonable accommodation and, if not, whether the employer can demonstrate undue hardship. In *E.E.O.C. v. Old Dominion Freight Line, Inc.*[2], the United States District Court, W.D. of Arkansas, further illustrated the need for an interactive process, holding that the transportation company's blanket policy prohibiting alcoholic drivers in its employ from returning to commercial driving positions, violates the ADA as a matter of law.

II. Alcoholism And The ADA

For an individual to recover under the ADA, the individual claiming disability discrimination must establish that he or she: (1) is a disabled person as defined by the ADA; (2) is qualified to perform the essential functions of his or her job with or without reasonable accommodation; and (3) suffered an adverse employment action because of his disability. The ADA requires an employee to establish a protected disability by adducing sufficient proof of either: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of such impairment; or (3) that the employee was regarded as having such impairment.[3]

Prior to the ADAAA, plaintiffs often failed to establish alcoholism as a disability as defined by the Act.[4] However, although some state disability civil rights statutes explicitly exclude alcoholism as a disability,[5] a person who currently uses alcohol is not automatically denied protection under the ADA,[6] The question of whether alcohol addiction is a disability is an individualized inquiry.[7] Further, since the primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the Act, Congress has made clear that the ADAAA's definition of "disability" must be construed in favor of broad coverage. Again, the focus should be an individualized inquiry and the interactive process.

Employers may still discipline, discharge and/or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct.[8] Employers may also logically prohibit alcohol use in the workplace and require that employees not be under the influence of alcohol while working.[9] This is especially important in transportation where public safety is a signif-

icant concern. Transportation employers may continue to test employees for on-duty impairment by alcohol and remove those employees who test positive for on-duty impairment.[10]

III. E.E.O.C. v. Old Dominion Freight Line, Inc.

In *E.E.O.C. v. Old Dominion Freight Line, Inc.*, the plaintiff was a commercial driver for defendant, Old Dominion Freight Line, Inc. ("Old Dominion"), a for-hire motor company providing global transportation services.[11] Plaintiff drove for five years without any major incidents.[12] On June 29, 2009, plaintiff informed his superior that he thought he was an alcoholic and he was going to an Alcoholics Anonymous ("AA") meeting.[13] Word of plaintiff's self-reported diagnosis traveled up the Old Dominion chain of command until the Regional Vice President removed the plaintiff from his driving position and then required him to undergo evaluation and treatment before he was allowed to return to work.[14] Old Dominion would not permit plaintiff to return to a *driving position* and informed plaintiff the only available non-driving position was as a part-time dock worker.[15]

Plaintiff was required to undergo outpatient treatment, but because his insurance only covered 60% of the treatment cost, he could not afford the other 40%.[16] Because treatment was a condition of continued employment at Old Dominion, plaintiff was terminated around July 24, 2009.[17] In August 2011, the Equal Employment Opportunity Commission ("EEOC") filed suit under the ADA on behalf of plaintiff.[18]

The United States District Court denied Old Dominion's motion for summary judgment, holding that reasonable jurors could find plaintiff was a disabled person as defined by the ADA.[19] The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities."[20] The court reasoned that alcoholism impairs not only work, but could also limit seeing, walking, speaking, learning, concentrating, thinking and communicating.[21]

A person is qualified to perform essential functions of his or her job under the ADA if performance is possible with or without reasonable accommodation. The court agreed that Old Dominion did not violate the ADA when, for safety justifications, it required plaintiff to undergo evaluation and treatment before returning to a safety-sensitive position as a commercial driver.[22] However, the court was not persuaded that Old Dominion provided a reasonable accommodation to plaintiff. It is discriminatory to use qualification standards that screen out an individual because of a disability, unless the standard is job-related and consistent with business necessity.[23] Old Dominion contended it made a policy decision as a matter of business necessity and public safety by prohibiting alcoholic drivers from returning to driving.[24] The evaluation and treatment process for alcoholics would serve a business necessity of not having an alcoholic drive a commercial vehicle, but it was not served in this case because there was no opportunity for an evaluated and treated alcoholic to return to his position.

The blanket ban prohibiting alcoholics from returning to driving positions shows on its face that no reasonable accommodation was offered. The EEOC suggested initialization of a breathalyzer in plaintiff's truck to insure he could not drive if impaired, but neither this nor other accommodations were considered by Old Dominion.[25] The court concluded that Old Dominion's blanket "no return" policy violated the ADA as a matter of law.

IV. Conclusion

It is too soon to determine what effect, if any, the *Old Dominion* decision will have in other jurisdictions when relied upon by other individual plaintiffs or the EEOC. It is clear that the EEOC intends to challenge blanket policies, and certain courts are sympathetic to challengers of these type of policies. The public safety concerns regarding alcoholic commercial drivers should not be taken lightly, and this decision does not affect an employer's right to terminate an employee for operating under the influence or consuming alcohol in the workplace. It is important to remember that each case is different and an individualized inquiry is necessary to identify and balance the competing concerns. It's also prudent to consult your employment counsel when analyzing these types of decisions and/or accommodations.

—END NOTES—

1 *See e.g.* 28 C.F.R. §35.104 (the definition of mental and physical impairment includes alcoholism).

2 *E.E.O.C. v. Old Dominion Freight Line, Inc.,* 2013 WL 3230670, *3 (citing *St. Martin v. City of St. Paul,* 680 F.3d 1027 (8th Cir. 2012)

3 42 U.S.C. § 12102(2); *Burch v. Coca-Cola Co.,* 119 F.3d 305, 316 (h Cir. 1997).

4 *See e.g. Burch v. Coca-Cola Co.,* 119 F.3d 305, 316 (th Cir. 1997) (holding that alcoholic plaintiff failed to establish that he was a qualified individual with a disability).

5 *See* Mich. Comp. Laws § 37.1103. Disability does not include a determinable physical or mental characteristics caused by the use of an alcoholic liquor by that individual, if that physical or mental characteristic prevents that individual from performing the duties of his or her job.

6 United States Equal Opportunity Commission, *Americans with Disabilities Act: Questions and Answers* (Oct. 9, 2008), http://www.ada.gov/qandaeng.htm.

7 *See Burch, supra.*

8 42 U.S.C. § 12114.

9 *Id.*

10 *Id.*

11 *E.E.O.C. v. Old Dominion Freight Line, Inc.,* 2013 WL 3230670, *2

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.*

17 *Old Dominion, 2013 WL 3230670 at *2..*

18 *Id.* at *1,

19 *Id.* at *3,

20. 42U.S.C. § 12102(1)

21. *E.E.O.C. v. Old Dominion Freight Line, Inc., 2013 WL 3230670, *3.*

22. *Id.* at *4-5.

23. 42 U.S.C. § 12112(b)(6).

24. *E.E.O.C. v. Old Dominion Freight Line, Inc.,* 2013 WL 3230670, *5.

25. *Id.* at *5-6.. ■

MICHIGAN SUPREME COURT UPDATE

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Varnum

Macomb County, et al v AFSCME Council 25, et al, 494 Mich 65 (2013), rev'g., 294 Mich App 149 (2011)

This case involved a decision by Appellants to change the actuarial table used to calculate joint and survivor pension benefits for certain employees working under collective bargaining agreements between Appellants and five separate local unions. Under both the agreements and a Macomb County ordinance, covered employees were required to choose between a retirement allowance based solely on the employees' lives or a joint and survivor retirement allowance that is reduced in amount to ensure it is "the actuarial equivalent to the straight life retirement allowance." Macomb County Retirement Ordinance, §26(a). The bargaining agreements each contained language incorporating the Retirement Ordinance, its terms and conditions.

For 24 years, the Appellants had used the 100% female actuarial table in calculating joint and survivor benefits, ostensibly to avoid possible claims of gender-based discrimination. In or around 2006, however, it was determined the use of the female actuarial table resulted in joint and survivor benefits greater than the actuarial equivalent of the straight life benefits. So Appellants adopted a blended actuarial table they concluded would best bring about benefits actuarially equal in value regardless of the option chosen by employees. Appellee Unions demanded bargaining, Appellants refused, and the Unions filed unfair labor practice charges with MERC alleging Appellants had made an unlawful unilateral change in their bargaining agreements.

The MERC Hearing Referee recommended that MERC dismiss the Charges, finding the parties had already agreed to have retirement benefits calculated pursuant to the Ordinance, and that any dispute over the term "actuarial equivalent" should be determined via the parties' grievance arbitration procedures, not by MERC. MERC rejected this recommendation and found Appellants had violated their duty to bargain in good faith by making a unilateral change. The Court of Appeals affirmed MERC, and Appellants sought and were granted leave to appeal to the Supreme Court.

In a 4-2 Decision (Justice Viviano recused himself, as he came to the Court from the Macomb County Circuit Court), the Supreme Court reversed and ordered the matter remanded to MERC for dismissal of the charges. The crux of the majority's ruling lies in its description of the Unions' burden to show a unilateral change in the parties' contracts. Here, according to the majority, the parties had clearly and consistently incorporated the terms of the Ordinance, including actuarial equivalency, into their bargaining agreements. Noting the undeniable fact Appellants had used the 100% female actuarial table for 24 years, the majority nonetheless opined the Appellee Unions had failed to demonstrate there had been any "meeting of the minds with respect to" this use of the female table such that there had been an actual agreement to modify the unambiguous contract language incorporating the Ordinance and its terms. The majority agreed with the original Hearing Referee's assertion that disputes over the term "actuarial equivalence" were best left to an arbitrator.

Dissenting Justices McCormack and Cavanaugh didn't really disagree with the majority's recitation of applicable law and legal burdens. They would have found, however, the parties' uninterrupted, 24-year use of the female actuarial table had effectively amended the terms of the parties' bargaining agreements, and Appellants' actions here constituted a unilateral change in the agreed upon, amended terms.

[Practitioner's Note: When using the expedient of incorporating a separate document, statute, rule or regulation into a collective bargaining agreement, take care to analyze the full potential impact of doing so.]

Smitter v Thornapple Tshp, et al, 494 Mich 121, 2013 WL 3064671 (2013), rev'g, Ct of Apps No. 294768 (Slip Op 2011, Unpub)

In this case, Appellant had been injured while working for Appellee Thornapple Township as a part-time firefighter, supplementing his income from another, primary employment. In such situations, the part-time employer's workers compensation coverage pays for the employee's wage loss attributable to the part-time employment, and the remainder of the employee's wage loss is ultimately the responsibility of the State's Second Injury Fund.

Here, Appellant had received disability benefits from both the Township's workers compensation insurer and a separate disability policy maintained by the Township. The Township, which had failed to coordinate benefit entitlement as between the two insurance sources, sought reimbursement from the Second Injury Fund for that portion of the workers compensation wage loss benefit applicable to Appellant's primary employment, but the Fund refused the Township's request. The Workers Compensation Magistrate, the Compensation Appellate Commission and the Court of Appeals all ordered the Fund to pay the Township the requested reimbursement. The Fund then sought and was granted leave to appeal to the Supreme Court.

The Supreme Court reversed and remanded the case to the Magistrate, ostensibly for dismissal of the Township's Hearing Petition. The Court ruled that coordination of benefits by an employer is mandatory under MCL 418.354(1)(b), and the Township's failure to do so foreclosed it from applying to the Second Injury Fund for reimbursement of monies its insurer should not have had to pay.

Justices Cavanaugh and McCormack each filed dissenting opinions. Justice McCormack opined that the Act may allow all employers to decide whether or not to coordinate benefits. Justice Cavanaugh took a narrower path and found Appellant Smitter had been a volunteer firefighter (despite the parties' concession before the Magistrate he was not!) and, therefore, MCL 418.354(15) gave the Township express statutory authority to waive coordination of benefits without penalty.

Hardaway v Wayne County, 494 Mich 423; ___NW3d ___; 2013 WL 3866780 (2013), rev'g, 298 Mich App 282 (2012)

Plaintiff in this case had worked 13 years as a principal attorney in Defendant's corporation counsel office. She was appointed to that position, but confirmation of her appointment by Defendant's Commission was not required and did not occur. Following the end of her employment, she sought additional life and

health insurance benefits available by County Resolution to "an appointee other than a member of a board or commission who is confirmed by the County Commission pursuant to …[Defendant's] Charter." The Circuit Court granted Defendant summary disposition, interpreting the provision in question to apply only to those appointees who had 1) been confirmed by the Commission and 2) not been members of a board or commission. The Court of Appeals reversed, interpreting the provision using the "last antecedent" rule of construction and finding the phrase "confirmed by the County Commission" was intended to apply only to members of boards and commissions.

A unanimous Supreme Court, Justice Cavanaugh concurring in the result only, reversed and remanded for entry of judgment for the Defendant. While recognizing the fundamental viability of the "last antecedent" rule, it rejected its application here for 3 essential reasons:

1. The rule should not be applied to language that is otherwise clear and unambiguous, and the Resolution's language here was both;

2. The Resolution also listed several specific, high-level administrative positions that did require Commission confirmation, and Defendant had never interpreted the language in question as bestowing entitlement upon anyone working in a position such as Plaintiff's; and

3. Since all appointments of board and commission members in Wayne County required confirmation, interpreting the Resolution's language as Plaintiff suggested would effectively render the phrase "who is confirmed by the County Commission" superfluous and meaningless.

Practitioner's Note: Care should be taken to recognize the Court's wisdom here may extend to other rules of statutory and contract construction.

One to Watch:

Wurtz v Beecher Metropolitan District, et al, No. 146157, Order Grtg Lv to App (June 5, 2013)

Appellant here had been Appellee water and sewer district's administrator, working under a ten-year contract that expired by its own terms February 1, 2010. In the last two years of his employment under that contract, Appellant engaged in two separate activities he alleged were protected by Michigan's Whistleblowers' Protection Act, MCL 15.361 et seq. The trial court granted Appellees summary disposition, finding that non-renewal of an expiring employment agreement is not an adverse employment action under the WPA. Without squarely deciding the issue in this case, the Court of Appeals ruled that whether non-renewal amounts to an adverse employment action should depend on the circumstances of the particular case. It then ordered the case remanded to the trial court with instructions to allow discovery to go forward. An application for leave to appeal followed.

In its Order Granting Leave to Appeal, the Supreme Court asked the parties (and interested amici) to address both the adverse employment action issue and whether there is a fair likelihood additional discovery in the case would produce a genuine issue of material fact. ■

SIXTH CIRCUIT UPDATE

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Registered Nurses Are "Supervisors" Under NLRA

In *GGNSC Springfield v NLRB,* Docket Nos 12-1528, 12-1529 (July 2, 2013), the plaintiff operated the Golden Living Center, a short- and long-term nursing facility that employs over 100 employees, including RNs, licensed practical nurses (LPNs), and certified nursing assistants (CNAs) who provide direct care for patients in the facility's two wings. The "employment hierarchy" at the Center placed an Executive Director at the top and in charge of overseeing the entire facility. Various department heads and a Director of Nursing reported directly to the Executive Director. Two Assistant Directors of Nursing oversaw each of the facility's wings. The RNs and LPNs (known as "charge nurses") reported directly to the Assistant Directors of Nursing. Typically, each wing was staffed with two charge nurses and between two and six CNAs. Although all charge nurses have similar duties, only the RNs attempted to collectively bargain in this case, which efforts the Center opposed. The issue was whether the Center's RNs were "supervisors" and, thus, not permitted to organize and collectively bargain under the National Labor Relations Act (NLRA). The Center argued that the RNs were supervisors "because they have the authority to discipline, assign, and responsibly direct CNAs all by using independent judgment." But the National Labor Relations Board disagreed and ordered the Center to bargain with the RNs. The Center appealed.

The Sixth Circuit first addressed the Center's argument that a recent decision from another Circuit Court voiding the NLRB's recent orders because it did not have at least three lawfully appointed members also renders void the NLRB's order here. Explaining that the issue is not a "jurisdictional" one, the Sixth Circuit refused to consider the Center's argument, which it raised for the first time on appeal.

Turning to the merits, the Sixth Circuit concluded that the Center "met its burden to demonstrate that its RNs utilize independent judgment in exercising their disciplinary authority." Specifically, the Court explained, the RNs have more than a mere reporting function with respect to disciplinary matters. Indeed, RNs, when confronted with CNA misconduct, can either do nothing, provide verbal counseling, or draw up a written memorandum – without the need for approval or consultation from their superiors. This choice, according to the Court, "depends on the RN's determination of how severe a violation is" and "there is no doubt when faced with a lesser violation the Center's RNs choose whether to issue an employee memorandum (discipline), to provide verbal counseling (not discipline), or to take no action at all." Because the RNs may issue actual discipline in the form of written memoranda under the Center's disciplinary policies (or choose not to do so), they are "supervisors", and the NLRB's failure to recognize the written memoranda as part of the Center's formal disciplinary scheme demonstrates that its decision was not supported by substantial evidence. The Sixth Circuit, thus, vacated the NLRB's decision.

ERISA Beneficiary Not Entitled to Back-Dated LTD Benefits

In June 2001, after suffering from numerous medical conditions, the plaintiff in *Engleson v Unum Life Ins Co of America,* Docket No 12-4049 (July 3, 2013), Jerry Engleson, stepped down

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SIXTH CIRCUIT UPDATE

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from his position as Vice President in charge of managing the casualty and property insurance lines for Seibert-Keck insurance. Engleson, upon stepping down, filed a claim for long term disability under the Seibert-Keck's long term disability plan managed by Unum. His claim was denied, and Engleson filed internal appeals with Unum in August 2001 and November 2001. Both appeals were denied. Engleson returned to work in 2007, but by August 2008 he was again unable to continue work due to his medical conditions. He filed again for disability benefits. The claim was approved, with a "disability date" of August 2008, not June 2001. Engleson sued, alleging violations of ERISA and seeking benefits back to June 2001.

The United States District Court for the Northern District of Ohio concluded that the three year contractual limitations period barred the suit seeking benefits back to June 2011 and dismissed it. It reasoned that, under the Plan's provisions, Engleson "had until March 12, 2005 to file a legal action with respect to his 2001 claim" and, thus, deemed his filing in 2009 to be untimely. The Sixth Circuit affirmed, concluding that Engleson's 2009 suit seeking benefits back to 2001 was eight years too late because the terms of the Plan gave him only three years to file it. Thus, "neither the law nor principles of equity allow us to excuse the tardiness of [plaintiff's] suit."

Rejecting Engleson's claim that Unum was required to inform him of his "right to seek review in federal court and the contractual time limitation attached to that right in its claim denial letters," the Court explained that, to satisfy ERISA's informational requirements under the applicable 2000 version of the Code of Federal Regulations, Unum needed only to provide "appropriate information" about internal appeals processes, not external judicial review (as the newer version of the regulations now requires). Next, the Court rejected Engleson's argument that its 2008 letter granting benefits, but expressly denying backdating benefits to 2001, constitutes another denial of his 2001 claim subject to appeal and triggering a new contractual limitations period. According to the Court, Unum treated the 2001 and 2008 claims as two separate claims, even assigning two "wholly different case numbers." Also, because both internal appellate reviews in 2001 provided the same ground for denial, Unum had no need to repeat the specific reason for declining to reconsider Engleson's plea to backdate benefits to 2001. Thus, the Court "fail[ed] to see any lasting connection between two claims that would lead us to construe the 2008 letter as a denial of the 2001 claim."

Finally, the Court rejected Engleson's argument that the Summary Plan Description did not provide for the three-year contractual limitations period for judicial review. Citing to the Supreme Court's 2011 decision in *CIGNA Corp. v. Amara*, the Sixth Circuit explained that SPDs are meant to convey information simply and in summary fashion. In other words, they "lack controlling effect in the face of plan language to the contrary." Thus, because the Plan provided for the three-year contractual limitations period for seeking judicial review, the SPD's failure to do so is not a violation of ERISA. Further, the ERISA provision requiring an SPD to set forth "applicable time limits" applies only to "procedures governing claims for benefits" – that is, according to the Court, internal time limits relates to the processing of claims, not contractual limitations periods for judicial review.

Firefighters Entitled to Preliminary Injunction For Claim That Promotional Exam Had Disparate Impact on Protected Groups

In *Howe v City of Akron*, Docket No 11-3752 (July 22, 2013), the plaintiffs were members of the Akron Fire Department who, after taking a promotion exam for the ranks of Captain and Lieutenant, failed to receive promotions. They sued the City alleging that the promotion exam "adversely impacted twelve Caucasian Captain candidates on the basis of race, eight Lieutenant candidates on the basis of age, and three African-American Lieutenant candidates on the basis of both age and race." The district court for the Northern District of Ohio, after the firefighters received a favorable jury verdict, awarded each Lieutenant and Captain compensatory damages, including front pay in lieu of equitable relief. The district court granted the City's motions for a new trial on the issue of damages, and it agreed to also consider the plaintiffs' motion to alter or amend the judgment to request equitable relief in the form of promotion. On July 11, 2011, during a pre-trial conference, the court granted the firefighters' motion for preliminary injunction (seeking the promotions) and ordered 18 firefighters promoted no later than July 18, 2011. The City appealed that ruling.

Administered and scored by an outside consulting firm, the promotion exam included a 100-question multiple choice test on technical job knowledge and two oral assessment exercises. The Lieutenant exam also included a written work-sample exercise. The Captain exam did not contain an additional written component, but included an additional oral assessment involving a group exercise. Promotional candidates were placed on an "eligibility list" in an ordered ranking upon achieving at least a 70% scaled score on the exam. The scaled score was then converted into a ninety-point scale, with points added for seniority. Then, for each available position, the three top-ranked individuals from the list were considered for the promotion. From there, the Chief would interview the candidates, although all individuals were, in fact, promoted according to their place on the ranked list. The firefighters challenged the exam because the promotion rates for individuals in certain protected categories did not reflect the corresponding exam passage rates.

The Sixth Circuit reviewed the district court's preliminary injunction for an abuse of discretion, noting that the district court had not yet issued a final judgment on the merits. The City argued that the firefighters cannot show a likelihood of success on the merits because they did not identify a particular part of the promotion exam process that resulted in the alleged disparate impact. According to the Sixth Circuit, the firefighters did not have to show that the various elements of the process are capable of separation from the overall process and identify them as causing the disparate impact because it was undisputed that individuals "were promoted in perfect consistency with their rank-order." Thus, the firefighters did not have to show how much of the alleged disparate impact stemmed from the test component versus the interview component of the process. Here, the Court concluded, the firefighters adequately identified an employment practice that they believed caused the disparate impact – i.e., the entire promotion exam.

Next, the Court agreed with the district court that the EEOC's "four-fifths rule" – which instructs that a selection rate for those in protected categories that is less than four-fifths of the rate for the group with the highest rate is generally regarded as evidence of disparate impact – is not the only means by which a plaintiff may establish disparate impact. Thus, according to the Sixth Circuit, the district court did not abuse its discretion by looking to the "promotion rates" (as opposed to "exam pass rates") as the proper metric for determining "adverse effect" in this case, where those who achieved a passing score were ranked and, thus, not placed

on "equal footing." According to the Court, "a comparison of exam pass rates cannot adequately capture the effects of a rank-order selection process."

Retirees Must Arbitrate Dispute With Employer Over Change to Health Benefits

In *VanPamel v TRW Vehicle Safety Systems*, Docket No 12-2173 (July 23, 2013), the plaintiffs' former Union and the defendant, TRW Vehicle Safety Systems, had negotiated a collective bargaining agreement in 1993 that included a provision for healthcare benefits for retirees. The Union and TRW negotiated a termination agreement in November 1996, in preparation for a plant closing, to govern the "terms and conditions applicable…to retirees and employees represented by the Union in the bargaining unit at the soon to be closed the plant." The termination agreement extended the 1993 CBA and also contained an arbitration provision. In January 2011, TRW "terminated prescription drug coverage for Medicare-eligible retirees, replacing it with an annual contribution to a health reimbursement account for retirees and their dependents." The plaintiffs, two retirees, sued alleging that the change violated TRW's contractual obligations, and TRW moved to compel arbitration, which the United States District Court for the Eastern District of Michigan granted. On appeal, the plaintiffs argued that retirees cannot be compelled to arbitrate benefit disputes with their former employers.

Noting the general presumption in favor of arbitration – particularly where there exists a broad arbitration clause – the Sixth Circuit held that the "arbitration provision in the termination agreement is controlling and is the exclusive remedy for disputes requiring interpretation or application of the Termination Agreement and the 1993 CBA." Because the plaintiffs attempted to enforce their right to benefits pursuant to the Termination Agreement and the CBA "they cannot circumvent the arbitration provision simply by virtue of their retiree status." The Court also noted that the plaintiffs retired in December 1997 and February 1998, respectively – well after the Termination Agreement – and that the 1993 CBA cannot be read in isolation without the Termination Agreement. Thus, because the retiree benefits were an express subject of the agreements at issue, and there is no contractual provision expressly excluding the dispute from the arbitration clause, the matter must be arbitrated. Rejecting the plaintiffs' additional argument that they could only agree to arbitrate ERISA claims by expressly listing that specific statutory claim in the arbitration provision, the Court explained that "ERISA claims [which are derived, at least in part, from rights provided in the CBA] can be the subject of arbitration pursuant to a CBA, even without the express listing of ERISA claims in the arbitration provision, because the genesis of the claim is the agreement not the statute."

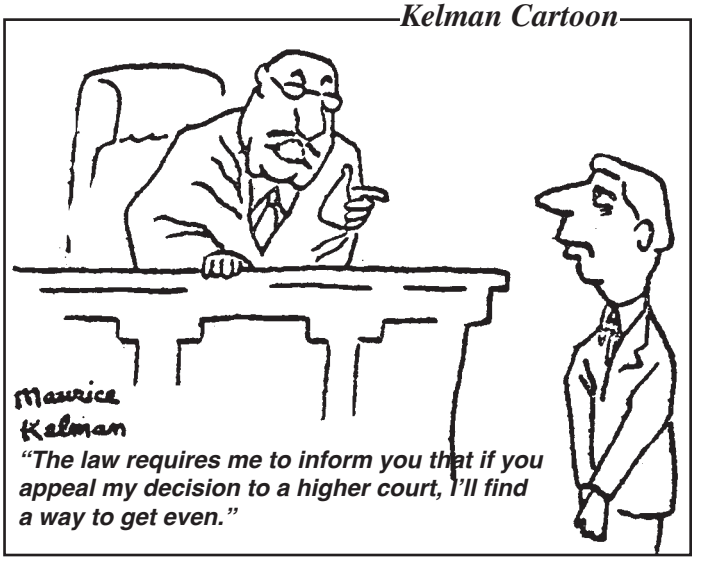
Employer's Delay In Requesting FMLA Certification Until STD Administrator Made Its Claims Decision Did Not Amount to Interference With Employee's Rights

In *Kinds v Ohio Bell Telephone Co*, Docket No 12-40-48 (July 29, 2013), the plaintiff, Debra Kinds, a decades-long employee, sought leave under the Family and Medical Leave Act on October 13, 2009 for the nine weeks of work that she missed in 2009 due to a hospitalization following a domestic dispute. She had run out of accrued but unused paid leave. The defendant, Ohio Bell Telephone Company, denied her request as to three of the nine weeks because she failed to provide timely documentation justifying her need for leave. Specifically, it had advised Kinds that she could apply for both short-term disability benefits and/or FMLA leave, and that she would have to submit an FMLA certification form only if her STD claim were to be denied. The STD administrator approved Kind's request for six weeks of the nine-week period, but denied it for the first three weeks of the period. Ohio Bell, in turn, approved the six-week period as FMLA leave, and on December 29, 2009 asked Kinds to submit an FMLA certification form demonstrating her need for FMLA leave for the first three-week period. She never returned a completed FMLA certification, despite Ohio Bell giving her an extension by which to do so, per her request. Ohio Bell denied her request, and in the denial letter offered Kinds yet another opportunity to submit a completed FMLA certification form if her failure to do so had been due to reasons out of her control. Thereafter, Kinds's physician submitted a completed FMLA certification form, but neither Kinds nor her physician provided any reason why she did not timely submit the requisite certification form prior to the denial decision. Consequently, Ohio Bell denied the request. Per its attendance policy, Ohio Bell discharged the plaintiff for unexcused absences, including for missing unexcused the three weeks not approved as FMLA leave.

Kinds sued, alleging that Ohio Bell interfered with her rights under the FMLA. Specifically, Kinds asserted that Ohio Bell failed to timely request the FMLA certification form – that is, within five days of her providing notice of her need for leave. The United States District Court for the Northern District of Ohio granted Ohio Bell's motion for summary judgment. The Sixth Circuit affirmed.

Noting that the FMLA regulations contain an exception to the five-day rule for requesting a medical certification form – i.e., "[t]he employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration" – the Sixth Circuit rejected Kinds's argument that the exception applies only to situations where the employee fraudulently sought FMLA leave. It thus "decline[d] to adopt a regulatory interpretation so devoid of any statutory, regulatory, or precedential basis." Instead, the Court explained, the STD administrator's denial of benefits for the three-week period provided adequate reason for Ohio Bell to question the appropriateness of the FMLA leave because the standard for disability status in its Plan was similar enough to the definition of "serious health condition" under the FMLA "that denial of the former at least raises a question as to the appropriateness of the latter." Thus, the Court held, Ohio Bell timely requested medical certification, which Kinds failed to submit, thereby permitting it to deny her request for FMLA-protected leave for the three-week period at issue. ■

Kelman Cartoon



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

THE CIVIL SERVICE COMMISSION VERSUS THE LEGISLATURE — WHICH REGULATES CONDITIONS OF EMPLOYMENT OF STATE CLASSIFIED EMPLOYEES?

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The Michigan Constitution vests the Civil Service Commission (CSC) with final decision making power that is exercised by the legislatures of most other states: "The Commission shall ... fix rates of compensation for all classes of positions... and regulate all conditions of employment in the classified service." Const 1963, art 11, § 5. See the *Report of the Michigan Citizens Advisory Task Force on Civil Service Reform* (July 1979), generally and at page 12. Michigan courts have read this constitutional provision (and its predecessor in the 1908 constitution) as it is written — very broadly. See, for example, *Womack-Scott v Department of Corrections,* 246 Mich App 70, 79 (2001) ("The CSC regulates the terms and conditions of employment in the classified service and has plenary and absolute authority in that respect.") Nonetheless, the Michigan Legislature has periodically legislated as to various conditions of employment of state employees. This article discusses three such efforts occurring in 2010, 2011 and 2012.

In 2010 the Legislature, facing a budget deficit, enacted Public Act 185, MCL 38.354. It required a mandatory three percent contribution from the compensation of state employees for a discrete period (from November 1, 2010 through September 30, 2013) into a fund that would largely be used to pay for the health benefits of state retirees. The Legislature made no effort to involve the CSC in this effort. And it acted after failing to veto (the only mechanism providing for legislative involvement in Article 11, Section 5) a three percent wage increase for state employees. The unions representing state employees sued. The Michigan Court of Appeals, affirming the Court of Claims, held unanimously (Judges Beckering, Fort Hood and Stephens) that the enactment of 2010 PA 185 violated Article 11, Section 5 because the Legislature was exercising authority over compensation, which was exclusively in the authority of the CSC. *AFSCME Council 25 v State Employees' Retirement System,* 294 Mich App 1 (2011), lv den 490 Mich 935 (2011). The Court concluded.

> The people expect that the system of checks and balances will be respected, and a review of the Michigan caselaw reveals that the CSC and the executive branch have dealt cooperatively to address employee compensation in times of economic hardship. The people can and should expect shared sacrifice; however, it cannot come at the expense of constitutional nullification, and the Legislature cannot expect to balance the budget on the backs of state workers.

294 Mich App at 28.

In 2011 the Legislature enacted Public Act 264, making multiple changes to the State Employees' Retirement Act, MCL 38.1 *et seq.* Again the Legislature acted without input from the CSC. The state unions made an Article 11, Section 5 challenge to two of these changes. One required employees hired before April 1997 who maintained membership in the defined benefit plan to choose either to contribute four percent of their income to that plan or switch to the 401(k) plan. The other changed the way overtime was calculated in determining compensation for pension purposes. Again the Court of Appeals, affirming the Court of Claims, held unanimously (Judges Owens, Gleicher and Stephens) that the enactment violated Article 11, Section 5. *Michigan Coalition of State Employee Unions v State of Michigan,* No. 314048, 2013 WL 4081020 (August 13, 2013). The Court found that these two changes were to fringe benefits and that such changes constituted not only an improper exercise of authority over "compensation" (analogous to the finding it had made in *AFSCME Council 25)* but also an improper exercise of authority over a "condition of employment"; authority over both resting solely with the CSC.

In 2012 the Legislature, as part of its efforts to turn Michigan into a "right to work" state, enacted Public Act 349 which amended the Public Employment Relations Act and prohibited public employers, including the state, from assessing agency fees against nonunion employees. MCL 423.210(3). This time the Legislature was not acting without input from the CSC. Rather it was acting with the CSC having long ago and consistently thereafter decided to the contrary. Civil Service Rule 6-7.2 permits, where it has been collectively bargained, the CSC to collect from employees a service fee to defray the costs associated with collective bargaining. And the Court of Appeals had twenty years ago held that this rule was constitutionally (per Article 11, Section 5) authorized. *Dudkin v Civil Serv Comm,* 127 Mich App 397, 723 (1983) ("We conclude that the [CSC] is constitutionally authorized to impose an agency shop fee pursuant to efficient civil service operations.") Nonetheless, two days after deciding *Michigan Coalition,* the Court of Appeals decided (Judges Saad and Donofrio, with Judge Gleicher dissenting) that Article 4, Section 49 of the Michigan Constitution that permits the Legislature to "enact laws relative to the hours and conditions of employment," trumps Article 11, Section 5 with its more specific delineation of CSC power. *UAW v Green,* No. 314781, 2013 WL 4404430 (August 15, 2013). So much for the plenary and absolute authority of the CSC. *Womack-Scott, supra.* So much for *Dudkin.* So much for the specific constitutional provision (Article 11, Section 5) trumping the general (Article 4, Section 49). See *Advisory Opinion on Constitutionality of 1978 PA 426,* 403 Mich 631, 639-40 (1978) ("specific provisions must prevail with respect to its subject matter, since it is regarded as a limitation on the general provision's grant of authority.") And so much for recent guidance from the Supreme Court in discussing Article 4, Section 49 [and 48]: "Under the existing constitutional language, the legislative power is broad, but it is neither absolute nor exclusive. Neither section suggests that this power cannot be limited or affected by other provisions of the Constitution." *Protect Our Jobs v Board of State Canvassers,* 492 Mich 763, 785-86 (2012). Would one such provision be Article 11, Section 5, perchance? [1]

Somewhat surprisingly, neither opinion in *UAW v. Green* makes reference to *Michigan Coalition.* Either opinion could have. On the one hand, the Court in *Michigan Coalition* concludes that pension benefits are within the authority of the CSC, not the Legislature, because they constitute conditions of employment. Slip op., page 10. And paying an agency fee undisputedly constitutes a condition of employment. On the other hand, the Court in *Michigan Coalition* distinguished cases upholding the Legislature's authority over state employees in certain circumstances where the law at issue was applicable to all employers, not just the state. Slip op., pages 10-11. Here PA 349 is applicable to all public employers.

As of this writing the time for seeking leave to appeal to the Michigan Supreme Court is running on both the "four percent" and the "right to work" cases. Applications for leave will likely be filed in each. hopefully, the Michigan Supreme Court will clarify the respective roles of the CSC and the Legislature in regulating the terms and conditions of employment of employees in the classified service.

—END NOTE—

1 Lest the tenor of the above discussion on the "right to work" case leave any doubt, the undersigned has been and/or is representing one or more of the unions in each of these three cases. ■

SIXTH CIRCUIT WEIGHS IN ON CLASS ACTIONS

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In June 2011 the U.S. Supreme Court, in a sharply divided 5-4 decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), rejected a broad-based class certification effort involving pay and promotion claims of over a million female Wal-Mart employees. The Court's majority found that the plaintiffs' proposed class lacked commonality as required by Fed.R.Civ.P. 23(a)(2), and hence the lawsuit could not go forward on a class basis. The Court also found that Rule 23(b)(2)'s requirement that monetary relief be only "incidental to the primary objective of obtaining equitable relief" was not satisfied. This past spring, in *Davis v. Cintas Corp*., 717 F.3d 476 (6th Cir. 2013), the U.S. Court of Appeals for the Sixth Circuit weighed in on the subject.

Tanesha Davis sought to represent a nationwide class of female service sales representative (SSR) applicants, claiming that she and others in the proposed class had been rejected for employment because of their gender. As in the *Dukes* case, Davis sought to establish a common thread that would allow her to satisfy the commonality requirement. Cintas utilized a complex multi-step hiring process for SSRs which Davis did not attack as inherently discriminatory. Instead, she relied on statistical evidence, some anecdotal evidence consisting of alleged discriminatory comments, and, importantly for her, expert testimony that Cintas was imbued with a "white male business culture."

The Sixth Circuit affirmed the trial court's determination that Cintas' SSR hiring decisions, which occurred in many places throughout the country over long periods of time and were based largely on individualized subjective decision-making, did not generate common questions of law or fact. The commonality requirement was therefore not satisfied. The Sixth Circuit also rejected Davis' assertion that the monetary relief sought for the class would be "incidental to the principal objective of obtaining injunctive relief." Because Cintas was entitled to individualized determinations of each plaintiff's unique damages claim, back pay could not be deemed "incidental" to class-wide injunctive relief. Davis' "shortfall" theory for calculating damages – i.e., analyzing the monetary claims of randomly selected individuals and then applying that assessment to the entire class – was emphatically rejected by the Sixth Circuit as a "trial by formula" approach that the U.S. Supreme Court had condemned in *Dukes*. Davis' approach was even more inappropriate because her damages model would give each proposed class member exactly the same recovery regardless of the year in which she had applied for a SSR position (the class period reached back to 1999).

The Sixth Circuit also analyzed Davis' disparate impact claim in light of the statistical evidence she had presented, which demonstrated a shortage of females in SSR positions. But Davis could not identify a particular element of Cintas' multi-phase decision-making process that accounted for the statistical disparity. While Title VII permits a plaintiff to proceed without identifying a particular aspect of the process if she can establish that the employer's decision-making process is not capable of separation for analysis, Davis had not made that showing. Her focus on the subjective decision-making aspect did not suffice. While the Sixth Circuit did not explain how she might have met her burden in this regard, it is apparent that she should have attempted to analyze each step in the hiring process separately, thus either locating the aspect of the process that caused the imbalance, or demonstrating thereby that such individualization was not possible.

The Sixth Circuit did return one of Davis' personal disparate treatment discrimination claims to the trial court for disposition on the merits, finding that she had presented enough evidence to avoid summary judgment on that claim. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Suppose you are sitting as the arbitrator in a discharge case. The employer has the burden of proof and goes first. The employer's lawyer is examining his key witness on direct, and he's *leading him by the nose.* There has been no objection from the union. That was fine during background questions, but now we're getting to critical testimony on key facts in the case, and there is still no objection. All the information is coming from the lawyer. The only thing the witness does is grunt affirmatively when the employer's lawyer pauses.

What should you do?

Should you *sua sponte* tell counsel to stop leading his witness on direct, or should you bite your tongue and let the parties try their cases with the advocates they chose?

When this situation came up on a case before me recently, I dithered and ambivalled until the moment passed. As it turned out, the case was clear enough so the leading didn't make any difference, and my ambivalence did no harm. But it bothered me enough that I conducted a small, highly unscientific survey of arbitrators and union and management lawyers on the question. Not surprisingly, there are different views on the subject.

One of my sources took the hard line: The parties pick their advocates, and it's not the arbitrator's job to correct their error. Others said they didn't object to a gentle reminder along the lines of: "Counsel, it would help me understand the case better if the witness's answers were not suggested by your questions. If you don't mind."

Even Dan Bretz and Stuart Israel, two lawyers who generally do not appreciate arbitrators' attempts to "help" them with their cases, allowed that that was fair.

Another source suggested that the proper course of action is to allow the leading on direct and wait to see if the witness testifies to the key facts in his own words on cross examination. If he does, the arbitrator doesn't need to do anything. If he doesn't, the arbitrator can take him back over that area with the arbitrator's own questions.

The idea behind waiting until direct and cross are both concluded before the arbitrator intervenes is that it avoids embarrassing either the lawyer who was leading or the lawyer who failed to object while it still ensures that the record will contain proper testimony on key facts from an important witness.

The suggestion, however, was not unanimously embraced. Some of the lawyers I talked to still resented what they saw as arbitrator intrusion. "I'm doing a good enough job losing this case on my own, Mr. Arbitrator, I don't need your help," is how Dan put it. A gentle reminder to stop leading the witness was acceptable, he said, and a specific clarifying question or two is appropriate if something is unclear. But when the arbitrator starts asking substantive questions, or asks a witness to go over his testimony in his own words, the arbitrator has stepped over the line.

Some sources said the decision whether to interject should depend on whether both parties are represented by counsel. Others pointed out that the presence or absence of a bar card is not determinative of competency.

Among arbitrators who favored intervention, the overriding concern was protection of the process. We are charged, they said, with providing the best decision we can. To do that we need both the arguments of the advocates and the testimony of the witnesses. If we permit key witnesses to be led on critical questions, we get only half of what we require.

The teaching here is that an arbitrator should be slow to intervene under these circumstances. Arbitration is an adversarial process after all. There is a downside risk to having a bad lawyer. In some cases lawyers may have strategic reasons for failing to object to leading questions on direct. They may be setting the witness up for a particularly humiliating cross-exam, for example. You know the ones I mean—where the witness reveals he had so little comprehension of the questions on direct that the exam may as well have been conducted in Urdu.

On the other hand, when we do intervene, you advocates should understand that it is not because we are looking for a chance to show off, or to unfairly assist your opponent, or to show you how to do your job. We do it because we're trying to do *our* job. ■

TWELVE SUGGESTIONS FOR WRITING WELL

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Legghio & Israel, P.C.

As the story goes, a law clerk prepared a draft letter to the Queen for the signatures of British appeals court judges. It began: "Your Majesty, keenly conscious as we are of our many grave deficiencies…." One judge protested vehemently at this expression of humility. The draft was edited: "…keenly conscious as we are of one another's grave deficiencies…."[1]

I have met few lawyers who do not believe they write well. Many of us, it seems, lack that gift written of by the poet Robert Burns: the ability to see ourselves as others see us.[2]

So, in the gift-giving spirit, with the assistance of Mark Twain and others, I offer suggestions to legal writers. If followed, I believe, the suggestions will help cure "many grave deficiencies" on the part of legal writers and, thereby, improve the lot of readers. I offer these suggestions with trepidation, of course, knowing that any mistake will bring critics on me like a colony of fire ants. Lawyers can be like that.

1. Before you write, identify your objectives and audience. Your main objective is to persuade others that your viewpoint is correct, or at least that your viewpoint likely will prevail. Your audience might be a judge, a three-judge panel, or opposing lawyers. Your audience, however, also may include judicial law clerks, opposing parties, your own clients, and others. Before you write, decide what you want to say and to whom, and then tailor your writing accordingly. As Yogi Berra said: "If you don't know where you are going, you will wind up somewhere else."[3]

2. Be clear, simple, strong, direct, focused, and specific. Mark Twain advised: "use plain, simple language, short words and brief sentences. That is the way to write English—it is the modern way and the best way. Stick to it; don't let fluff and flowers and verbosity creep in."[4,5]

3. Be succinct. As Shakespeare wrote, "brevity is the soul of wit."[6]

4. Avoid hyperbole, overstatement, exaggeration, and generalization. Keep to the facts, plainly and accurately presented. Follow Mark Twain's rule: "As to the adjective: when in doubt, strike it out."[7] Apply the same judicious rule to what Twain called the "adverb plague."[8] Show, don't tell. If your point is clear, prove it. If it is not clear, saying it is *clearly* so will not save the day. Along the same lines Twain advised: "substitute *damn* every time you're inclined to write *very*; your editor will delete it and the writing will be just as it should be."[9] Think of this when you are inclined to write "it cannot be disputed," "it is beyond peradventure," "obviously," or the like. In boxing terms, overstatement is leading with your chin. In Shakespearian terms, it is protesting too much. In Freudian terms, overstatement induces your critical reader to fight rather than flee.

5. Cite authorities, but only when and as appropriate. Citations can provide authoritative and credible support. They can show that your views are in the mainstream, and that your opponents' views are not. But citations can distract, when they divert from core legal points or the logic of your arguments. In this era of parsimonious page limitations, it makes little sense, for example, to spend two pages citing Rule 56 standards when there is no federal judge who doesn't know those standards. Elaborate discussion of authorities and extended quotes sometime make sense, but often it is enough to point to the governing authorities with page citations and pithy quotes or brief explanations of the authorities' significance. Readers can read the cited authorities for themselves and, if all goes as planned, confirm the significance that you attribute to those authorities. Summarize. This is why legal arguments are presented in "briefs." Elmore Leonard advised: "Try to leave out the part that readers tend to skip."[10]

6. Follow the laws of primacy and recency. Argument is subject to the laws of primacy and recency: people tend to be influenced by what they hear (or see, read, or understand) first and last. Applying these laws to legal writing, it is usually best to lead with strengths—in introductions, issue organization, headnotes, lead paragraphs, and topic sentences, for example—and end with strong conclusions.

7. Carefully choose your tone. As Ecclesiastes teaches: "To everything there is a season, and a time to every purpose under the heaven."[11] There are, as the saying goes, times to pound the facts, the law, or the table. Insult rarely works. Sarcasm and irony can obscure, and often backfire. Humor can be effective, but it better be apt *and* humorous. Obsequiousness and arrogance both distract. Choose just the right tone; avoid the wrong one. Making this choice is key to the art of legal writing.

8. Correct grammar, punctuation, and spelling. What lawyer doesn't experience *schadenfreude* upon discovering and exposing a writer's grammatical transgression? What lawyer wouldn't cast the first stone at a writer who refers to the principal point as the "principle" point? Spellcheck is not foolproof. Proofread. Proofread again.

9. Use footnotes judiciously. Sometimes, for one good reason or another, it makes sense to put the right footnotes in the right places in briefs. Sometimes footnotes, or endnotes, make sense in articles and legal memos. Indeed, footnotes can be gem-like essays, making important points which must be made, but are better-made in the margins.[12] Footnotes in letters? Fuggedaboudit!

10. Emphasize prudently. Emphasize what ought to be emphasized. Use (1) **bold**; (2) *italics*; and (3) ***combinations***. But apply the Aristotelian Mean.[13] Twain warned: "You thunder and lightning too much; the reader ceases to get under the bed, by and by."[14]

11. Edit and revise. Justice Louis D. Brandeis reportedly said: "There is no great writing, only great rewriting."[15] Just so. Rigorously edit your writing. Turn long, complicated paragraphs and sentences into short, simple ones. Use headings. Write one day; edit the next. Eliminate anything that interferes with your objectives. Enlist others to critique your clarity, tone, effectiveness, etc.

You should always rigorously edit for clarity and to eliminate needless words in order to improve and refine your writing and make very sure that you are providing the most effective communication you possibly can. Better yet: ~~You should always~~ **[R]igorously edit** ~~for clarity and to eliminate needless words in order~~ **to** ~~improve and~~ **refine your writing** ~~and make very sure that you are providing the most effective communication you possibly can~~.

More from Twain: "The time to begin writing an article is when you have finished it to your satisfaction. By that time you begin to clearly and logically perceive what it is that you really want to say."[16]

12. Break the rules, as necessary. Some believe that beginning sentences with *however* or *but* is a crime against nature. Some eschew the serial comma. Some believe a preposition is a good thing to end a sentence with. The truth will be revealed on judgment day, but in the meantime, as Pablo Picasso reportedly advised: "Learn the rules like a pro so you can break them like an artist."[17]

* * *

These suggestions are not exhaustive, of course. There is no shortage of articles, books, and programs on writing well in general and on good legal writing in particular. They offer countless suggestions. Consume them if you are so inclined. Still, all are informed by a core principle: be a rigorous self-editor. Whether you edit with a red pen or at the keyboard, however experienced and proficient you are at the start, rigorous self-editing will improve your writing. It will reveal some of your "grave deficiencies" of which the rest of us are "keenly conscious."

—END NOTES—

1 This anecdote is recounted in Frank E. Cooper, *Writing In Law Practice* (1963) at 3, note 8.

2 Burns wrote in 1786, in "To a Louse, on Seeing One on a Lady's Bonnet at Church" (in pertinent part, as we lawyers say):

> O wad some Pow'r the giftie gie us
> To see oursels as ithers see us!
> It wad frae monie a blunder free us...

3 This Berra quote may be apocryphal. I found it on several quotations websites, and that was good enough for me. Then I showed my draft article to two law professors, both well-regarded authors. That was my first mistake. Each, independent of the other, suggested that I provide citations for all quotations, from Berra and others. So I went back online in dutiful and time-consuming compliance with the professors' advice. I added many end notes, proving the adage: "Be careful of what you ask for, particularly when you ask for free advice from law professors." I don't have a citation for that adage. I do have, however, another Berra quote with an impeccable provenance. It is from Yogi Berra, *When You Come to a Fork In the Road, Take It!—Inspiration and Wisdom from One of Baseball's Greatest Heroes* (2002) at 53: "If you don't know where you're going, you might not get there." You can look it up.

4 This advice, according to twainquotes.com/Writing.html, the impressive website by Barbara Schmidt, comes from Twain's March 20, 1880 letter to D. W. Bowser.

5 Legal writing, in the United States at least, should be in English, mostly, but don't be too rigid. A little Latin and Yiddish couldn't hurt. See Stuart M. Israel, *"Lingua Latina Mortua Non Est,"* Vol. 21, No. 2, *Labor and Employment Lawnotes* 13 (Summer 2011), reprinted in Vol. 58, No. 4 *The Practical Lawyer* 9 (August 2012), and Stuart M. Israel, *"Chutzpah* and Other Legal Terms," Vol. 15, No. 4 *Labor and Employment Lawnotes* 10 (Winter 2006).

6. This comes from the prolix Polonius in *Hamlet* (1602), Act 2, Scene 2, whose own verbosity does not dilute the wisdom of his advice.

7 This is from Twain's *Pudd'nhead Wilson* (1894), chapter 11.

8 This is from Twain's "Report to a Boston girl," *Atlantic Monthly* (June 1880), quoted at twainquotes.com/Adverbs.html

9 This is attributed to Twain, perhaps apocryphically. See quoteinvestigator.com/2012/08/29/substitute-damn/.

10 This is from *Elmore Leonard's 10 Rules of Writing* (2007), originally published in the *New York Times* on July 16, 2001 as "Easy on the Adverbs, Exclamation Points and Especially Hoopteddoodle." The article title, likely imposed on Leonard by NYT editors, omits the serial comma. See Stuart M. Israel, "In Defense of the Serial Comma," Vol. 19, No. 2 *Labor and Employment Lawnotes* 23 (Summer 2009).

11 This is from the Hebrew Bible, Ecclesiastes, chapter 3, verse 1.

12 See *e.g.* notes 3, 5, 6, 10, 13, and 15

13 See Aristotle, *Nicomachean Ethics,* book 2, chapter 7: "...in all things the mean is praiseworthy, and the extremes neither praiseworthy nor right, but worthy of blame." I learned somewhere along the way—and I'm not going to try to find a citation for this—that the Aristotelian—or Golden—Mean is "Nothing too much."

14 This is from Twain's March 23, 1878 letter to Orion Clemens, quoted at twainquotes.com/Writing.html.

15 This quote is attributed to Justice Brandeis all over the internet, but I have not been able to find an original source. Among other places, this quote appears on the Brandeis University website, brandeis.edu/acserv/fellowships/essays.html. If you know where it is from, please let me know at israel@legghioisrael.com. In Melvin I. Urofsky, ed., *The Supreme Court Justices: A Biographical Dictionary* (1994), the entry for Justice Brandeis, at 44, recounts that his law clerks "frequently discovered that in his endless rewriting Brandeis had made as many as sixty changes in a draft of ten pages and had revised an opinion for the twentieth or thirtieth time." Nice.

16 This is from *Mark Twain's Notebook* (1902-1903), quoted at twainquotes.com/Writing.html.

17 I found this at en.wikiquote.org/wiki/Talk:Pablo_Picasso, so it must be accurate. ■

MERC UPDATE

Scott R. Lounds
White, Schneider, Young & Chiodini, P.C.

Summaries of three recent decisions issued by the Michigan Employment Relations Commission follows. Decisions of the Commission may be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/merc.

Galesburg-Augusta Community Schools -and- Michigan AFSCME Council 25, AFL-CIO and its Affiliated Local 1677. *Case No. C12 G-135* (April 23, 2013)

Charging Party AFSCME et al. filed an unfair labor practice charge against Respondent employer Galesburg-Augusta Community Schools, alleging that the employer had violated Sections 10 and 16 of the Public Employment Relations Act (PERA or the Act), by failing to bargain over whether Charging Party's bargaining unit was to be given an opportunity to bid on an equal basis as other bidders for work that was to be subcontracted. Administrative Law Judge Julia C. Stern found that the Respondent did not have a duty to bargain over "whether the unit was to be given the opportunity to bid on the same basis as the other bidders, over the RFP (request for proposals) and procedures for submitting bids," and that Responding Party, therefore, did not violate PERA.

Charging Party and Respondent are parties to a collective bargaining agreement (CBA) covering full-time and part-time non-supervisory maintenance custodians, head custodians, custodians, and grounds keepers. In September 2011, after learning of Galesburg-Augusta's intent to subcontract bargaining unit work, AFSCME made a written demand to bargain over "whether the bargaining unit was to be given an opportunity to bid on an equal basis as other bidders." In the alternative, requests were made that Galesburg-Augusta Community Schools provide the procedure for submitting bids and that the bargaining unit be excused from all provisions of the RFP.

In April 2012, the respondent provided the bargaining unit with a copy of the RFP along with a letter stating that the Charging Party would be given the opportunity to bid on an equal basis with other bidders and therefore no duty to bargain on that topic existed. The RFP included two provisions that the Charging Party claims essentially barred them from submitting a bid: 1) That the contractor be a "custodial company;" and, 2) a restriction on bidder communication with a host of school employees and officials. When the deadline to submit bids closed, AFSCME had failed to submit a bid. Instead, the Charging Party sent a letter demanding to bargain over whether the unit was given an opportunity to bid on an equal basis. Galesburg-Augusta Community Schools responded that they had provided the AFSCME bargaining unit an equal opportunity to bid, and since they had met the statutory requirement all other aspects of the subcontracting, were prohibited subjects of bargaining under PERA.

ALJ Stern referencing two previous decisions regarding §15(3)(f) of PERA regarding a public school employer's duty to bargain, *Lakeview Community Schools,* 24 MPER 37 (2011) and *Rochester Community Schools*, 26 MPER 17 (2012), and reiterated that when seeking bids for noninstructional support services, there is no obligation to bargain with the union representing its employees over the procedure for submitting bids. ALJ Stern noted that while an employer puts itself in jeopardy by ignoring a union's ob-

(Continued on Page 18)

MERC UPDATE

(Continued from page 17)

jection to the RFP's terms or if the RFP essentially precludes a bid from the bargaining unit, if a public school employer agrees to allow the bargaining unit to bid on an equal basis, and does so, it has no obligation to bargain with the union over the bid or its subcontracting decision. Stern concluded that since the Charging Party did not submit a bid, under the law as it stands it is precluded from claiming that it was not given an equal opportunity to bid and suggested that under *Lakeview* and *Rochester* a union cannot assert that it was denied an opportunity to bid on an equal basis unless it submits a bid and such bid is rejected. No exceptions being filed, the Commission adopted the recommended order as written.

Reese Public School District -and- Reese Professional Support Personnel Association, MEA/NEA. *Case No. C11 I-155* (April 3, 2012)

Charging Party Reese Professional Support Personnel Association, MEA/NEA filed an Unfair Labor Practice charge claiming that Respondent employer, Reese Public School District violated §§ 10(1)(a) and (e) of the Public Employment Relations Act (PERA or the Act) by privatizing the secretarial services previously performed by members of the Charging Party's bargaining unit. The Respondent employer asserted that the work constituted "noninstructional support services" under §15(3)(f) of PERA and therefore subcontracting of the work in question was a prohibited subject of bargaining under the Act. Administrative Law Judge (ALJ) David M. Peltz found that the secretaries employed by Respondent provide noninstructional support services within the meaning of §15(3)(f), that Reese Public School District had no duty to bargain, and recommended that the ULP be dismissed. The Charging Party filed exceptions, but the Commission found that Respondents did not violate §10(1)(e) of PERA.

Charging Party represents a bargaining unit of Reese Public School District employees that includes, among others, Custodians, secretaries, clerks, and paraprofessionals. Without bargaining with the Charging Party, the District decided to retain the services of a private secretarial services company and lay off six bargaining unit secretaries. These secretarial duties included maintaining and reporting student attendance and enrollment records; ordering and maintaining an inventory of office and classroom supplies; administering first aid to students; proctoring exams; and supervising detentions and in-school suspensions.

The parties agreed that there were no material facts at issue in the case. They further agreed that the secretaries performed support services; the legal issue presented was whether the secretaries provided noninstructional support services within the meaning of §15(3)(f) of PERA. The Charging Party argued that instructional support services consist of services assisting instructional staff and included services by support staff providing instruction or direction to students. In *Harrison Community Schools,* 23 MPER 82 (2010), the Commission explained that services not provided by a teaching professional may still be instructional services where a substantial part of the employee's duties are student instruction. Based on this stance and the statement in *Harrison* that instructional support services are "not services provided by a professional, but are services provided by support employees to assist professionals in performing duties for which they have been licensed" the Charging Party set forth a case that the outsourced work was in the nature of instructional support services.

The Commission refused to determine whether the support services were instructional or noninstructional based on the type of services provided by the professional staff the secretaries were assisting. Instead, the Commission ruled that the terms instructional and noninstructional in the context of §15(3)(f) describe the kind of services performed, not the kind of professional to whom the services are rendered; and that "instructional support services are only those services in which the support services provided are substantially instructional."

Michigan AFSCME Council 25 and its affiliated Local 1583 -and- Charte Dunn. *Case No. CU09 H-026* (April 15, 2013)

Charging Party Charte Dunn filed a Duty of Fair Representation claim under §10 of the Public Employment Relations Act (PERA or the ACT) against Respondent Labor Organization Michigan AFSCME Council 25 and its affiliated Local 1583. The Charging Party alleged that the Respondent violated its duty toward her through its handling of grievances filed on her behalf and through the refusal to arbitrate these grievances because of her history as a vocal opponent of Local 1583's president and her participation in a decertification petition. Administrative Law Judge Julia C. Stern concluded that the Respondent Labor Organization did not violate its duty of fair representation toward Dunn and recommended that the charge be dismissed in its entirety. Neither party filed exceptions and the Commission adopted the ALJ's Preliminary Decision and Order as the decision of the Commission.

The Charging Party was subjected to a series of warnings and disciplinary layoffs for absenteeism in 2007 and 2008, and her February 2009 termination was based in part on these prior disciplines. In each case the Responding Party grieved the disciplinary actions. It did not, however, take any of the grievances to arbitration. Dunn alleged that this failure to arbitrate was based on her having been a candidate for President of Local 1583 in 2008 and her participation in a petition to decertify AFSCME as bargaining agent following that election. Local 1583 did forward Dunn's grievance over her termination to the AFSCME Council 25 arbitration review panel, but that body rejected the Local's request to arbitrate. The Charging Party was then granted an opportunity to appeal this decision in a live hearing before the panel, which occurred in October 2009. In March 2010 the Council 25 arbitration review panel sent Charte Dunn a letter stating that even in light of new evidence provided at the hearing her grievance would not be arbitrated. This led to the Charging Party filing a second, written, appeal. On March 23, 2010 the arbitration review panel sent Dunn a letter denying this appeal and informing her that her file had been closed.

ALJ Stern found that while the President of Local 1583 had motive for interfering in the Union's handling of the Charging Party's grievances, there was no evidence that the President actually did interfere. Also, the grievances written for Charte Dunn were not as clearly meritorious as the Charging Party argued and there was no evidence that the Respondent handled these grievances in an arbitrary manner or in hopes of them being denied. ALJ Stern finally concluded that nothing in the record suggested that there were deliberate attempts by the Responding Party to sabotage Dunn's grievances, and that there was insufficient evidence to find that the Charging Party's history as an opponent to the Local leadership or her participation in the decertification petition influenced the handling of her grievances. Michigan AFSCME Council 25 and its affiliated Local 1583 therefore did not violate their duty of fair representation. ■

MERC NEWS

NATALIE PRIEST YAW APPOINTED COMMISSIONER

Ruthanne Okun, ***Director***
Michigan Employment Relations Commission,
Bureau of Employment Relations

Natalie Priest Yaw, of Detroit, was recently appointed as the newest member of the Michigan Employment Relations Commission. She replaces Commissioner Nino Green whose term expired on June 30, 2013.

Commissioner Yaw has years of experience working with businesses and associations. Currently, she is vice president and legal counsel for RBS Citizens, NA, in Southfield, where she represents Citizens Financial Group and RBS Citizens on legal issues concerning claims regarding lender liability from commercial loans, retail banking customers, and consumer lending. Commissioner Yaw previously worked at the Dickinson Wright law firm in Detroit where she managed complex litigation. She is a member of the State Bar of Michigan, Wayne County Chapter of the Women Lawyers Association of Michigan, and the Federal Bar Association—Eastern District of Michigan. She holds a bachelor's degree from Rice University and graduated *summa cum laude* from the Michigan State University College of Law.

Commissioner Yaw is serving a three-year term that expires on June 30, 2016.

NEW LABOR MEDIATOR / LANSING OFFICE MOVES

James R. Spalding
Mediation Supervisor
Bureau of Employment Relations

Sidney McBride is the newest Labor Mediator with the Michigan Employment Relations Commission, Bureau of Employment Relations. This is a promotion for Sidney, who has been with the Bureau since 2009 in the positions of Departmental Specialist and Administrative Law Specialist.

Sidney has been very active in a number of areas within the agency. He has conducted legal research and drafted commission opinions, conducted party settlement conferences on unit clarification and representation cases. He also administered MERC's Fact Finding and Act 312 processes, participated in the revision of MERC's Act 312 and General Rules, and regularly assisted Director Okun on special projects and initiatives.

Sidney's experience includes work as an Associate Court Administrator at the Third Circuit Court of Michigan and service as Local President and Chief Negotiator of AFSCME Council 25, Local 3309 (also while at the Circuit Court). As local president, he served as chief grievance official handling alleged contract violations, negotiated various complex matters to facilitate the merger of multiple bargaining units following court reorganization, and conducted training initiatives on collective bargaining and grievance processing methods.

Sidney is a graduate of Wayne State University Law School and a member of the State Bar of Michigan. With his educational background, extensive experience, proven organizational skills' and strong work ethic, he will be an invaluable addition to the MERC's mediation staff.

On August 20, 2013, the Lansing office of the Michigan Employment Relations Commission, Bureau of Employment Relations moved from its previous single-story, south-side Lansing location on S. Washington Avenue to the imposing Ottawa Building located at 611 W. Ottawa Street, behind the Capitol in downtown Lansing. MERC's Lansing office is on the 2nd floor of the Ottawa Building.

Access to the Lansing MERC office is not quite as easy as before. The prior location had no added security checkpoints aside from Bureau Executive Secretary Milli Kennedy, who cheerfully greeted visitors as they arrived. At the Ottawa Building, tight security is mandated as visitors are required, upon arrival, to sign in with the security guard who will call to have guests escorted to their destination. Also, only one entrance exists into the Ottawa Building which is accessible through the central courtyard at the southwest corner of the building.

The most convenient public parking to the Ottawa building appears to be in a paid lot having an entrance off W. Allegan Street, just east of Butler Street and almost directly across from the State of Michigan Library & Historical Center (worth visiting if time permits). Note: West Allegan runs one way east-bound from M-99, Martin Luther King Blvd.

At this writing, monthly meetings of the Michigan Employment Relations Commission scheduled for Lansing are not held in the Ottawa building. Instead they are held in the Lake Superior Room of the State of Michigan Library & Historical Center located at 702 W. Kalamazoo Street, Lansing, MI 48915. Parking to the library is conveniently available at the paid lot that is well-marked and located on West Kalamazoo Street-- just east of Martin Luther King Blvd (M-99). (Note: The library's entrance faces the parking lot on W. Kalamazoo which is a two-way street. Therefore, the parking lot can be accessed from either direction off of W. Kalamazoo).

Along with the change in location to the Ottawa Building, please note the updated contact information for MERC's Lansing Office:

Main phone line (no change)	(517) 373-3580
James Spalding, Mediation Supervisor	(517) 335-9178
Milli Kennedy, Executive Secretary	(517) 335-9142
FAX Line	(517) 335-9181

Mailing address: MERC/BER, P. O. Box 30015, Lansing, MI 48909

Bureau Director Ruthanne Okun may be reached at her telephone number in our Detroit office, which has not changed: (313) 456-3519. Also the Lansing-based Labor Mediators continue to retain their prior phone and email contact information. We look forward to seeing you at our new location in Lansing. ■

FMLA UPDATE

Shannon V. Loverich
Kienbaum Opperwall Hardy & Pelton, P.L.C.

Here are some of the more interesting federal court decisions in recent months under the Family and Medical Leave Act (FMLA).

Employee Must Show Alleged FMLA Violations Actually Caused Damages. In *Clements v. Prudential Protective Services*, 2013 U.S. Dist. LEXIS 32409 (E.D. Mich. Mar. 7, 2013), the U.S. District Court for the Eastern District of Michigan dismissed a security guard's suit alleging that Prudential had failed to provide her notice of her FMLA rights and unlawfully denied her reinstatement upon returning from leave. Prudential argued that Clements' FMLA claim should be dismissed because she had failed to follow customary procedures in requesting leave (she notified her supervisor but not the central office) and, in any event, she was not prejudiced because reinstatement to her former job was impossible due to a workforce reduction while she was on leave. The court held that Prudential was precluded from denying liability based on Clements' non-compliance with FMLA notice requirements because Prudential had not complied with its own FMLA notice obligations (*e.g*., it had no employee handbook or other written materials informing employees of FMLA rights). But the court granted summary judgment because Clements had failed to establish that Prudential's alleged FMLA violations had actually caused her any damages. Clements had received the pregnancy leave she requested, she did not contest the fact that reinstatement was impossible due to the reduction, and she never requested a new assignment following her layoff.

No Duty To Interpret Mixed Messages As Request For FMLA Leave. In *Miles v. Nashville Electric Service*, 2013 U.S. App. LEXIS 9548 (6th Cir. May 9, 2013), Miles alleged that her employer, NES, interfered with her FMLA rights when it refused to reinstate her after she tried to rescind an allegedly coerced resignation letter. Miles had returned to work from an approved FMLA leave for mental health issues, with her doctor's clearance, but she informed her supervisor the following day that she "could not come back." The supervisor requested that she prepare a resignation letter. Miles did so. Three days later she asked to rescind her resignation. NES declined. Miles sued and argued that NES had an obligation to inquire further into the context of her conversation with the supervisor to determine whether her statements could be interpreted to mean that she was not medically ready to return and that she was actually requesting additional leave for a potentially FMLA-qualifying reason. The U.S. Court of Appeals for the Sixth Circuit rejected Miles' argument, finding that she had communicated that she wanted to resign – not that she wanted to take more medical leave. Miles also claimed that NES' knowledge of her previous psychotic episodes and her sudden departure from work with little explanation was sufficient to require NES to question whether she was in fact invoking her FMLA rights. The court rejected this argument as well, because Miles had presented a medical release stating that she was able to work without restriction, and NES' duty at that point was to reinstate her (which it did) – not to second-guess her ability to return to work.

Along similar lines, the U.S. Court of Appeals for the Fifth Circuit held in *Lanier v. University of Texas Southwestern Medical Center,* 2013 U.S. App. LEXIS 11836 (5th Cir. June 12, 2013), that an employee's text message to her superior, requesting to be taken off "on call" status that day because her father was in the emergency room, was insufficient to trigger the FMLA. Critical to the court's reasoning were the facts (1) that Lanier was merely requesting relief from a single night of "on call" duty, and (2) that she knew from past experiences exactly how to invoke the FMLA leave procedure – and did not do that. The trial court had granted summary judgment to the University, and the appeals court affirmed, finding that "no reasonable jury could conclude that the text message Lanier sent was sufficient to apprise [her superior] of her intent to request FMLA leave to care for her father."

Infelicitous Statements Can Send An FMLA Claim To Trial. In *Branch v. Schostak Brothers & Co., Inc.*, 2013 U.S. Dist. LEXIS 70227 (E.D. Mich. May 17, 2013), Branch alleged that his employer had reduced his responsibilities and ultimately discharged him because he had taken FMLA leave on three occasions. The employer claimed it had non-discriminatory reasons for terminating him due to poor performance, which had been documented in three years' worth of declining performance reviews. It moved for summary judgment. The U.S. District Court for the Eastern District of Michigan denied the motion, finding that Branch provided ample evidence that his supervisor took a negative view of his medical leave and health issues, including comments in his performance appraisals regarding his "health issues" affecting his ability to consistently perform and also alleged verbal remarks that Branch was "taking too much time off work for his medical issues." The court found that these statements created an issue of fact as to whether Branch's performance issues were legitimate or had been manufactured to create a paper trail to support his termination.

Track And Notify Employees Of FMLA Eligibility. In *Bourne v. Exempla, Inc.*, 2013 U.S. Dist. LEXIS 43389 (D. Co. Mar. 27, 2013), the U.S. District Court for the District of Colorado held that Bourne could proceed to trial with her claim that Exempla had improperly interfered with her FMLA rights when it (1) failed to notify her that she was ineligible for further intermittent FMLA leave, and then (2) terminated her for absenteeism. Bourne had a chronic condition of recurring kidney stones. Exempla granted her intermittent leave for a one-year period, allowing her to use the leave in separate periods due to her single qualifying reason. When her rolling leave year ended, Exempla did not tell her she was no longer an FMLA-eligible employee (because she did not have the required 1,250 hours of service during the previous 12 months), and Exempla did not request that she re-apply for another rolling leave year pursuant to the FMLA. Instead, during the following six month period, it granted her subsequent requests for intermittent leave on 13 occasions. Then it terminated her for accumulated absences that it said were not protected by the FMLA. Bourne did not deny that she had not worked the requisite hours in the preceding 12-month period at the time of her termination, but claimed she would have worked additional hours to become eligible if Exempla had followed the FMLA's notice requirements months earlier. She also claimed that, because she did not know that she was ineligible, she relied to her detriment on Exempla's continued approval of her leave requests. The court refused to dismiss Bourne's FMLA claim, finding that Exempla had not complied with federal regulations that require an employer to notify employees of their statutory eligibility within five business days of acquiring knowledge that their requested leave may be for FMLA-qualifying reasons. ■

MAKING THE MOST OF MEDIATION: 10 TOP TIPS FOR MAXIMIZING RESULTS (PART 2)

Sheldon J. Stark
Mediator and Arbitrator

Part 1 — with tips 1-5 — appeared in Vol. 23 No. 2 *Labor and Employment Lawnotes* 20 (Summer 2013). Part 2 concludes with tips 6-10

6. Identify the proper audience for your written submissions and arguments

When counsel view mediation as one more hurdle rather than a unique opportunity to try something new, their mediation summaries tend to look like summary disposition briefs. They write to persuade the mediator. Too many advocates prepare their summaries either to influence the mediator or to impress their own clients with their zeal and grasp of the issues. A skilled, experienced and neutral mediator, of course, expects that. Mediators are trained to see through such efforts and retain their neutrality. An advocate's own client should not *need* persuading!

If not the mediator, who is the right "audience?" The opposition, of course: the parties on the other side of the mediation table! Mediation is a voluntary process. There is no settlement unless everyone agrees. Writing to persuade the other side is crucial. The other side's signature must appear on a final agreement, not the mediator's. Counsel's mediation summary is an extraordinary opportunity to communicate directly with the other side, an opportunity too often overlooked.

Realistically, even the best-written and most cogent summary is not likely to change anyone's mind about the facts. Opposing parties have their own version of what happened and will resist any contrary view. I wholeheartedly concur with litigators who say mediation is not going to lead to agreement about what happened. In fact, by the time the parties are in mediation, they are probably too committed to their own version to bring an open mind to the table. While the parties may never agree on the facts, however, they may reach agreement concerning the risks, the challenges, and the turning points. Mediation summaries that focus on these practical issues are likely to be more persuasive than one-sided summaries.

Similarly, language matters. As our proverbial grandmothers taught us: "We catch more flies with honey than with vinegar." This means discarding antagonistic language and vitriol. Rather than suggesting plaintiff is "a bald-faced liar," for example, defense counsel is better served setting out the factual basis on which to argue plaintiff faces a serious risk of being disbelieved. In employment cases, mediation advocacy suggests management counsel pull together evidence of just cause, rather than accuse plaintiff of incompetence and sloth. For plaintiff, it means setting forth the factual basis on which his complaints were based, instead of accusing management of being "chauvinists" or "racists."

Thinking carefully about how to diplomatically frame comments is equally important *at* the mediation table when facing the other side and presenting arguments orally.

I'm not suggesting advocates should suppress their passion, or that clients tamp down their emotions. Mediation is *not* unilateral disarmament. By all means, counsel should underscore any "smoking guns." A party need not hold back on honest and heartfelt perspectives. Not in the least. Such factors warrant consideration when assessing risk and determining whether settlement is appropriate. What I am suggesting, instead, is that presentations be crafted to persuade the other side that their risks are greater than previously understood; that another look is warranted; that serious danger warrants serious appraisal; and that settlement *today* is worth more than a verdict tomorrow.

Recommendation: Mediation is voluntary. The mediator has no power to impose a settlement. The case will resolve only if both parties agree. Mediation advocacy, therefore, dictates writing mediation summaries and making oral presentations to persuade the other side, inviting due consideration rather than retaliation and counterattack.

7. Develop an offer/concession strategy

The best negotiators are strategic. They develop an offer/concession strategy before they reach the mediation table, a strategy which anticipates each move and counter-move until settlement is reached. Strategic mediators play out the negotiation in their head, predicting how each offer will be received, anticipating the other side's response and carefully working the negotiation through until their settlement goal is achieved. Strategic negotiators generally get what they're after. Regrettably, strategic negotiators are rare. Too many advocates limit their planning to an opening number and a bottom line, relying on their gut instinct and experience for the moves in between. Some advocates do not prepare even that much. Seat-of-the-pants negotiation may work in some cases, but it is not a strategy to maximize results over time.

Central to effective negotiation is offer/concession strategy. What does offer/concession strategy look like?

From the plaintiff's perspective: If the goal is $100,000, plaintiff must decide where to start, leaving enough room to fall back without discouraging the other side from responding. Concerned she might appear too aggressive, counsel might start the negotiation process at $235,000. To flesh out the strategy, she must anticipate the likely response. Different lawyers will answer differently depending on their negotiation style and experience. For purposes of our example, plaintiff assumes $235,000 will be within the range expected. Accordingly, plaintiff can anticipate an opening counteroffer of $25,000 rather than an insulting "nuisance" number. In response, assuming her assumptions are right, she plans to reduce her demand to $175,000, a $60,000 move to signal appreciation and respect. Seeing a good faith move by plaintiff, she can expect a response in kind, an increase to $50,000. If the second move is $50,000, plaintiff might drop to $150,000. At this point, she can anticipate the defense will move to $65,000. In response to that proposal, plaintiff plans to lower her demand to $145,000. It does not take a great deal of imagination to see that plaintiff has planned a strategy that will achieve her goal and perhaps a little more.

From the defendant's perspective: Assume defense counsel also believes the case should settle for $100,000. He anticipates

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MAKING THE MOST OF MEDIATION: 10 TOP TIPS FOR MAXIMIZING RESULTS (PART 2)

(Continued from page 21)

plaintiff's initial demand – because he knows plaintiff's counsel as an aggressive bargainer - to start at $300,000. To signal that plaintiff is too high, defense counsel plans to offer no more than $5,000. Because $5,000 is "nuisance" value, he can expect plaintiff will be disappointed. What response can he anticipate from an unhappy plaintiff? The response could be a threat to withdraw from the process. Defense counsel is willing to take that risk because he knows he can rely on the mediator to keep the process going. An unhappy plaintiff willing to continue the process, however, is unlikely to move far. Defense counsel can expect the next demand to be $290,000 - $295,000, a move that "equals" or "doubles" defendant's opening proposal. At this point, defense counsel could demand a more "serious" proposal, in essence asking plaintiff to "negotiate against himself." As no self-respecting plaintiff's advocate is going to do that, matching an unrealistic demand with an unrealistic response often results in impasse. To avoid this frustrating scenario, defense counsel decides to open with $20,000, pointing out that $300,000 is out of line and expressly inviting a significant reduction in the next round. Assume defense counsel anticipates plaintiff to respond with $240,000, which is still unacceptably high. As a result, he plans to increase his offer by only $5,000 to $25,000. Realistically, he can anticipate a number of additional small, painful moves thereafter. At some point, however, defense counsel hopes to break the logjam by inviting the mediator's help. He asks the mediator to soften plaintiff up by focusing in caucus on plaintiff's risks and by offering to make a significant upward adjustment if plaintiff will reduce his next demand significantly. If the parties remain far apart, defendant might offer to "move to $50,000, if plaintiff will move to $150,000." Again, it takes little imagination to work out the next few moves for each side to reach its goal.

An offer/concession strategy is a prediction. Predictions about the future are fraught with peril. Mistakes will be made. The other side will exceed expectations as often as it meets them. Accordingly, strategic negotiators must be flexible. Adjustments will be necessary. It may turn out the parties reach a predicted point, but in fewer or a greater number of moves than predicted.

In any event, with an offer/concession strategy, client expectations are better managed and the negotiator retains tighter control of the process. With tighter control of the process, the likelihood of achieving the client's aims is greatly enhanced. Armed with a strategy, the emotional roller coaster ride can be smoothed out. Clients are less frustrated, less likely to become discouraged. Parties who are frustrated, angry, or depressed are more likely to make mistakes, offering too much or giving up too soon. With an offer/concession strategy, even disappointing moves are anticipated in advance and planned for. By focusing on process, both parties remain in the negotiation. The danger of one party or the other withdrawing is diminished. Indeed, by developing an offer/concession strategy, counsel reduces the risk of error and reading or sending the wrong signal.

If the strategy fails to bring the parties within the "landing zone," it could be a sign that one or both parties are not ready to settle; or someone is in error. In either case, counsel can learn from failure. It could be that one side or the other has underestimated the risks and a fresh assessment is necessary. It could be the problem can be resolved by additional discovery – the parties disagree, for example, about how a witness will testify. If so, the mediation can be adjourned until the witness is deposed.

Recommendation: Once a range is agreed upon, counsel should develop an offer/concession strategy to anticipate movement likely to occur during bargaining. With such a strategy, counsel is better prepared to manage client expectations and achieve client goals.

8. Make use of your mediator

The mediator is a tool, not an adversary. *Use* the mediator. Enlist the mediator's assistance - often. Confiding in the mediator helps him select the right intervention. If there is concern that a confidence might be revealed to the other side, ask that it not be shared. Experienced mediators know how to enforce confidentiality.

Here are several examples of how you can make better use of the mediator:

- Having trouble with your client? Share your concerns with the mediator and help him build trust with your client. A good mediator often will be able to improve client confidence in counsel's skills and reinforce the attorney-client relationship.

- Is there an impediment to settlement on your own side? Share it with the mediator and enlist his help in finding ways to address it. The mediator may have had experience with a similar issue. Where reinstatement is under consideration in a wrongful discharge case, for example, the employee may fear management will fire him again. The fear is understandable, but misplaced. I have been involved in dozens of reinstatements both as counsel and as mediator and I have seen only one case where that happened. My experience with this issue may help your client overcome their hesitation.

- Perhaps counsel has been unable to read where the other side is coming from. In a caucus mediation, the mediator is the only person who knows what is going on in both rooms. Ask the mediator to share his perception. Within the limits of confidentiality, the mediator may be able to provide important insight.

- Unsure about framing an opening offer or how the next move might be received? Employ the mediator as a negotiation coach. Ask the mediator for strategic advice. The mediator can be a neutral sounding board to help shape a more productive move.

- Having trouble generating ideas to move the case forward? Ask the mediator to convene a brainstorming process.

- Has the mediation reached a plateau? Has progress slowed to a halt? Inform the mediator so he can try something else to get the process back on track.

- Is there an impasse? Has all possible progress been made, but the parties remain far apart? Ask the mediator to consider using

the "mediator number" technique. In the mediator number technique, sometimes called the "disappearing number" or the "double jump", the mediator suggests a dollar figure somewhere between the last two offers, and shares his rationale with both sides privately. If both sides accept, the case settles. If a party rejects, that party is never told what the other side did, thus protecting everyone in future negotiations. The mediator number technique can be effective as a last resort in settling intractable disputes.

Recommendation: The mediator was hired in the belief he can help resolve the dispute. Make the most of the opportunity. Trust the mediator. Put him to use. Ask for the mediator's input.

9. Replace zealous advocacy with mediation advocacy

An old mediation truism holds that "If litigation is a search for justice, mediation is a search for solutions." Mediation is not a justice process. It very well may not right a wrong from any perspective. On the contrary, mediation is a process designed to find a resolution satisfactory to all sides. In mediation, the lawyers serve as joint problem solvers not zealous advocates. Everyone is focused on the same goal: a settlement that works for all sides. Mediation is the one place in the litigation process where everyone should take a step back from the "battle" and cooperate in seeking resolution. If mediation does not work, nothing is lost, the disputants can return to zealous advocacy the next day.

Here are some ways advocates might adjust their advocacy:

- Remove that zealous advocate hat and replace it with a joint problem-solver hat. Ask opposing counsel to do the same. Instead of trying to win every point, join together cooperatively to address their common problem: how do we resolve this lawsuit? In fact, a concession of weakness, rather than being a cause for concern, demonstrates to the other side that a party is realistic.
- As mentioned above, mediation provides the advocates and parties with the opportunity to communicate directly with each other. Participants are encouraged to fashion their arguments and present their claims and defenses so as to persuade the other side that resolution is in their best interest.
- The focus of mediation should be on risk analysis and how risk impacts valuation, rather than on "winning".
- In business, probate, or employment cases, the parties may know each other well. With good preparation and proper management of the process, a productive dialogue can be fostered allowing the parties to work out their own solutions.
- In mediation, advocates "check" invective and harsh language at the door. Accusations, charges, and personal attacks create the wrong atmosphere. Toxic charges ("liar," "thief," "incompetent," "fraud") stimulate equally ugly counter charges ("cover up," "pretext," "dishonest," "phoney").
- "Interest based" bargaining techniques predominate over traditional "positional" or "distributive" bargaining. The parties are encouraged to identify their own interests and needs, and develop proposals and counter-proposals directed at interests and needs wherever possible. Negotiators should become acquainted with the techniques in the book *Getting to Yes* by Fisher and Ury. *Getting to Yes* is the seminal work in dispute resolution, addressing the concepts of "win/win" resolution; interest based bargaining; and BATNA/WATNA analysis (the best and worst alternatives to a negotiated settlement).
- Do not overlook the value to parties of closure and resolution "today". There is often value to a party in resolving a case sooner rather than later. A plaintiff who says she is willing to take her chances before a jury can be reminded that the trial is months away and a favorable verdict may be at risk for years while the appeal is processed. A defendant who stands on principle can be reminded that resolution ends business disruption, hostile outside scrutiny and the pain of continued attorney fees.

Recommendation: Zealous advocacy makes for effective litigators in the courtroom, but not so much in the mediation room. In mediation, the most effective advocacy is directed at communicating productively with the other side, focusing on interests over positions and encouraging assessment of risk.

10. If the case does not settle at the table, keep the mediator engaged

While many mediators experience an 80% or better settlement rate, cases do not always settle at the mediation table. Sometimes parties are not ready. Additional discovery may be necessary, especially where mediation is attempted early. It may take time to digest and recognize the significance of new information learned at the mediation table. Several days may pass before a party is ready to talk further. Sometimes emotions cloud judgment, preventing a party from conceding a weakness or adjusting their objectives. A party may need time to process the information. Accordingly, if the mediation does not result in prompt resolution, parties should not give up.

Yogi Berra taught us "it ain't over till it's over." Even if the mediator does not request it, parties should leave their last offers on the table, at least for a reasonable time to reconsider. Given 48 hours to reflect away from the pressure of the mediation table, a plaintiff may become more comfortable with the last offer, a defendant may decide a few more dollars is not a hardship. Sometimes a limited delay can remove an impediment to resolution as when a key witness - not yet deposed – must be questioned. If the parties disagree on whether a certain piece of evidence will be admitted, an adjournment while a legal ruling is sought might be in order. Most mediators are willing to continue the process as long as needed.

Recommendation: Do not give up just because the case did not settle on the appointed day of mediation. It often takes time and a dose of reality for a party to realize that negotiated resolution is often better than continuing litigation. Keep the mediator involved.

Conclusion

Mediation is *not* just another stop on the Litigation Express. It is an opportunity to try another approach. By engaging in a thoughtful collaboration with clients to select the right mediator, tailor the mediation process to an individual dispute, and replace zealous advocacy with joint problem solving techniques, litigators can make the most of the process resulting in lasting, satisfying, and successful resolutions that maximize results. ■

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