LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

# LABOR AND EMPLOYMENT LAWNOTES

**Volume 25, No. 3** **Fall 2015**

# SIXTH CIRCUIT TREND: PREFERENCE FOR JURIES — AND NOT JUDGES — TO DECIDE FLSA OVERTIME CLAIMS

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The Sixth Circuit federal appeals court has spoken, and "independent contractors" or other workers who may be deprived of overtime pay under the Fair Labor Standards Act (FLSA) should be pleased to hear the news. A recent trend of decisions in the federal appeals court for the Sixth Circuit (covering Michigan, Ohio, Kentucky and Tennessee) affirms a clear right to jury trial, and against judicial rulings to dismiss, to decide overtime compensation claims. Under the FLSA, non-exempt employees are entitled to overtime pay at "time and a half" for all hours worked in a week.[1] The FLSA overtime law applies regardless of contract provisions or other agreements the employer has tried to impose (including "independent contractor" labels the employer might insist upon as a condition of employment). Recent published cases in the Sixth Circuit lend encouragement for workers seeking overtime pay and a note of caution for trial judges who may be inclined to issue summary dismissals.

**Exhibit A: Independent Contractors**

For one, the Sixth Circuit has been cracking down on the labeling of some workers as "independent contractors" or otherwise treating workers as "non-employees" who are not covered by the FLSA (such as volunteers or interns). For instance, in *Keller v. Miri Microsystems LLC*,[2] the plaintiff satellite-internet installer who worked nineteen-hour days, six days a week with no overtime compensation, was coined an "independent contractor" by the defendant company. The lower court dismissed the case, holding that the installer was an "independent contractor," but the Sixth Circuit reversed, finding genuine questions of fact that required a jury trial to properly determine the status. Under the appeals court's reasoning, to determine whether a worker is an employee or an "independent contractor", courts assess the "economic reality" surrounding the worker's job, drawing upon six factors to do so: (1) the permanency of the relationship between the parties; (2) the degree of skill required for the rendering of the services; (3) the worker's investment in equipment or materials for the task; (4) the worker's opportunity for profit or loss, depending upon his skill; (5) the degree of the alleged employer's right to control the manner in which work is performed; and 6) whether the service rendered is an integral part of the alleged employer's business.[3] Typically, it is first the court's job to decide if all the factors weigh in favor of classification as an independent contractor; if a genuine issue of material fact regarding employment status exists, then summary judgment is inappropriate.

The court in *Miri* not only held that there were indeed genuine factual issues, but also that these issues were to be resolved by a jury. Defendant Miri claimed it satisfied the independent contractor test because it paid its installation technicians by the job (not by the hour); it didn't withhold federal payroll taxes or provide the plaintiff with benefits; it had no contract or exclusivity agreement which prevented plaintiff from installing on behalf of other companies; it selected installers for job assignments based on location and availability and not their particular skill level; it allowed plaintiff to decide the location of his work and the number of jobs he took each day; it invested a more significant amount of money in the business; and it allowed Plaintiff Keller to hire assistants to work on his behalf. However, Plaintiff provided evidence that he worked for Miri for almost 20 months and treated the company as his permanent employer, never turning down an assignment; he needed certification, for which training was provided by Defendant; that he invested some money in the work he performed; and he could hardly increase his profitability as there were only a limited number of jobs that could be completed within a day, all of which the appeals court found to be important in remanding the case to a jury.

**Exhibit B: Outside Salespeople**

Similarly, the recent trend in the Sixth Circuit also suggests that employers will face an uphill battle in front of a jury when they deny overtime pay based on overbroad or abusive application of the exemptions under the FLSA. In *Killion v. KeHE Distributors, LLC*,[4] the appeals court also reversed the trial court judge's dismissal on summary judgment, holding that categorization of "sales representatives" as "outside sales employees" will not stand where a jury could find that employees do not have the primary duty of making sales. Although the title of "sales representative" may suggest that these employees are exempt, the FLSA requires a court to take into account all of the factors in a particular case and examine the true nature of the employees' work in its entirety. The Killion court ruled that a reasonable jury could find that plaintiff employees had the primary duties of stocking shelves and managing inventory, not making sales. Given that around 70% of the employees' compensation was based on stocking and cleaning shelves, along with the fact that their promotional work for KeHE was done in furtherance of the sales of account managers and not plaintiffs' own sales, the court found genuine issues of material fact existed that were appropriate for a jury to decide.

**Exhibit C: "Shift Supervisors"**

The court's refusal to grant summary judgment in false categorization cases is reiterated in *Bacon v. Eaton*.[5] In Bacon, the defendant employer denied overtime pay to "front line" shift supervisors after classifying them as "exempt executives." Under the FLSA, exempt executives must (1) be compensated on a salary basis and make no less than $455 per week; (2) have the primary duty of managing the business or a department within it; (3) regularly direct the work of two or more employees; and (4) have the authority to make hiring or firing decisions, or have particular weight given to recommendations as to hiring, firing, or any other change in other workers' employment statuses.[6] While the shift supervisors in *Bacon* satisfied the first three prongs of the executive exemption test, the Court re-

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**STATEMENT OF EDITORIAL POLICY**

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

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



# SIXTH CIRCUIT TREND: PREFERENCE FOR JURIES — AND NOT JUDGES — TO DECIDE FLSA OVERTIME CLAIMS

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manded based on the fourth; because plaintiffs' recommendations about the change in employment status of other employees were often not considered by upper-level management, a jury may find that they did not have a significant influence over whether employment status was actually changed. According to the plaintiffs, no significant weight was given to their probationary evaluations; their job descriptions didn't include giving hiring, firing, or other employment status change suggestions to upper-level managers; they didn't partake in the interviewing process; and the defendants often discarded discipline reports written by shift supervisors, Thus, the case was remanded to a jury for a decision on whether the issues surrounding these facts pointed to exempt employee status.

**Exhibit D: Timekeeping Disputes**

In *Moran v. Al Basit LLC* et al.,[7] the appeals court held that, in some circumstances, a plaintiff's testimony alone regarding disputed overtime can create a genuine issue of material fact requiring a jury trial to resolve the claims. The plaintiff, a mechanic at defendant's auto shop, complained that the defendant failed to properly compensate him for overtime work (and in turn that his employment was terminated in retaliation for requesting proper overtime compensation; this issue was not appealed). Management claimed that security camera footage was used to track the times of employees' arrivals and departures, and timesheets were handwritten by management based upon this footage. Although the plaintiff's testimony about his exact working hours was not precise, the court here held that precision was not necessary: not only was the burden on the employer to keep proper records (with the handwritten timesheets here not comprising "objective incontrovertible evidence" of hours worked), but that even plaintiff's imprecise testimony alone was enough to create a genuine issue of fact to be resolved by a jury.

**Conclusion**

While they present diverse factual scenarios, and implicate distinct legal arguments regarding the right to overtime pay, *Keller, Killion, Bacon*, and *Moran* together present a clear body of law showing a recent trend and a clear preference in the Sixth Circuit for fact finding by jury rather than by judge. In all four cases over the last year the Sixth Circuit has reversed summary judgment orders by the district court and remanded the cases for further proceedings – most likely a trial where a jury is empowered to determine whether the mandates of the Fair Labor Standards Act have been violated. Employers who seek to skirt the law should be on notice that quick dismissals by a judge are not in favor. Employees or independent contractors who have been deprived of a fair day's pay may reasonably also read the tea leaves to conclude that their claims for overtime pay are likely to get their day in court and not be lightly dismissed by a judge.

**—END NOTES—**

1 29 CFR 778.415
2 *Keller v. Miri Microsystems LLC,* 781 F.3d 799 (6th Cir. Mich. 2015)
3. *Id,.* citing *Donovan v. Brandel,* 735 F.2d 1114 (6th Cir. Mich. 1984).
4 *Killon v. KeHE Distribs.,* LLC, 761 F.3d 574 (6th Cir. Ohio 2014)
5 *Bacon v. Eaton Corp.,* 565 Fed. Appx. 437 (6th Cir. Mich. 2014)
6 29 CFR 541.100(a).
7 *Moran v. Al Basit LLC,.* 2015 U.S. App. LEXIS 9021 (6th Cir. Mich. 2015) ■

# THE EXEMPTIONS TO THE DEFINITION OF "PERSONNEL RECORD" UNDER THE BULLARD-PLAWECKI EMPLOYEE RIGHT TO KNOW ACT

**Nicholas Michael Saleh**
***Kitch, Drutchas, Wagner, Valitutti & Sherbrook***

This article follows my "how-to" article in *Lawnotes*, Vol. 25, No. 1 (Spring 2015), on the protection afforded internal investigations under the Bullard-Plawecki Employee Right to Know Act ("the Act"). This article focuses on the meaning and scope of four of the eight categories of information that the Act exempts from production. MCL § 423.501(2)(c)(i)-(viii). The four categories analyzed are those that are most likely to be of issue in compelling a complete record.

But first, an important preliminary tip on litigating the exemptions. As set forth in my previous article, there is a surprising dearth of case law regarding the Act; few of the exemptions have been litigated at the appellate level. For this reason, it is important for practitioners to recognize that grounds for analogical argument to a well-developed body of case law exist: the Michigan Court of Appeals has utilized the Act to interpret the exemptions of FOIA. See *e.g., Newark Morning Ledger*, 204 Mich. App. 215, 221-223 (1994)(using the Act to interpret the Legislature's intent in regard to FOIA, "mindful of the differences between the two acts").

**Employee References Supplied to an Employer if the Identity of the Person Making the Reference would be Disclosed. MCL §423.501(2)(c)(i).**

With regard to exemption (i), the Michigan Court of Appeals has stated that the "sole concern of the Legislature is to prevent disclosure of the identity of the person making the reference." *Muskovitz v. Lubbers*, 182 Mich. App. 489, 497-499 (1990). In *Muskovitz*, the Appeals Court affirmed the trial court's decision to prevent identification of the reference makers (by deleting the names of the makers), yet still allow production of the substance of the references (by providing the verbatim comments). Muskovitz, 182 Mich. App. at 493-494, 499.

**Materials Relating to the Employer's Staff Planning. MCL §423.501(2)(c)(ii).**

Internal documents affecting the rights of large numbers of employees have been considered exempt under (ii). *See e.g., Mich. Prof'l Emps. Soc. v. Dep't of Natural Res*., 482 N.W.2d 460, 467 (Mich. Ct. App. 1992)(exempting from disclosure an interviewer's notes and memo regarding the *applicant pool); Leininger v. Reliastar Life Ins. Co*., 2:06-CV-12249, 2007 U.S. Dist. LEXIS 72465, *6 (E.D. Mich. Sept. 28, 2007) (exempting from disclosure bonus agreement applicable to *all employees)*; *Muskovitz*, 182 Mich. App. at 497 (exempting from disclosure letter from university dean to university provost setting forth proposed salary increases for *every employee in two departments).*

**Information of a Personal Nature about a Person Other Than the Employee. MCL §423.501(2)(c)(iv).**

The Michigan Supreme Court has concluded that information is of a personal nature for purposes of the privacy exemption to Michigan's Freedom of Information Act if it "reveals intimate or embarrassing details of an individual's private life." *Bradley v. Saranac Cmty. Sch. Bd. of Educ.*, 455 Mich. 285, 294 (1997); *See also Mich. Fed'n of Teachers & Sch. Related Pers., AFT, AFL-CIO v. Univ. of Mich.*, 481 Mich. 657, 676, (2008) ("Private or confidential information relating to a person…is information of a "personal nature.""). This standard is evaluated in association with the customs, mores, or ordinary views of the community. *Id*. (citing *Swickard v. Wayne County Medical Examiner*, 438 Mich. 536, 547 (1991).

**Educational Records under Family Educational Rights and Privacy Act ("FERPA"). MCL §423.501(2)(c)(vii).**

The concept of education records under FERPA does not include records regarding employees of the educational institution who are not in attendance. 20 USC § 1232g(a)(4)(B)(iii); *See e.g., Wallace v. Cranbrook Educ. Cmty.*, 2006 U.S. Dist. LEXIS 71251 *12 (E.D. Mich. Sept. 27, 2006) (finding that student statements provided in relation to an investigation into a school employee are not "education records" and therefore were not exempt from disclosure). As for information that may fall within the broad definition of "educational records", disclosure is permitted pursuant to a judicial order when done in accord with the requirements set forth in the regulation. 20 USC § 1232g(b)(2)(requiring parents and students to be notified).

**Addendum: What to Watch for**

On July 14, 2015, State Representative George Darany (D-Dearborn) introduced a bill (HB No. 4789) to add a new section ("Section 2a") to the Act. The proposed section would require an employer to notify an employee by certified mail, return receipt requested, whenever a "disciplinary report, letter of reprimand, or other record of disciplinary action" is placed in an employee's personnel record.

Perhaps the fact that the bill proposes addition of the above mandate to Section 2 of the Act, the section providing for the exclusionary rule, foreshadows its potential to increase the value of the Act in litigation. For example, imagine a Title VII or ELCRA case wherein employee claims that employer issued unnecessary written discipline in a discriminatory fashion. Employer may retort that employee was on notice of the discipline and should have challenged it under Section 5 of the Act. As of publication, HR No. 4789 is before the Committee on Commerce and Trade. Keep an eye on this bill; it has the potential to distinguish Michigan employment law on the national stage. ■

# MEDIATORS AND ARBITRATORS: A "STARK" CONTRAST

**Sheldon J. Stark**
***Mediator and Arbitrator***

I recently spoke on the topic of mediation to the National Academy of Arbitrators, Michigan Region, whose members are some of the best and most respected arbitrators in practice. In an era when traditional labor work is down, arbitrators are wondering whether opportunities might exist for them by adding mediation to the services they currently offer. Many ADR providers already offer both mediation and arbitration services, but is it easy to offer both? Some mediators, on the other hand, refuse to arbitrate cases for the lawyers who use them regularly as mediators. Why? The reasons reflect a risk averse business model: after an arbitration, one side is often unhappy with the outcome. Mediators fear an unhappy losing party or litigator may never call again to handle another mediation!

For those ADR providers who would like to offer both services, how do the skill sets differ? Can experienced arbitrators develop a mediation practice? Of course! In fact, as I will argue below, well respected and popular arbitrators actually have a significant strategic advantage in breaking into the mediation field. Will adding mediation to a traditional arbitration practice be smooth? Not likely. In fact, as I prepared my remarks, I started thinking about these questions in a way that had not previously occurred to me. I believe the contrast between mediator and arbitrator skill sets is — you'll pardon the expression — a "Stark" one! Nonetheless, if an arbitrator is motivated to make the effort the result is likely to prove rewarding.

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

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

## I. THE DIFFERENCES BETWEEN ARBITRATORS AND MEDIATORS

**Evidence vs. Stories**. Arbitrators listen to evidence. They rule on objections and consider only evidence admitted into the record. They weigh record evidence and draw conclusions from it. They evaluate. They have pre-conceived opinions and generally make no secret of them. They filter the evidence through their pre-conceived opinions. They do or do not like last chance agreements, for example. They do or do not respect zero tolerance policies. They do or do not believe discharge should be used only as a last resort. Arbitrators know how to make decisions, and make decisions every day. They explain their decisions in reasoned awards, which they "publish" to the parties.

Mediators, by contrast, listen to stories not evidence. "Evidence" matters only to the degree there is risk that evidence will or will not be discovered, will or will not be admitted, will or will not be persuasive to a finder of fact. Mediators have pre-conceived opinions, too, but their opinions are used to ask pointed questions to make certain the disputants appreciate their risks. Mediators generally keep their opinions to themselves. Mediators may or may not be asked to evaluate the claims and defenses of the parties, but doing so threatens loss of credibility and trust. If Mediators have reached conclusions about the likely outcome of the case – how they might rule if they were the decision maker – they are kept under wraps to avoid complaints of bias, loss of neutrality and favoritism. About the only decisions a mediator makes are which technique to apply, whether the process should continue and whether every avenue to reach resolution has been explored!

**Boundaries**. The Collective Bargaining Agreement, executive contract or agreement to arbitrate generally governs the authority of an arbitrator. Arbitrators cannot go outside the four corners of that agreement. They are often bound by legal precedent and rules of evidence. Only in special cases, such as contract interpretation, do arbitrators consider how the outcome will impact the relationship of the parties.

There are few limits on the boundaries of a mediation process. The parties can agree to design whatever process they believe best fits the dispute. Mediation considers monetary issues, of course, but may or may not pay attention to legal precedent. The law is generally viewed as simply one more risk factor to consider. Mediation may take into consideration issues of public policy and broader social issues. Mediators frequently consider the relationship of the parties, both personal and business. If the parties have an ongoing relationship, the mediation process may help to re-establish or create new channels of communication. When was the last time an arbitrator considered that concept? A crumbling or tattered relationship between the disputants may be a crucial issue and mediation is an excellent vehicle to begin the process of relationship repair. This can be a powerful component of mediation in employer/employee disputes where plaintiff remains employed. Significantly, mediators come to grips with party emotions! If emotions are driving the dispute, a mediator ignores them at his peril.

**Relief Available**. Arbitrators are confined to relief within a narrow framework: back pay, reinstatement, severance, contract interpretation, damages, attorney fees, etc., the kinds of relief available to a judge.

Mediators can resolve all issues between the parties, in-

cluding those anticipated to arise in the future. Options for a sound resolution are limited only by the imagination of the participants in the process.

**Win/Loss vs. WIN/WIN**. Arbitration is about who wins and who loses. Mediation – especially interest based mediation – can result in WIN/WIN resolution. When I started in practice, we liked to quote Sir Winston Churchill for the proposition that the best settlements were those from which both sides walk away equally unhappy. Since Fisher and Ury published *Getting to Yes*, we've learned to resolve disputes by focusing on the underlying needs and interests of the parties, something the parties are often unable to do for themselves without the help of a third party neutral mediator. Mediations that focus on underlying needs and interests often result in durable agreements that both sides view as satisfying and workable.

**Communication**. Arbitrators, like judges, do not and cannot engage in ex parte communication with a party or lawyer. The arbitration proceeds in joint session with all parties present, observing each other, hearing each other and their witnesses testify on direct and cross examination and listening to the arbitrator rule on objections. The parties are not permitted to tell their stories; they are permitted only to answer questions. Direct communication between opposing sides is forbidden. All comments are directed to and through the arbitrator.

In mediation, confidential "eyes only" and "ears only" communication is an essential element of the process. Mediation process design may include joint sessions, private sessions where the parties are together solely to hear the mediator's opening statement, or some combination of both. In a mediation designed with private caucuses and shuttle diplomacy most, if not all, communication is ex parte. Where the process includes joint sessions, parties are encouraged to address one another. On occasion, the mediator might bring the principals of each party together separately to hammer out a final agreement face-to-face.

## II. BREAKING INTO THE MEDIATION FIELD

**Limited Opportunities to Compete**. Even for the busiest and most respected arbitrators, breaking into the mediation field presents challenging impediments. Experts believe 90% of the mediation work is handled by 10% of the providers. Most ADR providers practice law, represent clients, and mediate as a sideline. Their practice is rarely over 50% ADR. This is a difficult field to break into! Litigators prefer to stick with the mediators they have always used.

New business comes from old business, not from traditional forms of marketing. For many mediators, fresh engagements come through word-of-mouth endorsements like this one: "Let me tell you about the great job so-and-so did last week in this tough case I never thought would settle!" "Oh? I have a tough one coming up just like that. Maybe I should use her, too!" If you see ads for mediators in *Michigan Lawyer's Weekly* or the *Michigan Bar Journal, Laches*, etc., the goal is to remind the market he or she is still around. It is not necessarily to attract new clients.

Word-of-mouth endorsements come from good experiences with a mediator. Good experience with a mediator comes from having used that mediator before. It's Catch-22.

**A Boatload of Competitors**. There are many hundreds of individuals who have taken 40-hour, basic, hands-on, general civil mediation training to transition from litigation or transactional work to mediation. A tiny handful have succeeded. ICLE was the first basic training approved by SCAO, the State Court Administrative Office. It has been hugely successful and continues to be offered twice a year now, after more than 13 years since beginning in 2002. Over the years, approximately 1100 individuals have gone through the program. ICLE is only one of many trainings offered each year across the state. Many individuals who have gone through a training are well known, respected and have excellent reputations in their law practice. For most, going through the basic training has not worked out as anticipated. ICLE advises trainees not to give up their day jobs. For most, that's excellent advice.

## III. ARBITRATORS HOLD A SIGNIFICANT STRATEGIC ADVANTAGE

Notwithstanding the impediments standing in their way, arbitrators nonetheless hold a significant strategic advantage over other potential mediator wannabes.

First, well respected arbitrators are busy because they are trusted. They have already established strong relationships with the Bar. Through a lifetime of making thoughtful, good decisions presiding over conflict, they have gained the confidence of ADR consumers. Their name and number is already in many a Contacts file or Rolodex.

Second, litigators return their calls. If they choose to get trained and enter the field, they can communicate their decision directly to the people who select mediators. All they need do is pick up the telephone and schedule a lunch to have a one-on-one discussion with the very market they want to attract.

Third, litigators are calling *them*! They are being selected to preside over private arbitrations on a regular basis. During the scheduling process, well-respected arbitrators have the opportunity to discuss their new mediation practice and, perhaps, in the right circumstance, to suggest the parties try mediation first. If they do a good job, they may lose an arbitration, but they are likely to be praised and discussed in glowing terms on internal office intranets. "You'll never guess who started mediating! And did she do a good job!"

Fourth, the med/arb highbred process offers an option to mediate, and failing resolution, the arbitration proceeds as it would have done under traditional circumstances. Every arbitration could become the starting point for a burgeoning business expansion.

## CONCLUSION

Mediation and arbitration are two distinctly different processes. The skills necessary for a mediator to be successful are often very different from the skills necessary for an arbitrator to be successful. Yes, there is overlap, but at the end of the day, the skill sets are almost mirror opposites. While the distinction between skills sets is "stark," good ADR providers are able to successfully distinguish between them and offer both services effectively to their clients. Keeping straight which works best in which process will assist in assuring high quality service no matter which conflict resolution approach the parties select. As traditional work for labor arbitrators slows, therefore, mediation presents a realistic opportunity to expand ADR services successfully. ■

# WTF: THE BOARD'S TOLERATION OF PROFANITY AND CONFRONTATIONAL CONDUCT

**Joseph A. Barker**
***Retired Regional Director—NLRB Region 13 (Chicago)***

Normally, profanity or insubordinate conduct at the workplace by employes can subject them to lawful discipline and discharge. However, the same conduct must be considered in a different light in the context of an employee's engagement in protected concerted activity. Under those circumstances, the National Labor Relations Board has traditionally afforded protection to conduct that might be considered offensive. A bevy of recent cases have tested the outer limits of conduct the Board will tolerate. My apologies to anyone easily offended by the R-rated nature of some of the language that follows. Neither the Board nor I have bowdlerized it. Presumably, most labor and employment practitioners became immune long ago to the use of such language in the workplace, even if they don't normally represent sailors or their employers.

**Employee Use of Profanity in Social Media**

Social media provides the newest platform by which employees vent their frustrations and engage in potentially protected concerted activity. Because postings normally take place outside the workplace and oftentimes on non-work time, employers attempting to limit or address offensive conduct face considerable obstacles in attempting to impose discipline.

In *Pier Sixty LLC*, 362 NLRB No. 59 (March 31, 2015), a number of service employees expressed interest in union representation, in part because of concerns that management repeatedly treated them disrespectfully and in an undignified manner. At one point, employees presented a petition to the Employer concerning their ongoing complaints about management mistreatment. The petition included complaints that the Employer's managers and captains "take their job frustration [out on] the staff" and "don't treat the staff with respect." Eventually, a representation petition was filed and an election held.

Two days before the scheduled election, employee Perez became upset with the manner in which a manager, Bob, had addressed him and other servers during cocktail and dinner service at a fundraising event held on the Employer's premises. Bob had been specifically mentioned as one of the offending managers in the previous employee petition. Perez told one of the other servers, Gonzalez, who was the head of the employees' organizing effort, that he was "sick and tired of this" and the manager did not know how to talk to employees. Perez took a break and proceeded to the bathroom and then outside the Employer's facility. There he vented his frustration with the manager's mistreatment of the servers by posting from his iPhone the following message that might even make a sailor blush on his personal Facebook page:

> Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!

Perez' post was visible to his Facebook "friends," which included some coworkers, and to others who visited his personal Facebook page. Perez deleted the post the day after the election, but not before it was viewed by the Employer. The Employer discharged Perez shortly after the election, which was won by the Union, for violating the company's harassment policy.

The Board had no problem finding that Perez' Facebook comments, directed at the manager's asserted mistreatment of employees, and seeking redress through the upcoming union election, constituted protected, concerted activity and union activity. Instead, the real issue was whether the employee's comments were so egregious as to exceed the Act's protection.

Normally, the Board utilizes the four-factor test in *Atlantic Steel Co*., 245 NLRB 814, 816 (1979), to determine whether otherwise protected concerted activity at the workplace has lost its protection. Under that test the Board examines: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst or alleged misconduct; and (4) whether the conduct was provoked by an employer's unfair labor practice.

However, because in this case the comments regarding Bob and his family were initially made available to employees and others in a non-work setting and did not occur during a conversation with a supervisor or management representative, *Atlantic Steel* was deemed inapplicable. The Board cited a recent case, *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 3 (2014), for the proposition that "as a general matter, the *Atlantic Steel* framework is not well suited to address issues . . . involving employees' off-duty, offsite use of social media to communicate with other employees or with third parties."

The Board applied a "totality of the circumstances" test to find that Perez' posting was not so egregious as to lose its protected character. In evaluating Perez' posting, the Board considered: (1) whether the record contained any evidence of the Employer's antiunion hostility; (2) whether the Employer provoked Perez' conduct; (3) whether Perez'conduct was impulsive or deliberate; (4) the location of Perez' Facebook post; (5) the subject matter of the post; (6) the nature of the post; (7) whether the Employer considered language similar to that used by Perez to be offensive; (8) whether the Employer maintained a specific rule prohibiting the language at issue; and (9) whether the discipline imposed upon Perez was typical of that imposed for similar violations or disproportionate to his offense.

In finding a violation under the totality of the circumstances,

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the Board believed particularly significant was that the Employer maintained no specific work rules prohibiting vulgar or offensive language. While distasteful, the Employer had tolerated the widespread use of profanity in the workplace, including the words "fuck" and "motherfucker." Further, in the six years previous to this incident the Employer had issued only five written warnings to employees who had used obscene language and no employee had ever been discharged for such.

**Profanity in the Workplace**

The language was no less egregious, but no less protected in *Caterpillar Logistics, Inc*., 362 NLRB No. 49 (March 30, 2015). An employee was overheard telling pro-union co-workers that he was supporting the union after being embarrassed by the response of a supervisor at an employee meeting to his question as to why a guard shack was being erected at the entrance: "I'm sick of it, that motherfucker is going down, the gloves are fucking off now." However, the palpable threat had been immediately preceded by the statement: "You guys (union supporters) just gained another supporter, I'm sick of the way they treat us here. He (the supervisor) thinks he can treat us like he treated the thugs he managed in Denver. I'm not putting up with it anymore."

Since the conduct did occur on the warehouse floor, the *Atlantic Steel* test was applied to find that the employee did not lose the Act's protection. However, the seriousness of the employee's misconduct was somewhat lessened by the fact that the offending supervisor was not present when he made his remarks.

The factor considered most important though was that the threat had to be placed in the context of the entire discussion. It was found that the statement made no sense if one interpreted it as the employee was going to kill or assault the supervisor and then support the Union. Also significant was that when confronted by the Employer, the employee explained that he did not want to physically attack the supervisor, but wanted to hold him accountable for the previous night's embarrassment. Thus, it was concluded the employee was threatening consequences, such as future unionization, rather than physical harm.

Whether a statement is a threat is judged on an objective basis (how a reasonable person would view it). However, the subjective reactions of the Employer in this case in allowing the employee to go back to work and in not summoning security or the police was taken into account. The supervisor involved did summon police, but that neither the police nor the Employer took any further action was found to be consistent with the belief of all those involved that the employee had not made a threat to harm the supervisor physically.

Buttons and insignia also enjoy protection despite their offensiveness when considered part and parcel of protected concerted activity. It was considered unlawful for an employer to prohibit employees from wearing a variety of union insignia, including buttons and stickers reading "WTF Where's the Fairness," "FTW Fight to Win," "Cut the Crap! Not My Healthcare," and "No on Prop 32." *AT&T*, 362 NLRB No. 105 (June 2, 2015). The Board rejected the Employer's contention that these buttons or stickers contained content so vulgar and offensive as to lose protection.

In the Board's mind, any suggestion of profanity or "double entendre" created by the acronyms WTF and FTW was not sufficient to render the buttons and stickers unprotected. Furthermore, any confusion was clarified by the words that followed each, which was clearly visible to any customer that might observe them, thereby providing a nonprofane and nonoffensive interpretation. Likewise, the Board agreed with the administrative law judge that the illustration of the word "crap" had no "scatological" content as argued by the Employer and did not cross the line into vulgarity.

**Insubordinate Language or Conduct**

Union officials engaged in representational activities have always enjoyed heightened protection against discipline for otherwise discourteous or insubordinate conduct and language. In *Battle's Transportation*, 362 NLRB No. 17 (Feb. 24, 2015), a steward had raised his voice while participating in a disciplinary meeting of another employee and in response to being told by the manager conducting the meeting to "shut up." The steward then slammed his hand on the table and told her to shut up and added that she was a liar and stupid. Not to let the steward to get the last word in this battle of insults, the manager responded by calling him stupid and ended the meeting.

The steward was discharged for creating a hostile work environment. The Board adopted the ALJ's finding that the discharge was unlawful because under an *Atlantic Steel* analysis, the steward's outburst had been provoked by the manager's admonishment to shut up. Although the steward was found to have made an aggressive gesture by slamming his hand on the table in front of the manager, the ALJ rejected testimony that the manager feared the steward would strike her. The ALJ further noted that at least the steward hadn't used profanity during the exchange.

Similarly, by twice unlawfully threatening employees with termination because of their protected concerted activity, the fourth factor of the *Atlantic Steel* test weighed in favor of protection where an employee's outburst was provoked by the employer's unlawful threats of termination. *Staffing Network Holdings, LLC,* 362 NLRB No. 12 (Feb. 4, 2015). The employee had briefly refused to leave work when asked to do so and stated that she had done nothing wrong. For good measure, the Board found that even assuming this factor weighed against protection, finding a violation was still warranted because the other three *Atlantic Steel* factors weighed in favor of protection.

The discharge of a shop steward because of his protected concerted activity in leading a union protest of 15-20 employees into the office of the Employer's center administrator to present complaints about working conditions was violative when all the *Atlantic Steel* factors were evaluated in *Long Ridge of Stamford*, 362 NLRB No. 33 (March 24, 2015). The Board found that the steward had not engaged in any menacing or abusive behavior of kind that would lose protection. Also, the office was away from any patient care area, the conversation was not overheard by patients, and there was no disturbance of the Employer's operations.

In leading the rather large group of employees into the office, the steward informed the administrator that the group was there to discuss concerns about employees being suspended unfairly and that they had lost confidence in the administrator's leadership. While talking, the steward held a grievance in his right hand and touched his left palm with it as a gesture indicating emphasis. Upon being ordered to leave the office, he complied and did not attempt to prevent the administrator from leaving, both of which would have detracted from the protected nature of the conduct.

Although under the fourth factor of *Atlantic Steel* the steward's conduct was not provoked by any unfair labor practices, which weighed against finding his conduct retained protection of the Act, this factor was outweighed by the other three factors. The Board thus concluded the steward had not engaged in any men-

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acing or abusive behavior of the kind that weighs against continued protection.

**Expenses in Searching for Interim Employment**

Should an employer find itself on the wrong side of a finding that it ran afoul of the protections afforded employees to engage in protected concerted activity despite the use of profanity, insubordination, or confrontational conduct, they may be taken by surprise with a calculation of backpay for an unlawful discharge or suspension that can potentially exceed the amount of lost wages. Just after the first of the year, General Counsel Richard Griffin issued a memorandum directing Regions to seek an enhanced backpay remedy in complaints. GC Memo 15-1 (January 30, 2015).

Until now the Board has considered expenses incurred in seeking interim employment as an offset to a discriminatee's interim earnings rather than calculating them separately. As a consequence, reimbursement for search-for-work and work-related expenses is limited to an amount that cannot exceed the discriminatee's gross interim earnings. The General Counsel believes the practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work, but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

In order for employees truly to be made whole for their losses, the General Counsel argues the Board should be urged to hold that search-for-work and work-related expenses be charged against an employer regardless of whether the discriminatee received interim earnings and even if the expenses exceed interim earnings. These expenses might include: increased transportation costs in seeking or commuting to interim employment; the cost of tools or uniforms required by an interim employer; room and board when seeking employment and/or working away from home; contractually required union dues and/or initiation fees, if not previously required while working for respondent; and/or the cost of moving if required to assume interim employment. These expenses will be calculated separately from taxable net backpay and be paid separately, in the payroll period when they incurred, with daily compounded interest charged on these amounts.

In seeking this new remedy, Regions have been directed to argue that the Board should overrule precedent that holds such expenses are payable only to the extent they do not exceed interim earnings, citing the principle a discriminatee should be made whole for expenses that would not have been necessary had the employee been able to maintain working for respondent. It will be urged that under well-established Board law, when evaluating a backpay award the primary focus clearly must be on making employees whole. This means the remedy should be calculated to restore the situation, as nearly as possible, to that which would have occurred but for the illegal discrimination. The Board has yet to address this argument.

**—END NOTE—**

The views expressed are soly those of the author and not those of the National Labor Relations Board or its General Counsel. However, please direct any profanity regarding the views expressed herein directly to the Board rather than the author. ■

# UNLAWFUL SURVEILLANCE AND IMPRESSION OF SURVEILLANCE

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This is a primer on National Labor Relations Board law regarding employer surveillance, written from a union-side labor lawyer's point of view. The primer is followed by summaries of recent cases. There are no dramatic developments to report, but it may be helpful to see how the Board has applied the law to recent fact patterns.

## The Board's View of Employer Surveillance

**Unlawful surveillance**

"[A]n employer violates Section 8(a)(1) when it surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and thereby coercive. Indicia of coerciveness include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation." *Aladdin Gaming*, 345 NLRB 585, 586 (2005) (internal citations omitted).*

It is not necessary for surveillance to be visible to the union members for it to be held unlawful. *See N.L.R.B. v. Grower-Shipper Vegetable Ass'n,* 122 F.2d 368 (9th Cir. 1941). The Ninth Circuit found that an employer engaged in unlawful surveillance when it spied on union activities without the union members' knowledge, reasoning that a person may be interfered with, restrained, or coerced without knowing it. *Id.* The Fifth Circuit stated that the operative question is "whether the surveillance tends to be coercive," and "not whether employees are in fact coerced." *Strugis Newport Business Forms, Inc. v. N.L.R.B.,* 563 F.2d 1252, 1256 (5th Cir. 1977). *See also Belcher Towing Co. v. N.L.R.B*., 726 F.2d 705 (11th Cir. 1984).

**Unlawful impression of surveillance**

An employer also violates Section 8(a)(1) when it causes employees to reasonably believe that their protected activity is being surveilled. "[T]he test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement that their union activities had been placed under surveillance. . . . The idea behind finding 'an impression of surveillance' as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. We have never required . . . evidence that management actually saw or knew of an employee's union activity for a fact, nor do we require evidence that the employee intended his involvement to be covert or that management is actively engaged in spying or surveillance. Rather, an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement." *Flexsteel Indus*, 311 NLRB 257 (1993) (Oviatt dissenting in part).

**Photography and video surveillance**

Employers may observe any open, public union activity on or near their property, but may not "do something out of the ordinary" to spy on workers' union activity or even to give the impression that they are doing so. *Metal Industries, Inc., and Sheet Metal Workers Int'l Association Local 411, AFL-CIO*, 251 N.L.R.B. 1523 (1980). Extraordinary activity includes using surveillance cameras that are "purposefully directed at protected concerted activity." *Snap-On-Tools, Inc. and International Union, UAW,* 342 N.L.R.B. No. 2, *11-12 (2004).

A lower threshold exists for a finding of a Section 8(a)(1) violation with regard to surveillance through videotaping and photographing (as opposed to in-person observation). *Alle-Kiski Med. Ctr.,* 339 N.L.R.B. No. 44, *7 (2003). There is a presumption that the photographing of peaceful protected activity violates Section 8(a)(1), which an employer can rebut only by proving specific justifying circumstances. *Trailmobile Trailer, LLC*, 343 N.L.R.B. No. 17, *2 (2004). While employers have the right to maintain security measures necessary to the furtherance of legitimate business interests during union activity, videotaping of the activity is justifiable only if the surveillance serves a security objective or if the employer can prove it had a reasonable basis to believe misconduct would occur. *See Nat'l Steel and Shipbuilding Company,* 324 N.L.R.B. 499 (1997); *N.L.R.B. v. Colonial Haven Nursing Home,* 542 F.2d 691 (7th Cir. 1976).

In *Snap-On Tools,* the employer was found to have violated Section 8(a)(1) by videotaping union representatives handbilling outside the employer's plant gate. While the employer normally had a surveillance camera panning back and forth during shift changes, the security guards would keep the camera fixed on the handbillers when they were distributing union literature. *Snap-On-Tools, Inc.,* 342 N.L.R.B. 5, *10 (2004). The Board affirmed the ALJ's finding that the video surveillance violated the employees' Section 8(a)(1) rights because the Company had altered its normal videotaping practice. *Id.*

In *Kingsbridge Heights Rehabilitation Center v. S.E.I.U.*, the Board found a Section 8(a)(1) violation where a company made a video-recording of union members' picketing activity that was separate from the company's usual security surveillance system. *Kingsbridge Heights Rehabilitation Center v. S.E.I.U.,* 2007 WL 2022210 (N.L.R.B., July 9, 2007). The Board held that such video surveillance violated Section 8(a)(1) because the employer deviated from its normal video surveillance practice and had no legitimate security interest for doing so. *Id.* Likewise, in *Alle-Kiske Medical Center*, the Board affirmed the ALJ's finding that the employer engaged in unlawful surveillance when company security guards monitored and videotaped union organizers handbilling in a parking lot on company property from approximately 20 yards away. *Alle-Kiski Med. Ctr.,* 339 N.L.R.B. No. 44 (2003). The Board made a similar finding in *Trailmobile Trailer, LLC*, where it held that videotaping union members during their organizing campaign had a "reasonable tendency to interfere" with employees' Section 8(a)(1) rights and that there was a clear connection between union activity and the use of the cameras. *Trailmobile Trailer, LLC,* 343 N.L.R.B. No. 17 (2004).

Videotaping can be unlawful even if the employer does not specifically instruct security guards to videotape union handbillers. The Fifth Circuit upheld the Board's finding of a Section 8(a)(1) violation against a company whose security guards videotaped the front entrance of its plant during union activity even though there was no direct evidence that the company specifically authorized or instructed the guards to do so. *Poly-America, Inc. v. N.L.R.B.*, 260 F.3d 465, 486-87 (5th Cir. 2001). The court determined that "agency status is properly found in the absence of such specific instructions." *Id.*at 487. The Sixth Circuit made a similar finding when it upheld the Board's holding that a company engaged in unlawful surveillance in the security guards' use of video cameras to record union picketing. *U.S. Ecology Corp. v. N.L.R.B.,* 26 Fed.Appx. 435 (6th Cir. 2001). The Board firstly found that the foreseeable effect of redirecting stationary cameras toward the picket lines would be to intimidate strikers and that no unusual circumstances existed to provide a valid justification. *Id.* at 437. Secondly, the Board stated, "[t]hat the security guards were not specifically instructed to record the picketers' identities is no defense, since they were acting as agents of the corporation and their actions were reasonably foreseeable." *Id.* at 438.

**Note-taking**

In *Crown Cork & Seal Company*, the Board held that an employer violates Section 8(a)(1) when its plant personnel manager takes notes while observing handbilling from a distance away. *Crown Cork & Seal Company,* 254 N.L.R.B. 1340 (1981). The Board reasoned that note-taking is analogous to photographing in that both inhibit employees from communicating with their union, thus restraining or coercing them in the exercise of their Section 7 rights. *Id.* Likewise, in *Cook Family Foods,* the Board found that the employer engaged in unlawful surveillance of its employees' union activities when the plant supervisor observed, from his car, employees handing out union literature and the supervisor took notes on undisclosed aspects of the union's activities. *Cook Family Foods,* 311 N.L.R.B. 1299, *enforcement denied* by *N.L.R.B. v. Cook Family Foods, Ltd.*, 47 F.3d 809 (6th Cir. 1995).

The Board has also held that an employer's note-taking of union meetings constitutes a Section 8(a)(1) violation. In *Chariot Marine Fabricators*, the plant manager observed a union meeting and took notes on a pad in a manner that the Board characterized as "not routine." *Chariot Marine Fabricators & Industrial Corpl,* 335 N.L.R.B. 339, 348 (2001). The Board held that because the company provided no valid justification for the note-taking and the conduct created the impression of coercion, it violated Section 8(a)(1) of the act. *Id.* See also, *Sacramento Cable Television*, *Inc. and CWA*, 1992 WL 1465912 (N.L.R.B. July 8, 1992) (supervisor's note-taking and videotaping combined to interfere with employees' Section 7 rights).

**Email**

In *Purple Communications*, the Board pointed to its existing framework when determining whether employer surveillance of employees' emails is unlawful. That is, if the surveillance is out of the ordinary, then it may be deemed unlawful. But, if it is part of the employer's otherwise usual surveillance practices, then it is lawful. *Purple Communications, Inc. and Communication Workers of America, AFL-CIO*, 361 N.L.R.B. No. 126 , *15 (2014). In *Bellagio, LLC,* an ALJ rejected allegations that the employer created unlawful impression of surveillance when it searched emails of a staff member who had engaged in protected, concerted activity. *Bellagio, LLC,* 2014 WL 1213387 (N.L.R.B. Div. of Judges) (March 20, 2014). The ALJ pointed to the fact that the search was performed for the purpose of finding an email that supported the employee's story in a disciplinary matter (and in fact

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protected her from discipline). *Id*. In *MONOC*, the NLRB General Counsel cited *Bridgestone Firestone South Carolina* when opining that an employer did not create an unlawful impression of surveillance when it informed the union's attorney of emails written by a union officer that had been forwarded to the employer. *MONOC*, 2010 WL 6162573 (N.L.R.B.G.C. 2010), citing *Bridgestone*, 350 NLRB 526, 526-27 (2007) (no unlawful impression of surveillance when employees voluntarily provided the information).

**Social media posts**

According to a General Counsel memorandum, an employer did not engage in unlawful surveillance when it "made employees aware that their fellow employees had provided the Facebook posting and emails to the Employer." *MONOC*, 2010 WL 6162573, supra. Given that the information was provided unsolicited, that the employees involved knew it was provided by another employee, and that the Facebook account in question was only open to those who were Facebook "friends" with that person, the situation would not lead the employees to reasonably believe that the employer was monitoring their Facebook communications. *Id.*

**Fifteen Recent Cases**

1. *Corliss Resources, Inc. and Teamsters Local 174*, 362 NLRB No. 14 (Feb 27, 2015)

In this case, the Board affirmed many of the ALJ's findings. Among other things, the ALJ found that the employer had unlawfully created the impression of surveillance. The employer did not file exceptions to that particular finding.

Relevant Facts: During a period where a first contract was being negotiated, shortly after the union won a re-run election, a company supervisor questioned an employee what he thought about a recent union meeting and whether another employee was a union committee member. The same supervisor also told another employee that the company owners were looking at him and wondering who he was. The supervisor also told him that he should keep his nose clean and not be seen talking to the union guys.

The ALJ found that these activities reasonably created the impression of surveillance and violated Section 8(a)(1) of the Act.

2. *Farm Fresh Co., and UFCW, Local 99*, 361 NLRB No. 83 (Oct 30, 2014)

The Board adopted the ALJ's decisions in the case. The employer had not excepted to the ALJ's surveillance findings, which are described below.

Relevant Facts: This case arose during an organizing campaign at a produce packaging company where the prospective union members handled and packaged the produce. Some of the employees had reached out to the union and had met with union representatives off-site. Thereafter, union representatives met with employees as they left work, within viewing distance of the work site. On the days that the union representatives stood outside the job site, the company supervisor stood in the parking lot to say good-bye to employees as they left from their shifts. This was not the supervisor's usual practice and it allowed him to watch the employees as the union representative tried to talk to them. Around the same time, a company supervisor confronted two employees about whether they signed union cards. During that confrontation, the supervisor told the employees that he already knew they had signed cards.

The ALJ found the supervisor's actions, watching employees leave work (not his usual practice) while the union representative waited to to talk to them to be unlawful surveillance in violation of Section 8(a)(1).

The ALJ found that the supervisor's statements regarding whether employees had signed union cards would lead a reasonable employee to believe that his or her union activities were being surveilled, thus creating an unlawful impression of surveillance in violation of Section 8(a)(1) of the Act.

3. *Durham School Services and Teamsters Local 570*, 361 NLRB No. 44 (Sept 5, 2014)

The Board affirmed the ALJ's finding that the employer violated the Act by engaging in actual surveillance and creating the impression of surveillance of union activities.

Relevant Facts: The employer is a transportation company that, in this situation, was providing school bus services. The employer's safety coordinator left her usual post, where she checked returning school buses, to respond to a complaint that employee cars were parked on a neighbor's grassy area near an entrance to the facility. The safety coordinator crossed the facility so that she could tell the employees to move their cars. The union had set up an information table outside that entrance and the safety coordinator lingered in the area for 10-15 minutes, at one point approaching the union table, and at other times taking notes on a clipboard. The union organizers took a photo of her. She then took a photo of them. No employees were present in the photo. This all occurred 3 days before the union filed its representation petition. Additionally, this took place in the context of a settlement with the employer involving posting a notice that stated "We will not make it appear to you that we are watching out for your activities on behalf of the International Brotherhood of Teamsters, Local 507, or any other union."

The ALJ found (and the Board agreed) that the above actions constituted actual unlawful surveillance because the safety coordinator's observations of the union table were out of the ordinary. Although her initial presence at the entrance was legitimate (to tell the employees to move their cars), her act of remaining in the area and approaching the table was not.

The ALJ also found (and the Board agreed) that the safety coordinator's actions unlawfully created the impression of surveillance. The Board noted that an employer may create such an impression by its actions and that statements to employees implying surveillance are not required to support such a finding.

4. *HTH Corp. and ILWU Local 142*, 361 NLRB No. 65 (Oct. 24, 2014)

This was a consolidation of several cases involving numerous allegations. It came on the heels of a 10(j) injunction compelling the employer to bargain and findings by the Board of unlawful activity by the employer, including unlawful termination of several employees for their union activity.

Relevant Facts: The employer in this case is a hotel. The union represents employees in a long list of titles, such as housekeepers, cooks, and mechanics, to name a few. The union was handing out leaflets to employees from a public sidewalk near

hotel garage entrances. The leaflets described the unlawful termination of a bargaining unit member who was active in the union. Hotel security guards observed and photographed the leafletting. The employer argued that the security guards were present because the leafletting created a traffic hazard. The ALJ held that the photos and testimony discredited this argument. The employer pointed to*, inter alia*, *Town & Country Supermarkets*, 340 NLRB 1410 (2001), arguing that an employer may photograph handbilling due to concern for traffic congestion and accidents. The ALJ noted that the employer must show that it had a reasonable basis to anticipate misconduct by the employees. Here, the employer failed to make such a showing. Therefore, the surveillance was illegal.

The ALJ found that the employer's actions constituted unlawful surveillance in violation of Section 8(a)(1) of the Act.

5. *Modern Management Services and UNITE! HERE Local 5,* 361 NLRB No. 24 (Aug. 18, 2014)

A Board majority of Chairman Pearce and Member Hirozawa agreed with the ALJ's finding of unlawful surveillance and creating an impression of surveillance. Member Johnson dissented on that particular finding.

Relevant Facts: The employer is a hotel. The bargaining unit members involved in this dispute were members of the housekeeping staff. The union and employer were engaged in contract negotiations at the hotel. The union representatives invited employees to attend and chairs were placed in the negotiating room for observers. The housekeeping staff manager, in the presence of a bargaining unit member, instructed a supervisor to attend the negotiations and take notes of what went on and who attended. The supervisor complied.

The ALJ found that the housekeeping manager's actions created the impression of surveillance because a bargaining unit member witnessed her instruction to the supervisor to engage in the surveillance. The ALJ also found that the supervisor's observations and note taking at the bargaining session constituted unlawful surveillance. The Board majority agreed, but Member Johnson dissented on this issue, pointing out that the meeting was open to employees and that the supervisor had a legitimate reason to take the notes of attendance given that on-duty employees were supposed to be working. The majority pointed to *Heartland of Lansing Nursing Home*, 307 NLRB 152, 159 (1992) for the proposition that surveillance in public place can be illegal if it's of a suspicious nature and not fortuitous. (There was also an issue on whether the surveillance impression allegation was properly included in the complaint, but that was procedural.)

6. *Intertape Polymer Corp. and USW*, 360 NLRB No. 114 (May 23, 2014)

The Board, by majority, upheld the ALJ's finding that the employer engaged in unlawful surveillance (among other things). Member Miscimarra dissented in part.

Relevant Facts: The union filed a petition to represent the employer's plant production and maintenance employees. At election, the union lost and filed objections, including allegations of unlawful surveillance. The surveillance at issue occurred when the employer's agents distributed campaign literature at the plant gate near where union representatives distributed their literature. The employer did not normally communicate with its employees in this manner.

The ALJ found this activity to be unlawful surveillance because it was only a few days before the election, the activity offered the management officials the opportunity to observe who took the union literature, and it was out of the ordinary. The Board majority agreed. Member Miscimarra disagreed, pointing out that the supervisors arrived at the gate before the union representatives and that there was no evidence that they knew that the union was also going to leaflet on those days. Therefore, he stated, he would find that the employer's actions were incidental to its otherwise lawful activity of distributing campaign literature on its own premises.

7. *Pressroom Cleaners and SEIU, Local 32BJ,* 361 NLRB No. 57 (September 30, 2014)

In this case, the Board affirmed the ALJ's rulings, findings, and conclusions and decided to adopt the ALJ's recommended order. Among other things, the ALJ found that the employer neither engaged in unlawful surveillance of the employees nor created an impression of surveillance of the employees. No exception was filed over this particular finding.

Relevant Facts: During the first week of the union's organizational campaign at a facility, a company supervisor observed through a glass window several of the company's employees taking union cards from a union representative. The supervisor told the employees that if they continued talking to the union representative, they would get fired. The supervisor also informed the employees that the company fired previous employees because they were unionized.

Although the ALJ found that the company supervisor's statements violated Section 8(a)(1) of the Act, the ALJ held that the supervisor's observation of the employees' activities was not unlawful surveillance because the activities were conducted in the open. The ALJ further held that the supervisor's comments that the employees should not talk to the union did not create an impression of surveillance of the employees because it was clear that the information came from public union activity.

8. *Portola Packaging and UFCW, Local No. 99*, 361 NLRB (December 16, 2014)

In this case, the Board agreed with most of the ALJ's rulings, findings, and conclusions, expect for two (unrelated). The Board affirmed the ALJ's finding that the company created an impression of surveillance of its employees. The ALJ found that a company's supervisor created an unlawful impression by engaging in an illegal interrogation.

Relevant Facts: Two employees were present in the company's lunchroom with a company supervisor. When the first employee approached the supervisor to help another employee who had too much work, the supervisor replied that he would not help that employee because he was a union member. The supervisor then proceeded to interrogate the employee. The interrogation consisted of the supervisor asking the employee: 1. if she knew whether another employee was in the union (to which she replied that she did not know), 2. whether she signed a union card (she initially replied that she did not and refused to answer the second time she was asked) , 3. whether she had been in a union before (to which she admitted that she had) and 4. what she thought of unions (to which she replied that she had no opinion).

The ALJ found that the supervisor unlawfully created an impression of surveillance among the employees because the supervisor made the statement that another employee was in a union as

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if it were fact. The ALJ also found that by asking the employee if she was "sure" that she did not sign a union card after she denied having done so, the supervisor acted as if he had knowledge of what she did. The ALJ concluded that the supervisor's statements created an impression of surveillance on the employees because they could have reasonably left both employees present in the lunchroom with the impression that the employer was aware of the employees' union activity.

9. *Purple Communications, Inc. and CWA* , 361 NLRB No. 126 (December 11, 2014)

The Board overruled *Register Guard*'s holding that employees have no statutory right to use their employer's e-mail system for Section 7 purposes. Applying *Republic Aviation*, the Board concluded that an employer that grants its employees access to its e-mail system must presumptively permit the employees to use the e-mail system for statutorily protected communications during nonworking time. The Board acknowledged, however, that an employer can rebut the presumption by demonstrating by showing that special circumstances make the restrictions necessary to maintain production and discipline.

The Board emphasized that employers who choose to impose working-time limitations can monitor their employees' e-mails so long as they do so for legitimate management reasons (i.e., ensuring productivity and preventing usage that serves as grounds for employer liability).

The Board noted that it can assess any surveillance allegations by the same standards it applies to alleged surveillance in bricks-and-mortar cases. The Board elaborated that employees who choose to openly engage in union activities at/near the employer's premises have no right to complain when management observes them. The Board further elaborated that management officials can observe public union activity without violating the Act so long as they do not do something out of the ordinary. Applying those principles to the issue of e-mail communications, the Board established that employers' monitoring of electronic communications on their e-mail systems are similarly lawful so long as they do not do something out of the ordinary (i.e., increasing monitoring during organizational campaigns or focusing on protected conduct or union activists).

Having established those principles, the Board rejected the Respondent's arguments under Section 8(c) and the First Amendment. The Respondent argued that its employer rights were infringed upon because e-mail messages sent within its e-mail systems (but not sent the employer) could be perceived as employer's speech. The Board found that e-mail users understand that an e-mail conveys the views of the sender—not the account provider.

10. *Metro-West and IBT Joint Council #37, Local #223,* 360 NLRB No. 124 (May 30, 2014)

The Board affirmed the ALJ's rulings, findings, and conclusions. The ALJ found that the employer engaged in unlawful surveillance of its employees.

Relevant Facts: The Teamsters were trying to organize a unit of Emergency Medical Technicians/ambulance drivers. During that period, some employees would approach others in the parking lot about joining the union. The union complained that various visits by management officials to the parking lot amounted to unlawful surveillance. At one point, three management officials made three trips to the company's parking lot to discourage an employee from remaining in the restricted area. The employee was attempting to talk to other workers about union organizing. Although nobody complained about the employee's presence and the employee was not engaged in disruptive behavior, one management official instructed the employee to leave the parking lot. Within the same day, another management official sent an e-mail to employees instructing them to inform a manager or supervisor if they see people lingering in and around the parking areas.

The ALJ did not find unlawful surveillance when management parking lot visits were part of normal supervisory activities, e.g., conducting inventory. But, the ALJ found that the three management officials' repeated visits to the parking lot exceeded mere passive observation and constituted unlawful surveillance. The ALJ further found that the management official's subsequent e-mail also constituted unlawful surveillance because the e-mail was in the context of a continuing pre-organizational effort and the e-mail's instruction conveyed a chilling effect.

11. *Overstreet v. Gunderson Rail Services*, 5 F. Supp.3d 1073 (D. Ariz. April 8, 2014), *rev'd and vacated,* 587 Fed.Appx. 379 (9th Cir. 2014)

The employer manufactures and repairs railroad cars throughout North America and Europe. The employees had engaged in several organizing drives with different unions. During one such drive, a supervisor asked an employee (who was involved in the campaign) if it was true that the union was coming around again. The employee responded that he did not know. The supervisor stated that there were rumors to that effect. Not long afterward, the plant suffered mass layoffs and eventually closed. The Regional Director brought a 10(j) injunction suit, seeking, among other things, reopening of the plant. Among the allegations were unlawful surveillance and creating the impression of surveillance. The court pointed to the supervisor's questioning of the employee regarding whether the union was coming around again to find a likelihood of success on proving unlawful impression of surveillance. The court noted that the employee didn't respond truthfully, indicating that he was feeling coerced. Also, the employee had been previously disciplined for soliciting union support during work time. The Regional Director also alleged actual unlawful surveillance based on supervisors' observation of handbilling. The court did not agree that there was a likelihood of success on that issue because the record indicated that the handlbilling was causing a safety hazard and traffic problems. Ultimately, the District Court granted the injunction, but the Ninth Circuit vacated, finding that the lower court's order compelling the employer to re-open the plant was an abuse of discretion based on a balance of equities.

12. *Garcia v. High Flying Foods,* 2015 WL 773054 (S.D. Cal. February 12, 2015)

The United States District Court for the Southern District of California denied the Petitioner's petition for a Section 10(j) temporary injunction with respect to his allegation of unlawful surveillance.

Relevant Facts: The Petitioner argued that the Respondent improperly conducted surveillance of the union's activities when the Respondent's supervisor photographed a petition containing

the signatures of workers that was circulated by an employee. The employee testified that he brought the petition to work one day so that other employees could sign it; the petition was in a folder in his backpack. He allowed other coworkers to read the petition by his backpack. The employee also testified that, at one point, he noticed that his petition was on the trash can near his backpack. He then allegedly saw the supervisor open the folder on the trash can and take a picture of the petition with her cell phone. After the supervisor left, the employee put the folder back in his backpack.

The Respondent argued that no unlawful surveillance occurred. The Respondent's supervisor testified that the elevator room, where the employee's backpack was located, was an access point to her office. She also testified that she was constantly going into the elevator room to pick things up and move trash cans. She stated that when she saw the employee's petition on top of the trash can, she opened the folder to determine whether it was trash, glanced at the petition and saw a few signatures, returned the petition to the trash can, and left the elevator room. The supervisor denied taking pictures of the petition with her cell phone.

The Court determined that the Petitioner could not likely succeed on the surveillance issue because the facts were directly disputed and came down to a credibility issue.

13. *McKinney v. Ozburn-Hessey Logistics, LLC*, 2015 WL 480675 (W.D. Tenn. January 29, 2015)

The United States District Court for the Western District of Tennessee granted the Petitioner's petition for Section 10(j) temporary injunction for a host of unfair labor practices, including unlawful surveillance. Petitioner argued that Respondent's supervisor engaged in unlawful surveillance of employees on multiple occasions.

Relevant Facts: On the first occasion, on the same day as the ballot count for the second election favored union certification, two employees arrived at the Respondent's facility to inform other employees of the election results. The Petitioner testified that both employees passed out union information near the employee entrance and later in the parking lot without ever entering the facility. The Petitioner also testified that two management officials directed both employees to leave the parking lot. The Petitioner further testified that a third management official observed from his car one employee passing out union cards and speaking with other employees about membership. Despite contradicted testimony, the Court determined sufficient factual evidence proved that the Respondent engaged in unlawful surveillance.

In the second instance, a supervisor reportedly observed and took pictures on his cellular phone of employees signing union cards. On the same date, an employee stated that Respondent's senior vice president observed him signing a union card he obtained in the parking lot. The following day, the same employee testified that when he left a meeting to move his car in another parking spot, Respondent's director of operations observed him leaving the building and moving his car. The Court found that Petitioner offered sufficient evidence to establish unlawful surveillance by the Respondent.

Finally, an employee claimed that two supervisors observed her signing and distributing union cards with two other employees. The Court determined that sufficient evidence existed to show that Respondent engaged in unlawful surveillance of employees.

14. *Garcia v. Green Fleet Systems,* 2014 WL 5343814 (C.D. Calif. October 10, 2014)

The United States District Court for the Central District of California granted the Petitioner a Section 10(j) injunction with respect to her claim that Respondent created an impression of surveillance.

Relevant Facts: Petitioner argued that Respondent's general manager once took a photograph of employees leafleting outside of Respondent's facility. Petitioner stated that Respondent's labor consultant subsequently told employees that he possessed a list of union supporters. The Petitioner also argued that Respondent's mere act of taking the photograph caused intimidation and fear among employees. Respondent argued that taking a photograph does not violate the Act. Moreover, the Respondent argued that its reason for taking the photograph was to document a union agent that trespassed on Respondent's property.

Although the Court acknowledged that Respondent's argument was meritorious, it found that Petitioner met her burden for a Section 10(j) injunction. The Court reasoned that the Petitioner provided an arguable legal theory that Respondent's actions were not due to the union agent's trespass and that the photograph was taken to document the employees who supported union efforts.

15. *Rubin v. Vista Del Sol Health Services, Inc.,* 2015 WL 294101 (C.D. Calif. January 21, 2015)

The United States District Court for the Central District of California granted Petitioner's Section 10(j) motion for preliminary injunction for various unfair labor practices by Respondent, including creating an impression of surveillance.

Relevant Facts: Petitioner argued that a management official questioned an employee prior to the presentation of a union petition. The employee testified that the official called her into her office and asked her if the union sought her membership. The official then stated that she knew who were union members and that union cards were being circulated. Respondent argued that the official was presented with the union petition half an hour after the conversation in her office took place and that she received phone calls from employees before the conversation regarding the union.

The Court granted the injunction because it found some evidence that Respondent created an impression of surveillance through the official's comments. Specifically, the Court found that the official's comments constituted evidence revealing that she knew union organizing was taking place and that authorization cards were being circulated before she received the petition. Moreover, the Court noted that the official did not reveal the source of her information. The Court deemed Respondent's argument unpersuasive because the official's comments objectively conveyed to the employee that the official obtained that information through surveillance.

**—END NOTE—**

* Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "Act") prohibits employers from "interfering with, restrain[ing], or coercing employees in the exercise of [Section 7] rights." 29 U.S.C. § 158(a)(1).

Section 7 of the NLRA guarantees the right to self-organization and provides, in pertinent part, that employees shall have the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of mutual aid or protection." 29 U.S.C. § 157. ■

# MERC EXPANDS POLICY TO ALLOW EMAIL FILING

**John G. Adam**
***Legghio & Israel, P.C.***

MERC recently expanded its policy on email and fax filing. This policy is not always paperless — it can sometimes mean paper plus e-filing — but it is an improvement based on my recent experience.

You should review the July 21, 2015 policy, but I will give you some key points on the e-filing component. (See www.michigan.gov/merc under MERC Policies.) I do not discuss fax filing as I have not faxed a document since around 2001!

1. **Email before 5 p.m.** Documents e-filed (or faxed) and received after 5:00 p.m. shall be considered received on the next business day.

2. **Don't forget to send by regular mail (if required).** Certain documents — like briefs, exceptions, charges, and petitions --- must also be mailed or delivered to the appropriate MERC office within five days of e-filing. For example, in addition to e-filing a brief in support of exceptions, you must also mail (or deliver) an original and four copies to MERC.

3. **Size matters.** You can only e-file documents that do not exceed 10MB or 45 single-sided pages, whichever is larger. This is much better than the prior policy which limited the fax filing of briefs to a total of 10 pages.

4. **E-addresses.** Unlike federal courts or the NLRB web sites — where e-filing requires you to sign in and file — MERC makes it easy. You just email the document (in pdf format) to one of five email addresses (with email copies to the other parties), depending on the subject matter:

   *ULPs*: merc-ulps@michigan.gov

   *elections*: merc-elections@michigan.gov

   *mediation*: merc-mediation@michigan.gov

   *Act 312 and fact finding*: mercpanel@michigan.gov

   *grievance arbitration*: merc-grievarb@michigan.gov

5. **Subject Line**. Make sure you include the MERC case number and the names of the parties. If you are filing a new petition or charge, indicate "New Case" in place of the MERC case number. ■

# THE KEYS TO SUCCESS IN COURT-ORDERED MEDIATION

**Paul F. Monicatti**
***Attorney/Mediator/Arbitrator***

Given that virtually all Michigan civil cases end up in mediation, and less than 2% of all filed federal and state cases ever reach trial, mediation advocacy is gradually replacing trial advocacy as *the* key skill in the litigator's tool box. Consequently, listed below are best practices for advocates in court-annexed mediations, although most will have broader application to all mediations.

**Trust, credibility, and relationship.** Since the court-annexed mediation trajectory commences once litigation is filed, begin building momentum toward mediation success by honoring your commitments, showing respect for the other side, and cooperating in scheduling and reasonable extensions of discovery dates. This positive attitude and working relationship likely will carry over into the eventual mediation process. Also, mutual trust between counsel if not also the clients is an essential ingredient of successful mediations. One way to build trust is by voluntarily sharing information openly with the other side whereas withholding relevant information erodes trust and creates suspicion. Another way is to connect with each other through shared life experiences, looking for similarities not differences.

**Preparation for court scheduling conferences.** Be prepared for court scheduling conferences in order to discuss the suitability and timing of all appropriate ADR methods, including mediation. Consider submission of a written ADR Plan outline, especially in business court cases. Also consider in more protracted or complex cases whether to suggest expanding by stipulation the traditional role of the mediator to include additional duties such as discovery disputes and case management, and in appropriate cases, selecting a mediator with specialized or technical expertise.

**Mediator selection**. Do everything possible to reach agreement with all counsel in selecting a mutually acceptable mediator who is well-known, reputable, and has a proven track record. Otherwise, in the absence of the parties' agreement, courts generally will appoint a mediator (by random rotation in state courts) from a list of court-approved mediators, without an opportunity to consider the particular needs, attitudes and personalities of the parties as well as the individual circumstances of the case. Competent advocacy requires litigators to be proactive in mediator selection and not resort to a default court selection unless they truly are unable to agree on a suitable mediator.

**Scheduling considerations**. Work closely with the mediator to schedule mediation at the most opportune time, not only within the deadlines set (often automatically) by the court but also with reference to other litigation milestones:

- After allowing sufficient time within which to obtain the essential facts/information/discovery required for productive negotiations and informed decision making (if necessary, ask the court to compel any discovery needed for mediation)

- Before incurring the significant transactional expense of experts, discovery completion, and extensive motion practice indispensible for trial preparation but not for negotiation; if the case is unusually complex or technical as in some commercial, medical malpractice, product liability, intellectual property or antitrust cases, extensive formal discovery and expert evidence may be unavoidable
- Before non-binding court-ordered case evaluation that usually sets a ceiling, floor, or otherwise limits future negotiations depending upon party responses to the award
- Before significant evidentiary or dispositive motions are decided by the court because doubt, risk, and uncertainty usually motivate parties to negotiate, unless settlement prospects are wholly dependent on prior resolution of controlling legal issues even though negotiation leverage will be lost
- Before ongoing business or personal relationships are irreparably further damaged by the adversarial, costly, time consuming, and disruptive nature of litigation

**Compliance with rules, orders, written agreements**. Pay close attention to, and fully comply with, all provisions of judges' mediation/facilitation orders as well as all applicable federal, state, and local court rules. This would include terms regarding confidentiality, inadmissibility, good faith, and especially the presence at mediation of client decision makers with full settlement authority. In my experience the last point is by far *the* rule most commonly violated. Moreover, most active mediators utilize written mediation engagement agreements containing the above terms and others that may go beyond applicable court rules and case law.

**Involvement of all necessary participants including "Significant Others"**. It is essential, in order to maximize the effectiveness of the mediation process, to identify client representatives with binding decision making settlement authority, obtain their commitment to attend in person and participate, and accommodate their availability when scheduling. Also, consider availability by phone of any consultants or experts whom you might need to answer questions arising during the mediation. Other unnamed but critical interested parties, whom I broadly refer to as *significant others*, are those persons who could affect or be affected by the outcome of a mediation, such as the clients' spouses, family, trusted advisors, or corporate department heads. Ideally they should be present in person at the mediation and included in scheduling unless their influence is expected to be more disruptive and negative than beneficial and positive.

**Pre-mediation summaries**. It is standard practice to mutually exchange written pre-mediation summaries (which usually are required in court-annexed mediations) unless the dispute is simple or preparation cost is a factor. The summaries should set a nonadversarial, collaborative tone conducive to joint problem solving. While it is appropriate to zealously yet honestly advocate your client's best interests, avoid crossing the line into argumentative or confrontational territory. Since your target reading audience should be primarily the clients on both sides and secondarily the mediator and opposing counsel, your summary should be written in plain language easily understood by non-lawyers. If there is confidential information you think the mediator should be made aware of before the mediation, then you can provide an *ex parte* supplemental summary or other correspondence to the mediator alone. Focus on the key disputed issues impeding a resolution. And, keep it as simple and brief as possible, no more than 10 pages not including attachments (highlighted where pertinent) except in unusual or complicated situations.

**Preparation for the hearing**. Since mediation is about the clients not the attorneys nor the mediator, client preparation is paramount. Prepare your clients and yourself by meeting with your clients before the day of mediation to realistically consider the important issues in the case from the perspective of *all parties.* Coax you clients to candidly talk to the mediator during private caucus about their goals, concerns, and interests. The main points to cover would include:

- How to showcase your client for most favorable impact on the other side
- Anticipated questions by the mediator and the other side
- Overall negotiation strategy and tactics
- Assessment of strengths and weaknesses
- Risk, uncertainly, and consequences
- Further information needed in order to negotiate
- Information to strategically disclose or withhold
- The difference between legal positions and underlying interests, needs, and concerns, *especially those shared in common*
- Objective and independent standards on value
- Client negotiation priorities
  - — First priority, essential for clients (non-negotiable)
  - — Second priority, important for clients (negotiable but preferred)
  - — Third priority, desirable for clients (adds value)
- Variety of options that might settle the case, including creative non-monetary solutions
- Principled opening offers that encourage not discourage serious negotiation as well as your concession strategy in response to various possible subsequent moves by the other side
- A flexible higher negotiation target range and a flexible lower negotiation discomfort range, avoiding rigid bottom lines
- The client's "best alternative to negotiated agreement" (BATNA) and "worst alternative to negotiated agreement" (WATNA); for negotiation purposes, parties should accept offers better than their perceived BATNA and reject offers worse than their perceived WATNA

**Effective advocacy.** Except on those rare occasions when counsel or the parties can't stand being in the same room with each other, you ought to welcome the opportunity to use the gift of an opening joint session to appeal directly to the decision makers on the other side and to vent emotions constructively. At the root of many disputes are misinformation, misunderstanding, and miscommunication. Joint sessions usually help eliminate a lot of the problem. Even if it is your style to be a zealous adversary during litigation proceedings, it's OK to wear a more mellow, different hat when an advocate during mediation, unless that conflicts with your overall strategy.

From the objective perspective of an experienced mediator, here's what impresses me when I see it during opening joint sessions:

*(Continued on page 16)*

# THE KEYS TO SUCCESS IN COURT-ORDERED MEDIATION

*(Continued from page 15)*

- Conversation not confrontation
- Communication not interrogation
- Interactive dialog not monolog
- Constructive discussion not destructive argument
- Active listening more than talking
- An open mind receptive to different perspectives
- A good story that is credible, persuasive, and powerful with a compelling and memorable theme
- Careful use of words, avoiding "hot button" phraseology and polarizing comments
- Client participation
- Calm and positive demeanor
- Search for shared interests and common ground
- Attention to unmet needs and underlying interests behind positions
- Flexibility as new information is learned
- Attack of the problem not each other
- Focus on problem-solving for the future more than problem-blaming for the past

**Using mediators.** Don't be shy about using mediators. They are there to be used and I assure you they want to be used. Even though they cannot favor either side, they want to help both sides and advance the process. Among the roles mediators serve are the following:

- *Pressure valve* to defuse tension, excessive emotion, polarizing comments
- *Traffic cop* to enforce the rules and keep discussions on track
- *Sounding board* for screening ideas, arguments, offers
- *Confidant* for discussing problems including client control issues
- *Negotiation coach* for advice
- *Messenger* for delivery of offers and conveying sensitive, inflammatory or damaging news
- *Resource* for creative ideas and options
- *Reality tester* for managing client expectations
- *Devil's advocate* for asking tough questions and raising tough issues
- *Spin doctor* to filter and constructively reframe opposing points or offers
- *Buffer* for venting emotions and frustration
- *Cheerleader* to maintain a positive, optimistic atmosphere

**Overcoming resistance to involuntary court-ordered mediation.** If empowerment and self-determination, together with confidentiality and inadmissibility, are the cornerstones of mediation, then involuntary mediation seems theoretically to be an oxymoron and doomed to failure. However, that is not always true in practice because many of those cases do settle. Even if the parties initially are resistant to the thought of settling, involuntary mediation still provides many other benefits such as:

- Offers an opportunity to listen, learn, evaluate, persuade
- Identifies uncontested facts and evidence suitable for stipulation and other simplification of trial
- Narrows the key issues in a case, streamlining further discovery and trial preparation
- Reveals impediments to settlement for later when the parties *are* ready to talk, and which could be removed by subsequent pretrial motion practice such as *in limine* motions on admissibility of disputed evidence and dispositive motions to eliminate claims or defenses
- Explores other possible resolution methods besides court-ordered mediation including non-binding neutral evaluation, binding arbitration, use of mutually agreeable neutral experts to opine on critical disputed issues where the parties' own experts conflict, and summary jury trial among others
- If nothing else, it forces the parties to talk and opens the lines of communication possibly leading to cooperative discovery and, who knows, eventual settlement

**Term sheet**. Outline an ideal bullet point term sheet. Better yet, prepare a draft settlement agreement containing your standard boilerplate deal terms with blanks for later completion at mediation or modification in accordance with a final agreement. As progress is being made during mediation, consider presenting the draft to the other side earlier rather than later in order to focus discussion on key items.

**Making the most of involuntary court-ordered mediation.** Be prepared, proactive, enthusiastic, and committed to the process instead of mere passive attendance at mediation with little or no strategy or preparation, acting like mediation is nothing more than another necessary stop on the litigation train. That is a disservice to your client, the court, and to the other side. If the court's mediation deadline is premature given the particular circumstances of the case, make a timely motion asking the court to extend the deadline for good cause shown instead of participating half-heartedly in an unripe process. If you have serious doubts about the other side's commitment to the process, set in advance reasonable time or cost limits subject to mutual adjustment during the mediation if the parties are making more progress than expected. Keep in mind that virtually all court-annexed mediations contemplate some sort of status reporting by mediators, and most judges during subsequent court conferences will ask what happened at mediations in which the case didn't settle, so it is critical to use your best efforts and participate in good faith in order to avoid possibly alienating the judge who will be trying your case if it doesn't settle. ■

# DEFENDING WORKPLACE DEFAMATION CLAIMS

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

Labor and employment lawyers are sometimes called on to defend against defamation claims. Libel and slander counts occasionally appear toward the end of omnibus complaints alleging federal and state statutory violations, retaliation, wrongful discharge, collective bargaining agreement breaches, breaches of the union fair representation duty, and civil wrongs—tortious this and intentional that.

State-law claims involving unionized workplaces often are preempted and barred by federal labor law. See, *e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985) (when "resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract," that claim must be treated as a claim under Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185).[1] Workplace defamation claims, too, may be preempted and limited by federal law, as is discussed next.

## I. PREEMPTIVE FEDERAL WORKPLACE DEFAMATION LAW

Defamation claims, generally, are governed by 50 sets of state tort laws which—pun intended—are all over the map. Some states' defamation laws serve policies that seemed pretty important to early English common law but have little to recommend them today. The saving grace for many charged with workplace defamation—and their defense lawyers—is that preemptive federal law often sets standards stricter than state-law standards. *See, e.g., Letter Carriers v. Austin,* 418 U.S. 264 (1974) and *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966), applying *New York Times v. Sullivan*, 376 U.S. 254 (1964) standards to workplace defamation claims.[2]

*Letter Carriers* holds that federal law preempts state law when "the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated." 418 U.S. at 279. Some federal labor policies safeguarding speech are in the National Labor Relations Act, 29 U.S.C. §151, *et seq*., which protects concerted work-related activities, including union participation in "labor disputes."[3] The definition of "labor dispute under the NLRA is very broad and 'rarely have courts found concerted union activities to fall outside this broad definition.'" Indeed, where a "union acts for some *arguably* job-related reason and not out of pure social or political concerns, a 'labor dispute' exists." *Beverly Hills Foodland, Inc. v. UFCW Local 655*, 39 F.3d 191, 195 (8th Cir. 1994) (internal citations omitted, emphasis added).

Preemptive federal law imposes a rigorous burden, requiring proof, in some respects by "clear and convincing" evidence, that the challenged statement was false and caused actual harm and was made with "actual malice," *i.e*., "with knowledge that it was false or with reckless disregard of whether it was false or not." See *Letter Carriers*, 418 U.S. at 281, citing *New York Times*, 376 U.S. at 280, 285-286. These elevated federal standards require more than the unreasonableness, "ill will," imprudence, or failure to investigate which might be actionable if state-law governed. See, *e.g., Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667, n.7, 688, 692 (1989) (citations omitted): **(1)** "[F]ailure to investigate will not alone support a finding of actual malice"; rather, there must be "purposeful avoidance of the truth."; **(2)** "[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."; **(3)** "A 'reckless disregard' for the truth…requires more than a departure from reasonably prudent conduct."; **(4)** "the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense" and "actual malice' may not be inferred alone from "evidence of personal spite" or "intention to injure" or "bad motive"; **(5)** if statements report "a third party's allegations," "recklessness" requires proof that the speaker "actually had a 'high degree of awareness of…probable falsity'" and "obvious reasons to doubt the veracity of the informant or the accuracy of his reports."

**"He's got a bad reputation!"**

The elevated federal standards do not foreclose all workplace defamation claims, so defense attorneys may be called on to resist defamation claims by developing and discovering reputation and character evidence to support Rule 56 motions and, sometimes, to present at trial. Considerations for doing so are discussed next.

## II. PRESENTING BAD-CHARACTER EVIDENCE

In most litigation, reputation, character, and past misconduct evidence is limited or barred. See FRE 404. In defamation cases, however, such evidence often is central, and key to refuting the elements of defamation and to defending against damages claims. The essence of a defamation claim is that defendant's false and defamatory statements, "published" to others, wronged plaintiff, injuring plaintiff's reputation, resulting in damages such as job loss and emotional injury. Accordingly, the defense is interested in presenting witnesses to show that the negative statements about plaintiff were true and, true or not, did not cause the claimed damages, in particular because plaintiff has bad character and already had a bad reputation and did and does bad things.

### A. Reputation, Character, and Conduct

In defamation cases, the truth and plaintiff's reputation, character, and claimed damages are at issue and may be addressed by defense evidence of plaintiff's bad reputation, negative opinions about plaintiff's reputation and character, and plaintiff's specific acts of misconduct relating to character. Sometimes bad things are "published" about bad people.

See FRE 405(a) (reputation and opinion); FRE 405(b) (specific conduct); FRE 803(21) (reputation concerning character not excluded as hearsay); *World Wide Assoc. of Specialty Programs v. Pure, Inc.*, 450 F3d. 1132, 1138-1139 (10th Cir. 2006) (citations omitted) (the FRE "permit the introduction of opinion evidence, reputation evidence, and specific instances of conduct where the character of a person is an element of the claim or defense or is otherwise at issue"; "it is well-established in other jurisdictions that the character of the plaintiff in a defamation case is at issue"; "specific instances of conduct" are admissible as relevant to the "quantum of damages" and "actual malice"); and *Schafer v. Time, Inc.,* 142 F.3d 1361, 1370-1372 (11th Cir. 1998) (in defamation actions, "the plaintiff's reputation and character scarcely can be avoided"; "given the plain language of Rule 405(b)," plaintiff's "arguments that specific acts remain inadmissible to prove char-

*(Continued on page 18)*

# DEFENDING WORKPLACE DEFAMATION CLAIMS

*(Continued from page 17)*

acter in an action for libel are unpersuasive").

In all cases, evidence of a witness' bad character for untruthfulness, in the form of reputation or personal opinion, may be presented by the opposing party, after the witness has testified, to diminish that witness' credibility and the weight of that witness' testimony. FRE 608(a).

In particular, defendants in defamation cases will want to present evidence of plaintiff's negative reputation and misconduct relating to the character traits at issue to address the substance of the allegedly defamatory statements and to counter damages claims. For example, if plaintiff alleges that defendant's defamatory statements about plaintiff engaging in workplace bullying caused plaintiff to be terminated from employment, resulting in claimed current and future economic damages, the defense will want to show: **(1)** that the statements were well-grounded, either accurate statements of fact or appropriate statements of opinion; and **(2)** that plaintiff already had a bad reputation for abusing co-workers, and so there is no causal nexus between the statements and the claimed damages.

**B. Evidence of Plaintiff's "Bad" Character**

An antidote for claims that defendant's statements tortiously besmirched plaintiff's pristine reputation may be in the testimony of knowledgeable defense witnesses showing that the statements were true, and that, in any event, plaintiff's reputation was already sullied.

**1. Foundation**

First, the evidence must come from qualified witnesses, *i.e.*, those with foundations for their reputation, character, and conduct testimony.

Regarding bad reputation, the witness must have heard plaintiff's reputation discussed *by others* in the "community." Regarding negative opinion, the witness must have had contact with plaintiff or have other reliable information which provides a basis for forming the witness' opinion. Regarding specific acts of misconduct, the witness must have first-hand knowledge of the acts. In sum, these three categories cover the spectrum:

1. What the witness heard, second-hand, from others (so hearsay is not only permissible, it is *the* foundation). See FRE 405(a) and 803(21).
2. What the witness opines, based on the witness' perception. See FRE 405(a) and 701.
3. What the witness observed, first-hand. What the witness saw or heard—or touched, tasted, or smelled, to finish the five senses. See FRE 405(b) and 602.

Second, the evidence must be relevant. Relevance depends on the court and the context. See FRE 401-402.

The evidence should focus on the character traits at issue, *e.g*, dishonesty, bullying, untruthfulness, etc. The evidence should relate to the pertinent time period—*i.e.*, back a reasonable number of years, to date. The evidence should relate to the relevant "community," *e.g*., the workplace, as well as the broader "community" where plaintiff and those who know him live, conduct business, and socialize.

In short, each defense witness presented to address plaintiff's "bad" character must be familiar either with plaintiff's reputation, *or* with plaintiff, *or both*. Each witness' testimony should have a solid foundation, be relevant to the character traits at issue, and be presented in persuasive detail.

**2. How to present the testimony**

Here is a typology of questions, to be tailored to each witness, with additional questions developed to elicit pertinent detail. As with most testimony, detail, clarity, and witness confidence enhance credibility and persuasiveness.

Q. Please state your full name for the jury.
Q. Where do you live, with whom, and for how long?
Q. Background, education?
Q. Where do you work? What do you do there? How long have you worked there?
Q. You are appearing today in compliance with the subpoena given to you by defendants? Your lost work time and expenses connected to your court appearance are being covered by the defendants?
Q. Do you know [or know of] plaintiff? Explain. How long have you known [or known of] him? Under what circumstances?
Q. During the period you've known [or known of] plaintiff, have you known other people in the community where he works [or lives or does business or socializes] who also know [or know of] him? Where? Who? What con-

# FROM THE EDITOR


## HOORAY FOR HOLLYWOOD!

Longtime *Lawnotes* columnist Barry Goldman is expanding into television. Goldman teamed up with award-winning documentary producer Carl Byker and an advisory group of leading researchers (including Nobel Prize winner Daniel Kahneman). The team applied to the National Science Foundation for a grant to produce a multi-part TV special on decision-making and persuasion. As regular *Lawnotes* readers know, Goldman wrote a book on the psychology of negotiation called *The Science of Settlement* (available at http://tinyurl.com/ol88khv). Goldman's book was favorably reviewed in *Lawnotes* by this editor (and collaborator with Goldman on another book). The review is reprinted at http://tinyurl.com/q3g7ufx.

NSF awarded the team, and their partners at Oregon Public Broadcasting, a $2.6 million grant to produce four shows. That's $2.6 million! Goldman must know something about persuasion.

The working title of the series is *Hacking Your Mind*. Goldman and Byker will spend 22 months in production. If all goes according to plan, the series will air nationally on PBS in early 2018.

Once an obscure arbitrator, mediator, Wayne State teacher, and book author, Goldman now is set to move from these humble beginnings on to stardom--all thanks to *Lawnotes*.

Will success spoil Barry Goldman? Will the rolling credits give *Lawnotes* its due? Will I be picked up for the cast party in a chauffeur-driven limousine? As they say in the show biz, stay tuned.

**Stuart M. Israel**

nections do they have to plaintiff?

Q. Have you been present when people who know [or know of] plaintiff discussed plaintiff's reputation in the workplace [and the community]? What circumstances (who, when, where, how many times)? What have you heard?

Q. Aside from what you heard about plaintiff's reputation from others, do you have a personal opinion about plaintiff? What is it based on? What is your opinion?

Q. Do you have first-hand knowledge of plaintiff's behavior [regarding honesty, bullying, truthfulness, etc.]? Explain.

The same sort of information can be elicited through deposition questions or presented in declarations supporting Rule 56 motions.

Ideally, defense witnesses should not have vulnerabilities that might be exploited on cross-examination, like a confrontational history with plaintiff that suggests a motive for providing less-than-reliable testimony. Seeming vulnerabilities like personal animosity, however, may be used to the advantage of the defense—*e.g.*, if a witness is hostile to plaintiff because plaintiff did something bad to, or in the presence of, or known to, the witness. Potential witness vulnerabilities, put in appropriate context, can be turned into strengths, or at least neutralized by suitable inoculation on direct examination.

## III. CROSS-EXAMINING GOOD-CHARACTER WITNESSES

Here are some lines of cross-examination, to be tailored and ordered to address the nature and circumstances of each witness presented to attest that plaintiff's "good" reputation was injured by the alleged defamation. Of course, there must be a good-faith basis for all these questions.

1. Questions to undermine the credibility and foundation of positive reputation and opinion testimony, asking whether the witness "is aware of," "knows about" (or, less desirable, has "heard about") specific acts of plaintiff's misconduct before the alleged defamation. See FRE 405(a).
2. Questions to undermine the credibility and foundation of positive reputation and opinion testimony, asking whether the witness "is aware of," or "knows about," (or "heard about"), specific acts of plaintiff's misconduct after the alleged defamation. Again, see FRE 405(a).
3. Questions undermining the basis for and credibility of positive reputation and opinion testimony, asking, regarding "good" reputation, who said what, when, where, and how many times plaintiff's "good" reputation was actually discussed and in what context. It is believable that "bad" reputation is frequently discussed, because people like gossip, backbiting, judging others, etc. It is less believable that people casually discuss others' positive traits.
4. Questions showing that the positive witness has some bias in favor of plaintiff, or prejudice against the defendant, or has an interest in the outcome of the case (like plaintiff's spouse).
5. Questions showing that the positive witness is not knowledgeable about the relevant community (the workplace, the broader community), or the relevant time period (before and after the alleged defamation), or the particular conduct and traits that are the subjects of the alleged defamation.
6. Questions that show the positive witness has no first-hand knowledge of pertinent events or context. See FRE 602.
7. Questions that make points favoring the defense case.
8. Questions that show the positive witness did not hear about the alleged defamatory statements before, or outside the context of, plaintiff's lawsuit.
9. Questions that show that the positive witness did not hear the alleged defamatory statements, and does not know exactly what the statements were, or whether the statements were true or false, or were opinion, or were invited by plaintiff.
10. Questions that show the witness had a positive opinion of plaintiff, and that plaintiff had a good reputation, before the alleged defamation and that nothing has changed since: *i.e.*, that the witness *still* has high regard for plaintiff and still hears that plaintiff has a positive reputation. Indeed, the witness agreed to testify for plaintiff because the witness has high regard for plaintiff, and wants to help plaintiff, right?
11. Questions that show that some other people—unlike the witness—find plaintiff to be dishonest, abusive, untrustworthy, etc. What negative things about plaintiff has the witness heard from others? Details.
12. Questions that show that after the alleged defamation plaintiff continued on the job, or got a new job, or otherwise was unaffected by the defamation.
13. Questions about the witness' knowledge of plaintiff's medical or emotional problems or difficult life circumstances before and after the negative consequences plaintiff attributes to the defamation, showing that the defamation had little or no impact on plaintiff's problems or medical and emotional conditions, etc. Bad things happen to bad people, but bad things also happen to good people for reasons having *nothing* to do with others' statements.

## IV. CONCLUSION

Like politics, workplace defamation cases "ain't beanbag." When defamation plaintiffs cast the first stone, they invite the defense's microscopic inquiry into their flawed reputations, stained character, and past misconduct. Sometimes it may be best for potential defamation plaintiffs to turn the other cheek, like Mark Twain:

> I don't mind what the opposition say of me so long as they don't tell the truth about me. But when they descend to telling the truth about me I consider that this is taking an unfair advantage.

**—END NOTES—**

1. See also *DeCoe v. General Motors Corp.,* 32 F.3d 212, 214-216, 218 (6th Cir. 1994), citing *Allis-Chalmers* and other authority ("[s]ince 1962, the Supreme Court has held that section 301 preempts state law rules that substantially implicate the meaning of collective bargaining agreement terms"; holding that "tortious interference with economic relations," "conspiracy," and "intentional infliction of emotional distress" claims arising out of alleged workplace sexual harassment require review of the "relationship" between a union "committeeman and his constituents, the employer, and the union" and CBA interpretation, and so are governed by federal law and preempted under Section 301); *Mattis v. Massman,* 355 F.3d 902, 904-907 (6th Cir. 2004) (Section 301 preempts "tortious interference with an advantageous economic relationship or expectation" and "intentional infliction of emotional distress" claims against plaintiff's former employer and former supervisor because the parties' "business relationship" was governed by a CBA and adjudication would require the court to "delve into the rights and responsibilities" under that CBA); *Maynard v. Revere Copper Products, Inc.,* 773 F.2d 733, 736 (6th Cir. 1985) (Michigan anti-disability-discrimination statute claims "preempted by the federally created right of a union member to fair representation"); and *In re Glass, Molders, Pottery, Plastics & Allied Workers Int'l v. Local 173,* 983 F.2d 725, 728-729 (6th Cir. 1993) (citations omitted) (an "action for breach of duty of fair representation that directly implicates the grievances provision of a collective bargaining agreement 'clearly falls within the ambit of section 301 preemption"; state-law tort claims "fall prey to §301 preemption" when they "fail to articulate theories clearly independent of collective bargaining agreement rights and obligations"; "purported state claims against the union are clearly related to" the DFR and "[t[hus, federal law clearly preempts them"). And see *Wells v. Chrysler Group LLC,* 559 Fed. Appx. 512, 513-514 (6th Cir. 2014) "a claim that the duty of fair representation was breached on account of discrimination and a claim of discrimination in failing to fairly represent the employee are essentially the

# DEFENDING WORKPLACE DEFAMATION CLAIMS

*(Continued from page 19)*

same"; the differences between plaintiff's race, sex, age, and retaliation claims under state and federal civil rights and disability statutes and a DFR breach claim are "naught," "form above substance," and reflect only "an inconsequential difference in name and emphasis"; the argument that a different standard applies because plaintiff's claims against the union were based on a civil rights statute, and not on the DFR, is "meritless"). Consider, too, if the circumstances warrant, NLRA preemption under *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959).

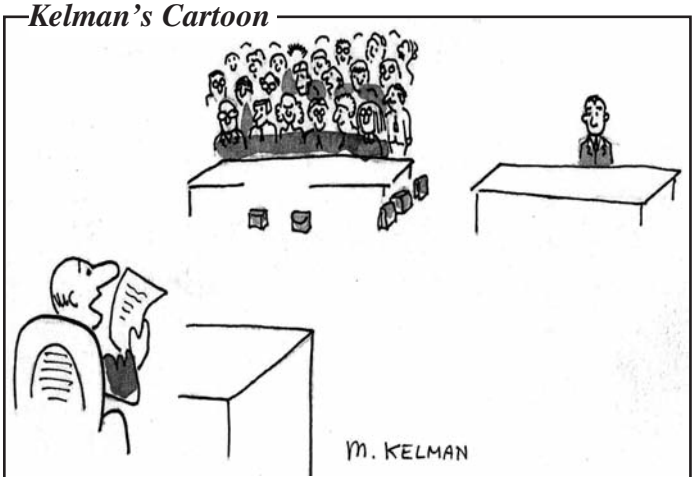
2. See also *Holbrook v. Harmon Automotive, Inc.,* 58 F.3d 222,225 (6th Cir. 1995) (in a state-law "defamation action" based "on an utterance that is related to a labor-management dispute" and is "made in the context of that dispute," "federal law supplants state law with regard to the degree of fault that a plaintiff must establish"; applying *Linn* and the *New York Times* "actual malice" standards). The application of preemptive federal law to workplace defamation claims is essential to enforce uniform federal labor law policy, as required by *Letter Carriers* and *Linn.* State law often is not up to this task. For example, the Minnesota Supreme Court recognizes that "the law of defamation is a complex mix of competing interests," not "viewed by legal scholars as either rational or clear in application." *Bolton v. Dept. of Human Services,* 540 N.W. 2d 523, 525 (Minn.1995). Quoting Professor W. Page Keaton, the Minnesota Supreme Court observes that much in defamation law "makes no sense," that the law contains "anomalies and absurdities," and that the law is the product of "haphazard development" which created a "set of arbitrary and illogical rules." *Id.* at 525-527 (citation ommitted).

3 The NLRA protects concerted activities in the workplace, including union participation in labor disputes. See 29 U.S.C. §157. A "labor dispute" is "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation" of employees "regardless of whether the disputants stand in proximate relation of employer and employee." 29 U.S.C. §152(9).

4 Free speech in the labor context is so essential that federal law "tolerates" union statements that are "inaccurate" and "gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *Letter Carriers,* 418 U.S. at 272, 294, citing *Linn,* 383 U.S. at 60-61, 65. The federal standards (1) ameliorate "the propensity of juries to award excessive damages for defamation" which poses "a threat to the stability of labor unions" and would "interfere with effective administration of national labor policy" and (2) foster the "uninhibited, robust, and wide-open debate" and "free discussion" protected by the NLRA. *Letter Carriers,* 418 U.S. at 272-273, 287 n.17; *Linn* 383 U.S. at 64-65.

5 There is plenty to know about defamation law not mentioned in this article. For overviews, see, *e.g.,* R.A. Smolla, *Law of Defamation* (2d ed. 2014) and D.A. Elder, *Defamation: A Lawyer's Guide* (2003). And, in particular, there is more to know about workplace defamation not mentioned in this article. For example, while defamation *per se* and presumed damages are recognized in some states, they are barred by preemptive federal labor law. See *Linn*, 383 U.S. at 65 (plaintiff must prove defamatory statements"caused him damage"); *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 15-16 (1990) (where federal standards apply, states may not "permit recovery of presumed or punitive damages on less than a showing of *New York Times* malice"); *Intercity Maint. Co. v. Local 254,* 241 F.3d 82, 89-90 (1st Cir. 2001) (citing *Linn,* federal law bars in labor cases any "common law presumption of damages in those [state[ jurisdictions where libel is actionable *per se*." ■

## *Kelman's Cartoon*




"I see this is a suit to relieve jail overcrowding. Who's appearing for the inmates?"

# FOR WHAT IT'S WORTH

**Barry Goldman**
***Arbitrator and Mediator***

Friends, we need to talk.

I've tried to tell you this before in this column. Anne Patton and George Roumell tried to tell you (in the Spring 2015 issue of *Lawnotes*). We tried to be gentle about it, but we're just not getting through. It's time for a more direct approach. You're big boys and girls, you can take it.

The Seven Tests of Just Cause don't really exist. They're made up.

I know you learned about them in law school, and you've seen them repeated countless times in post-hearing briefs and even in arbitration decisions. I know they make it easier to write closing arguments. But you are ready for the truth now. The Seven Tests of Just Cause don't really exist. They're just a story we tell baby lawyers.

Yes, we owe you an explanation. That's fair. Here it is.

Once upon a time many years ago there was a labor arbitrator named Carrol Daugherty. Mr. Daugherty was a referee in the railroad industry. He famously appended the Seven Tests to his opinion in *Enterprise Wire*, 46 LA 359 (1966). I'll quote here from an article by John E. (Jack) Dunsford, Past President of the National Academy of Arbitrators and Chester A. Myers Professor of Law, Saint Louis University, St. Louis, Missouri:

> As a referee Daugherty did not hear witnesses testify about the events surrounding the discipline. The grievant did not appear before him. Instead, he heard representatives of the parties argue over the meaning of facts uncovered earlier by the investigation of management and presented to a division of the Adjustment Board. The nature of his work consisted of reviewing, as an appellate court would, what others had done in imposing discipline.

Daugherty developed the Seven Tests as a result of that experience. Here's Dunsford and Myers again:

> Whatever their virtues in the railroad industry, the undiscriminating transfer of these tests to the private sector, where hearings before an arbitrator are de novo and an almost infinite variety of grievance arrangements are found, is inappropriate. Designed for an arbitration system different from the one in which they are now employed, the tests generate of vague confusion about the meaning of due process further compounded by the pretense that they simply reflect prevailing practice.

There it is. The Seven Tests were designed for an appellate proceeding. Labor arbitration as it is practiced outside of the railroad industry is a de novo proceeding. Applying the seven tests in an ordinary labor arbitration is, as Dunsford said, "peculiar and misbegotten."

As Patton and Roumell wrote:

> [T]he Seven Tests neglect the first question in the just cause analysis — the sufficiency of the evidence to prove the reason for the discipline/discharge. Thus, adhering to a strict application of the Seven Tests when writing a brief may result in omitting argument regarding the primary question.… Reciting each of the Seven Tests in a rote litany, as if each had potentially equal merit and application, distracts from the real issues and lessens the impact of the arguments on the real issues, resulting in a brief which appears empty of meaningful content.

And, as I wrote:

> If you represent unions, you probably remember that some law professor told you there are seven tests of just cause. You figure if you can make an argument that the employer violated all seven, then you've got a lock, right? Um, no.
>
> Of course you can make an argument that the employer violated all seven tests. You're a lawyer. You can make up an argument to explain anything! You've been doing it since you were four years old. That's why your family said you should go to law school.
>
> First of all, it's time to give the seven tests a rest. Second, in the real world it is very rare for an employer to violate all seven. The best course of action is to find the one or two things the employer really did do wrong and build your case on those.

You can't just go through the Seven Tests and call yourself an effective advocate. It is time to take off the training wheels. Sorry.

# SIXTH CIRCUIT UPDATE

**Scott R. Eldridge**
**Brian M. Schwartz**
***Miller, Canfield, Paddock and Stone, P.L.C.***

**Sixth Circuit Clarifies "Protected Activity" Standard Under Sarbanes-Oxley**

In *Rhinehimer v US Bancorp Investments*, Docket No. 13-6641 (May 28, 2015), the plaintiff, Michael Rhinehimer, a financial advisor on a disability leave of absence, sent an internal email protesting trades that his co-worker placed on behalf of an elderly client. After Rhinehimer learned of the first trade, he called his supervisor, who told him to stay out of it. Soon after, Rhinehimer learned of a second trade, which caused him to call his supervisor and email his supervisor principal. Three days later, Rhinehimer received a written warning based on the email (which had promoted a FINRA investigation). US Bancorp explained that it issued the warning because of unprofessional language in the email. It later placed Rhinehimer on a performance improvement plan and terminated him when he did not meet the stated goals. Rhinehimer filed a lawsuit alleging that he was retaliated against in violation of the Sarbanes-Oxley Act ("SOX"). The jury returned a verdict in his favor.

On appeal, the sole issue was whether the jury could find that Rhinehimer had engaged in protected activity under § 1514A of SOX. A prior unpublished opinion, *Riddle v First Tennessee Bank, National Association*, 497 F Appx 588, 595 (CA 6, 2012), held that to engage in protected activity, an employee's complaint must "must definitively and specifically relate to one of the six enumerated categories" of fraud by "approximat[ing] the basic elements" of a fraud claim. In *Rhinehimer*, however, the Sixth Circuit rejected this standard as inconsistent with § 1514A and the statutory scheme. Instead, the Court adopted the rule "that the employee's reasonable belief is a simple factual question requiring no subset of findings that the employee had a justifiable belief as to each of the legally-defined elements of the suspected fraud" – giving deference to a decision by the Department of Labor's Administrative Review Board.

Explaining the standard, the Court noted that it involved both a subjective and an objective component. "The subjective component is satisfied if the employee actually believed that the conduct complained of constituted a violation of relevant law. Objective reasonableness 'is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.'" Thus, rather than establishing a reasonable belief "as to each element of the violation," the reasonableness of the employee's belief "depend[s] on the totality of the circumstances known (or reasonably albeit mistakenly perceived) by the employee at the time of the complaint, analyzed in light of the employee's training and experience." Applying the standard to the case, the Court concluded there was sufficient evidence for the jury to conclude that Rhinhimer possessed an objectively reasonable belief that his co-worker's conduct constituted unsuitability fraud.

**No Class Certification for Childcare Providers Because of Internal Conflict Over Preferences of Whether to Join Union**

In *Schlaud v Snyder*, Docket No. 12-1105 (May 12, 2015), the Sixth Circuit affirmed denial of a proposed class of home childcare providers against their union alleging that their First Amendment rights had been violated because a collective bargaining agreement required them to pay union dues or agency fees. The named plaintiffs were providers who received subsidy payments from the State of Michigan. The collective bargaining agreement governing their employment required them to become members of the union, or to pay an agency fee from the subsidy payments. After Michigan started deducting agency fees from the subsidy payments, the providers filed suit.

In March 2011, while the suit was pending, Michigan stopped the subsidy deductions, terminated the collective bargaining agreement, and entered into a settlement agreement with the providers that prohibited Michigan from requiring them to financially support the union as a condition of employment. The union then tendered to the named plaintiffs the maximum amount of damages they could recover.

The United States District Court for the Western District of Michigan denied the plaintiffs' second attempt to certify a proposed class and subclass. The Sixth Circuit concluded that the providers did not demonstrate that the named plaintiffs would fairly and adequately protect the interests of the class, as required by Federal Rule of Civil Procedure 23(a)(4). It explained that there were conflicts between the named plaintiffs who opposed paying the agency fees, and many members of the proposed class, who favored paying fees to the union. The Court held that the proposed class improperly included class members whose "probable preferences" conflicted with the named plaintiffs.

**Job Responsibilities "Not Truly Relevant" to Determine Whether Fighting Co-Workers Were Similarly-Situated**

In *Wheat v Fifth Third Bank*, Docket No. 13-4199 (May 7, 2015), Plaintiff Curtis Wheat, an African American employee of Defendant Fifth-Third Bank who was terminated following an altercation with a Caucasian employee, filed suit alleging that he was terminated based on his race in violation of Title VII and state law. After a hallway confrontation, Wheat became exasperated during a meeting to discuss the incident, admittedly talking on top of and being rude to the employee relations specialist. At the end of the interview, Wheat was told to clock out, go home, and not report back to work until the investigation was completed. The Caucasian co-worker was interrogated and sent home for the rest of the day, but was told he could report to work on Monday.

Fifth-Third Bank later telephoned Wheat and informed him that he was terminated for violating the workplace violence policy. After he filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), Fifth-Third took a "second look" at the case, re-interviewing the Caucasian co-worker. Fifth-Third then fired the Caucasian co-worker, stating that he had lied during the first interview and that he too was an aggressor in the incident. The United States District Court for the Southern District of Ohio granted summary judgment to Fifth-Third Bank, concluding that Wheat could not show that he was similarly situated to his Caucasian co-worker or that the reason proffered for his discharge was a pretext for unlawful discrimination. Wheat appealed.

Stating that the *prima facie* case of discrimination was "not an onerous one," the Sixth Circuit concluded that Wheat created a genuine issue of material fact regarding whether he was similarly situated to his co-worker. The Court rejected the bank's asserted differences between the two employees' jobs, concluding that they performed "sufficiently similar job functions to be considered similarly situated." The Court further explained that the "identity of the job responsibilities" was "not truly relevant" (emphasis original) to the similarly-situated analysis. Instead, "the relevant comparison…should involve only the two men's roles and actions in the contretemps."

The Sixth Circuit also concluded that Wheat met his burden of establishing pretext, noting that Fifth-Third Bank's reported reliance on Wheat's statement that he could "take care of it [him]self" was ambiguous and could not support the bank's belief that Wheat would resort to violence if he were to return to work. The Court also considered significant that Wheat had denied making the statement. Finally, the Court noted that there was evidence that, while Wheat engaged in shouting, the Caucasian co-worker was the only one who did resort to physical violence and he was not terminated until three months later. Accordingly, the Sixth Circuit reversed and remanded the matter for further proceedings. ■

# MICHIGAN SUPREME COURT UPDATE

**Richard A. Hooker, *Varnum***

***UAW v Green*, ____ Mich ____, Dkt. No. 147700 (Slip Op 7/29/15), aff'g on other grds, Int'l Union v Green, 302 Mich App 246; 839 NW2d 1 (2013)**

The UAW, joined by others, had filed suit seeking a declaratory judgment that the portion of Michigan's "Right To Work" law, MCL 423.210(3), applying to public employees was an unconstitutional infringement on the powers of the Civil Service Commission. The Court of Appeals, in a 2-to-1 Decision, upheld the challenged statute's constitutionality on the ground the Civil Service Rule enabling mandatory agency fees in public collective bargaining agreements was subservient to the subsequent legislation. Plaintiffs then sought and were granted leave to appeal, continuing to argue the supremacy of Const 1963, Article 11, §5:

> The Commission shall…make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service.

The four Justice Supreme Court majority, in an Opinion authored by Justice Young, agreed with the Court of Appeals Majority, but on entirely different grounds. The most telling portion of the Court's Opinion lies in its "RESPONSE TO THE DISSENT," *Id*, Slip Op at 11.

The Court found that public sector collective bargaining bestowed an operational "benefit" on the Civil Service Commission in that such bargaining facilitated its mandate to "regulate all conditions of employment in the classified service." It then concluded that because mandatory union dues and agency fees authorized by Civil Service Rule 6-7.2 were funding sources for that bargaining, they were in fact funding sources for the Commission itself. Id, Slip Op 12-13. This, the Court opined, was essentially a "tax" on public employees beyond the constitutional authority of the Commission, since the Constitution's funding provisions were narrowly restricted and did not include any taxation or appropriation authority. Id, Slip Op at 7. In response to the Dissent's assertion the Civil Service Rule in question merely authorized agency fee provisions and did not require them, the Majority held the Commission lacked the power to authorize anything it could not itself do. Id, Slip Op at 13-14.

In an Opinion that, in this writer's view at least, wins the "War of Common Sense," the three Dissenting Justices advance the view that mandatory union dues and agency fees are neither a tax nor a funding source for the Commission. Instead, they are monies paid directly to the employees' exclusive representative for representational services that are mandatorily rendered to union members and non-members alike. Query: how many Michigan employers, if asked, would take the position that union dues paid by their employees are a "benefit" to those employers?

***Mich Coalition of State Employee Unions v State of Mich*, ____ Mich ____ (Slip Op 7/29/15), rev'g & rem'g, 302 Mich App 187 (2014)**

This case involved a constitutional challenge to 2011 PA 264, an amendment to the State Employees' Retirement Act (SERA), MCL 38.1 et seq, which potentially reduced the value of overtime compensation in the calculation of participants' future pension benefits and required participants to make an election between paying to remain in a defined benefit plan that was previously free or instead joining a 401(k)-style defined contribution plan. Both amendments were prospective only in their application.

Plaintiffs filed suit, claiming the legislation was an unconstitutional infringement on the powers granted the Civil Service Commission under Const 1963, Article 11, §5:

The Commission shall…fix rates of compensation for all classes of positions,...and regulate all conditions of employment in the classified service.

The Court of Claims agreed, finding the challenged enactment unconstitutional, and the Court of Appeals upheld this ruling. The State sought and was granted leave to appeal to the Supreme Court.

The Supreme Court Majority reversed, finding the term "rates of compensation," as used in the 1963 Constitution, was intended to refer only to wages and salaries, and not to fringe benefits such as pensions. As to whether pensions fell within the term "conditions of employment," the Supreme Court assumed they did and assumed the Commission had the authority to establish and maintain a pension plan. It nevertheless upheld the constitutionality of 2011 PA 264 on the grounds the Civil Service Commission lacks the legislative authority to amend SERA in any fashion and had without exception acquiesced, by its own Rule 5-13, in every legislative amendment to and application of SERA since its enactment in 1943.

Each of the 3 other Justices, Kelly, McCormack and Bernstein, filed separate Opinions. Justices Kelly and McCormack concurred in the finding "rates of compensation" is a term referring only to wages and salaries, but dissented from the Majority's ruling on the "conditions of employment" issue. Justice Kelly would have remanded the case to the Court of Claims on that issue, while Justice McCormack would apparently join in the Majority result solely on the basis of Commission Rule 5-13, and not dealt at all with the "separation of powers" issue in the absence of an actual dispute between the Commission and the legislature. Justice Bernstein would find 2011 PA 264 to have been an unconstitutional intrusion into the Commission's exclusive sphere of influence and would have affirmed the Court of Appeals.

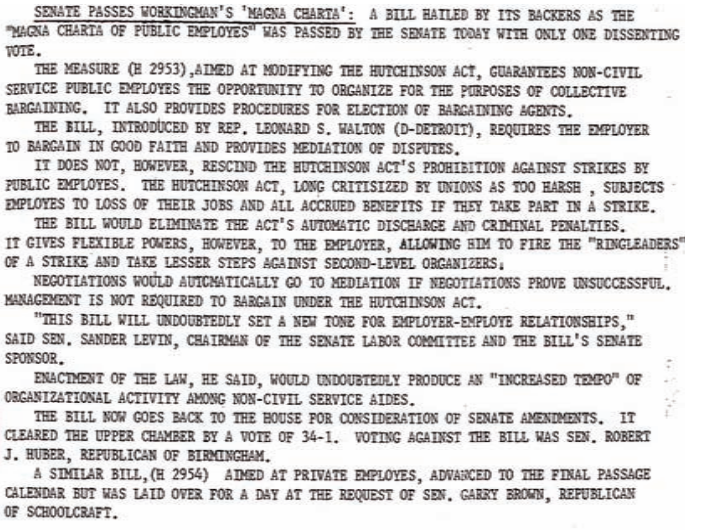
# MERC NEWS

**James Spalding, *Mediation Supervisor***
**Ashley Olszewski, *Paralegal***
***Bureau of Employment Relations***

The MERC/BER reception recognizing the 50th anniversary of the signing of PERA was a well-received event with over 100 attendees. Among the highlights was the "MERC Museum," assembled by BER staff, including original documents, photographs of past and present MERC/BER staff and constituents, and use-worn election ballot boxes filled with ballots. The MERC museum will remain available to visit for the remainder of the year.

A few comments were shared by presenters recognizing the events leading up to the passage of PERA, and the experiences of the labor relations community under PERA, including: Edward Callaghan, Chairperson of MERC, Ruthanne Okun, Director, BER, John Runyan, for the late Theodore Sachs, and Keith Nelson, presenting sentiments on behalf of U.S. Congressman Sander Levin. Mike Zimmer, Director of the Department of Licensing and Regulatory Affairs, gave warm congratulations to Director Okun and the BER staff for their effective continuous efforts in ensuring effective labor-management relations in the State of Michigan.

**The June 16, 1965 announcement from Gongwer News**



SENATE PASSES WORKINGMAN'S 'MAGNA CHARTA': A BILL HAILED BY ITS BACKERS AS THE "MAGNA CHARTA OF PUBLIC EMPLOYES" WAS PASSED BY THE SENATE TODAY WITH ONLY ONE DISSENTING VOTE.

THE MEASURE (H 2953),AIMED AT MODIFYING THE HUTCHINSON ACT, GUARANTEES NON-CIVIL SERVICE PUBLIC EMPLOYES THE OPPORTUNITY TO ORGANIZE FOR THE PURPOSES OF COLLECTIVE BARGAINING. IT ALSO PROVIDES PROCEDURES FOR ELECTION OF BARGAINING AGENTS.

THE BILL, INTRODUCED BY REP. LEONARD S. WALTON (D-DETROIT), REQUIRES THE EMPLOYER TO BARGAIN IN GOOD FAITH AND PROVIDES MEDIATION OF DISPUTES.

IT DOES NOT, HOWEVER, RESCIND THE HUTCHINSON ACT'S PROHIBITION AGAINST STRIKES BY PUBLIC EMPLOYES. THE HUTCHINSON ACT, LONG CRITISIZED BY UNIONS AS TOO HARSH , SUBJECTS EMPLOYES TO LOSS OF THEIR JOBS AND ALL ACCRUED BENEFITS IF THEY TAKE PART IN A STRIKE.

THE BILL WOULD ELIMINATE THE ACT'S AUTOMATIC DISCHARGE AND CRIMINAL PENALTIES. IT GIVES FLEXIBLE POWERS, HOWEVER, TO THE EMPLOYER, ALLOWING HIM TO FIRE THE "RINGLEADERS" OF A STRIKE AND TAKE LESSER STEPS AGAINST SECOND-LEVEL ORGANIZERS.

NEGOTIATIONS WOULD AUTOMATICALLY GO TO MEDIATION IF NEGOTIATIONS PROVE UNSUCCESSFUL. MANAGEMENT IS NOT REQUIRED TO BARGAIN UNDER THE HUTCHINSON ACT.

"THIS BILL WILL UNDOUBTEDLY SET A NEW TONE FOR EMPLOYER-EMPLOYE RELATIONSHIPS," SAID SEN. SANDER LEVIN, CHAIRMAN OF THE SENATE LABOR COMMITTEE AND THE BILL'S SENATE SPONSOR.

ENACTMENT OF THE LAW, HE SAID, WOULD UNDOUBTEDLY PRODUCE AN "INCREASED TEMPO" OF ORGANIZATIONAL ACTIVITY AMONG NON-CIVIL SERVICE AIDES.

THE BILL NOW GOES BACK TO THE HOUSE FOR CONSIDERATION OF SENATE AMENDMENTS. IT CLEARED THE UPPER CHAMBER BY A VOTE OF 34-1. VOTING AGAINST THE BILL WAS SEN. ROBERT J. HUBER, REPUBLICAN OF BIRMINGHAM.

A SIMILAR BILL,(H 2954) AIMED AT PRIVATE EMPLOYES, ADVANCED TO THE FINAL PASSAGE CALENDAR BUT WAS LAID OVER FOR A DAY AT THE REQUEST OF SEN. GARRY BROWN, REPUBLICAN OF SCHOOLCRAFT.

# UNITED STATES SUPREME COURT UPDATE

**Regan K. Dahle**
***Butzel Long***

**Employer Knowledge Not Necessary for Disparate Treatment Claim**

Rejecting Abercrombie and Fitch's argument that it cannot be held liable for disparate treatment religious discrimination under Title VII if it did not have knowledge of an applicant's need for religious accommodation, the Supreme Court held that it is the employer's motive, not knowledge that is dispositive in a disparate treatment claim. In *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028 (2015), the Commission filed suit on behalf of Samantha Elauf, a Muslim woman who had applied and interviewed for a position as a sales clerk or "model" at an Abercrombie store. "Models" are required to abide by the Abercrombie "Look" policy which generally requires employees to wear clothing and accessories consistent with its "preppy and casual" brand. Among other prohibitions, models are prohibited from wearing "caps" — a term that is not defined in the policy.

When Elauf interviewed for the job she wore a hijab, but never asked the interviewer whether she would be permitted to wear a hijab if she were hired. No one at Abercrombie addressed the issue directly with Elauf, but the store's hiring manager knew that Elauf wore a hijab. Suspecting that Elauf would wear a hijab if employed, the store's manager confirmed with her district manager that wearing a hijab would violate the Look policy. Consequently, Abercrombie gave Elauf a low "appearance" score on her interview that ensured she would not be offered a job.

The EEOC filed suit on Elauf's behalf. Abercrombie moved for summary judgment, arguing in part that it had no duty to consider an accommodation to Elauf's religious beliefs because Elauf had never informed them that she wore a hijab for religious reasons or that she may require an accommodation. The district court denied the motion, but the Tenth Circuit Court of Appeals reversed, finding it dispositive that Elauf did not tell Abercrombie that she wore a hijab because of her religious beliefs or that she would need an accommodation to Abercrombie's Look policy. The EEOC successfully sought cert regarding the principle issue of whether an employer needs direct notice from an applicant regarding religious practices before the employer has any duty to consider the issue of accommodation.

The Supreme Court reversed the decision of the court of appeals, disagreeing that in order to be liable for failing to hire an applicant because of the need for a religious accommodation, an employer must have knowledge that the applicant will need that accommodation. The Court noted that, unlike the Americans with Disabilities Act, Title VII "does not impose a knowledge requirement. . . . Instead, the intentional discrimination provision prohibits certain *motives*, regardless of the state of the actor's knowledge." *Id*. at 2033. The Court recognized that while it may be easier to *prove* an employer's motive with evidence that the employer knew that the applicant would require an accommodation or that the applicant actually requested an accommodation, neither of these facts is necessary to sustain a claim. Instead, the Court articulated a bright-line rule for "disparate treatment claims based on a failure to accommodate a religious practices . . . An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." *Id.* ■

# SHLOMO "SOL" SPERKA PASSES AWAY

**Ruthanne Okun**
***Bureau Director***
***Bureau of Employment Relations***

It is with great sadness and fond memories that we report the recent death (in Israel) of former Director of the Bureau of Employment Relations/Michigan Employment Relations Commission (MERC), Shlomo "Sol" Sperka.

Sol first served as an Administrative Law Judge for MERC and later, as Director of the Bureau for 14 years. Before joining the Bureau, he worked as an attorney for NLRB Region 7. Sol was an adjunct professor at Wayne State University Law School and a professor and Interim Director of the Industrial Relations Master of Arts program at Wayne. Sol was a past president of the Association of Labor Relations Agencies, an organization of state, federal, and Canadian agencies whose mission is similar to that of MERC.

Sol was my immediate predecessor, and a true mentor to me and a friend to our entire constituency. Sol "wore shoes" that I could never hope to fill. Those of us who worked with or were acquainted with Sol will always remember his kindness, calm demeanor, and good humor, even when challenged by the most difficult lawyers. His knowledge of labor law and labor issues in general, and especially public sector labor law, was incredible. He was always willing to share his wisdom with others, available to respond to any question from constituents, and ready to debate at the first opportunity.

Sol was able to blend his impeccable knowledge with his profound commitment to his Judaism and to his family. He will be remembered as a wise and decent man, who was dedicated to finding the right answer and doing the right thing. Sol will be missed by the labor-management community and, especially, by us at the Bureau and the Commission. Contributions in Sol's memory may be made to Young Israel Synagogue of Oak Park with a designation that they are to be sent to one of his most-loved charities in Israel. ■

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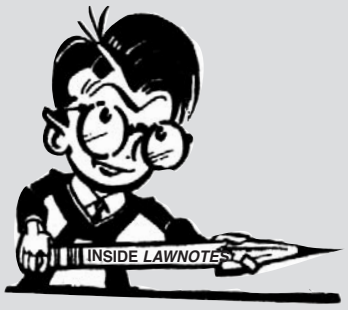


- David Blanchard writes about FLSA trends and Nick Saleh has more on the Employee Right to Know Act.
- Barry Goldman offers arbitration advocates *Miranda* warnings about the Seven Tests for Just Cause — again.
- Dick Hooker reports on RTW and pension decisions in the Michigan Supreme Court.
- Joe Barker confirms the workplace application of Cole Porter's lament that "good authors, too, who once knew better words now only use four-letter words writing prose" and that when exercising NLRA rights, almost "anything goes."
- And speaking of free speech, Stuart Israel points out that in most circumstances preemptive federal law "tolerates" union speech that is "inaccurate," "intemperate, abusive, or insulting." The Supreme Court said so.
- Shel Stark offers advice to aspiring mediators while Paul Monicatti offers advice to the mediated-upon.
- Alex Roe addresses unlawful surveillance, real and apparent.
- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, MIOSHA, MDCR and EEOC news, websites to visit, a Kelman cartoon, and more.
- Authors John G. Adam, Joseph A. Barker, David Blanchard, Regan K. Dahle, Scott R. Eldridge, Barry Goldman, Richard A. Hooker, Stuart M. Israel, Maurice Kelman, Paul F. Monicatti, Ruthanne Okun, Ashley Olszewski, Katherine Alex Roe, Nicholas Michael Saleh, Brian M. Schwartz, James Spalding, and Sheldon J. Stark.