LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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DOES TITLE VII NOW PROHIBIT DISCRIMINATION AGAINST THE LGBT COMMUNITY?

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Lesbian, gay, bisexual, and transgender (LGBT) rights have quickly evolved, though they do vary from jurisdiction to jurisdiction. In recent years, the U.S. Supreme Court has been expanding LGBT rights by invalidating state and federal statutes on the basis of constitutional principles. In 2003, for instance, the Court ruled in *Lawrence v. Texas*, 539 U.S. 558 (2003), that a state law banning sexual activity between consenting adults of the same sex was unconstitutional. And in 2015, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Court ruled that state laws prohibiting same-sex marriages were unconstitutional. Several states have also passed laws that specifically outlaw same-sex or gender identity discrimination.

Title VII does not expressly prohibit discrimination based on sexual orientation or gender identity. Instead, the law prohibits discrimination in employment "because of . . . race, color, religion, sex, or national origin." Since 1994, a bill to amend Title VII – the Employment Non-Discrimination Act (ENDA) – has been proposed in almost every Congressional session, and would, if passed, expressly add the categories of "sexual orientation" and "gender identity" to protected classes under Title VII.

Because ENDA has never passed, victims of sexual orientation discrimination usually sue on the theory that they are being discriminated against on the basis of sex – i.e., because they are not conforming to gender norms. Early court decisions rejected this theory, but the most recent opinions have adopted it and expanded "sex" discrimination to cover these situations. In October 2015, for instance, an Alabama federal court ruled that claims of sexual orientation discrimination are cognizable under Title VII because "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination." And in December 2015, a California federal court similarly stated that "the line between discrimination based on gender stereotyping and discrimination based on sexual orientation . . . is illusory and artificial, and that sexual orientation discrimination is not a category distinct from sex or gender discrimination."

In a recent much-publicized case, the U.S. Department of Justice filed suit against the state of North Carolina to prohibit the enforcement of what has become commonly known as "HB2" – a law the federal government alleges violates Titles VII and IX of the Civil Rights Act by discriminating against transgender individuals on the basis of sex. After the city of Charlotte passed an ordinance prohibiting gender identity discrimination and creating an accommodation for bathroom use, the state legislature passed HB2, which repealed Charlotte's LGBT civil rights law, prohibits local governments from passing such laws in the future, and requires transgender people in state buildings and schools to use the bathroom corresponding to the gender on their birth certificates.

In a pre-suit letter to North Carolina's governor, the U.S. Attorney General warned that HB2 violates Title VII by "treat[ing] transgender employees . . . differently from similarly situated non-transgender employees" by restricting "access to restrooms and changing facilities." The North Carolina governor insisted that Congress should clarify the law, and said he would sue the Justice Department seeking a declaration that the law does not constitute sex discrimination. Shortly after this announcement, the Justice Department filed suit, and North Carolina counter-sued.

The Equal Employment Opportunity Commission (EEOC) – the federal agency that enforces Title VII and other federal employment discrimination laws – has also weighed in on the controversy. In the EEOC's view, gender identity discrimination is sex discrimination and employers are prohibited from denying a transgender employee access to the restroom that corresponds to the employee's gender identity. The EEOC also warned that employers may not condition transgender employees' rights on "undergoing or providing proof of surgery" and cannot restrict transgender employees to a "single-user restroom instead."

Employers can expect the EEOC to be looking for test cases to drive the expansion of the law. We will be watching for the next development. ■

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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***

MEDIATION ADVOCACY – RESTRUCTURING TRADITIONAL JOINT SESSIONS

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Joint sessions in mediation have been widely discussed in the literature, presentations, and training as well as in frequent debates among attorney advocates and mediators. Resistance to use of joint sessions is particularly prevalent in employment disputes, often for good reason. Unscripted, unrestricted, and unguided statements in open session by counsel or clients are risky and can be a recipe for mediation disaster. Yet, advocates and mediators who work together creatively to customize procedure to fit the particular needs, attitudes, personalities, relationships, issues, subject matter, complexity, timing, and other characteristics of their dispute and the people involved can dramatically enhance the process. This article discusses joint session statistics and rationale as well as various techniques for restructuring traditional joint sessions, making them more productive and effective.

I. CURRENT TREND AND STATISTICS

Given the national trend away from trials, as only slightly over 1% of all cases filed ever reach trial, mediation advocacy is gradually replacing trial advocacy. In pre-trial motion practice, trial lawyers use their advocacy skills and persuasive powers on judges. In arbitration, they use them on experienced and sophisticated arbitrators. However, mediation offers the rare opportunity to use them on laypersons like jurors, i.e., the clients on the other side.

Like vanishing trials, joint sessions are disappearing in employment and other cases. Recent statistics reported by Jay Folberg in the Winter of 2016 *Dispute Resolution Magazine* published by the ABA Section of Dispute Resolution are very telling:

- JAMS surveyed all of its panelists in March 2015 about use of joint sessions in mediation, with 76% of JAMS mediators responding
- JAMS is a private ADR provider of mediation and arbitration services with more than 300 exclusive, independent contractor panelists across the US and Canada
- JAMS files are primarily business and commercial disputes which are in litigation and where all parties are actively represented by attorneys
- 80% of JAMS mediators regularly used opening joint sessions when they began mediating as compared to 45% now, a reduction by almost half
- Nearly 60% of JAMS mediators have experienced increased attorney resistance to the use of opening joint sessions although there are significantly higher regional variations along the West Coast

II. TRADITIONAL PROS AND CONS

Joint sessions are widely debated because they may disintegrate into an uncomfortable, upsetting, revealing, frustrating, contentious, or emotional misadventure… just like trials, except those are in public and mediations are in private. On the other hand, joint sessions can be persuasive, transforming, liberating, and game changing. These are common pros and cons of joint session:

A. Pros given by Mediators
- Clients hear different points of view
- Clients get their quasi "day in court" in an era of vanishing trials
- Clients empowerment is enhanced
- Clients experience a "dry run" of the other side's case before trial, when by then it's too late to do something about it
- Clients can vent emotion constructively in a protected environment
- Clients are humanized
- Clients are educated directly and unfiltered by their own counsel
- Clients and counsel can ask questions to clarify, understand, and learn more information from the other side
- Clients can show compassion or make a sincere apology if the situation warrants
- Sends critical negotiation signals by subtle non-verbal communication from voice tone, facial expressions, hand gestures, demeanor, manner of speaking, and other body language
- Provides a forum for clients and their attorneys to tell a powerful and persuasive story with compelling themes
- Lays a foundation of downside risks for the other side to consider in later private caucus discussions with the mediator
- Gives attorneys and the mediator an opportunity to set the stage and create the desired negotiation atmosphere

B. Cons given by Advocates
- Often argumentative, accusatorial, confrontational, or insensitive
- Inflames hostilities
- Hardens positions
- Polarizes counsel or clients further
- Rehashes what is already known from prior discovery and discussions
- Wastes time when clients or attorneys don't respect or trust each other
- Intimidates clients
- Risks loss of client control in traumatic or emotional situations
- Gives clients unrealistic expectations if they believe what their lawyers are saying
- Exposes anxious clients to weaknesses and risks in their case
- Facilitates a bad faith fishing expedition for information without serious intent to negotiate

III. INNOVATIVE TECHNIQUES FOR RESTRUCTURING THE TRADITIONAL JOINT SESSION IN ORDER TO OVERCOME ITS DRAWBACKS

A. ***"Learning Conversation"*** as used by Eric Galton from Texas
- Involves a collaborative group attempt to understand each other with no set agenda
- Mediator acts as the joint discussion host to initiate conversation and mostly stay quiet as long as it goes well, occasionally joining in to take the conversation in a different direction
- Abandons traditional no-interruption rule in mediation
- Involves interactive dialog rather than a monolog, argument, or lecture
- Encourages polite, non-confrontational questions
- Especially suited but not limited to pre-suit mediations and those with limited discovery
- Little if any lawyer resistance or flare-ups

B. ***"Directed Discussion"*** as used by Jerry Palmer from Kansas
- Mediator sets the agenda for focused joint discussion by specifically requesting the parties to address particular issues the mediator feels might be outcome-determinative
- Mediator thus controls what topics counsel discuss and the basic flow of information in an organized way
- Mediator prepares a discussion outline for use in joint session based on information gleaned from pre-mediation written submissions and conversations with counsel
- The Directed Discussion then flows from the mediator's outline as the mediator directs questions to one side or another
- After the Directed Discussion each party is given an opportunity to raise anything else, by question or comment, that they believe should be communicated to the other side before separating into private caucuses to consider the issues raised

C. ***"Joint Session 2.0"*** as used by Jeff Kichaven from California
- Counsel and the mediator work together to pre-arrange and set the agenda for focused joint discussion
- Involves opposing counsel constructively "putting stuff out there" which the mediator then can take into caucus with the other side and explore with probing questions
- Depends on counsel's submission of pre-mediation materials far enough in advance of the hearing to allow time for the mediator to follow-up in *ex parte* phone calls with counsel
- After reviewing the submitted materials, the mediator then confers with each counsel by phone to determine the critical issues and pressure points they need to be addressed in order to make progress with their client as well as those to be avoided because they're too inflammatory
- Mediator then works separately to convince the other side to focus on those issues in joint session in order to lay the foundation for productive conversation between attorney and client in the caucus to follow
- To the extent that opposing counsel's remarks have merit that can be acknowledged by counsel in the client's presence when asked by the mediator in caucus, then client persuasion and progress have a chance

D. ***"Crossed Caucus"*** as used by the Author
- Involves an informal discussion, adhering to a pre-arranged agenda of specific topics, where clients without attorneys or attorneys without clients meet and talk together, with or without the mediator, depending on the situation and who the negoation impediments are

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MEDIATION ADVOCACY – RESTRUCTURING TRADITIONAL JOINT SESSIONS

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- Relies on mutual agreement to have a casual conversation without confrontation, accusation, or argument
- Focuses on problem solving solutions not problem blaming
- Addresses what is most important to each side and their goals
- Especially useful in relationship-based disputes such as employer / employee, close corporation or family business, probate, life partner breakups
- Not useful where there is a radical difference in client power or sophistication

E. ***Change in Sequence.*** Instead of opening a mediation in joint session, defer it until after emotions, accusations, and blame have been thoroughly vented in separate caucuses. Then perhaps the parties can convene in joint session to constructively discuss the unemotional issue in the dispute.

IV. CONCLUSION

What can be learned from these variations of traditional joint sessions? It would seem that the success of techniques A, C, and D depends primarily on the degree of trust and respect between counsel, clients, or both, whereas B's effectiveness is a function of the trust and confidence the parties have in the mediator. All of them can work, but only if all sides share the same goal and want to truly resolve their dispute. They demonstrate how trustworthy advocates and mediators can work together in exploring different ways to salvage joint sessions and make them more productive and effective, *if:*

- Advocates submit pre-mediation statements well in advance of the mediation in order to allow sufficient time for the mediator to follow up with them as necessary before mediation
- Advocates tone down the destructive rhetoric often heard in traditional join sessions
- Mediators coach advocates to drop unscripted, unrestricted, and unguided joint sessions and consider working together with them to customize the procedure. ■

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SUMMARY JUDGMENT: DEFEATING THE EMPLOYER'S INEVITABLE MOTION (Part II)

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V. PREPARING AN EFFECTIVE RESPONSE TO THE EMPLOYER'S MOTION

A. Showing That There is a Genuine Issue for Trial

Rule 56 (c)(1) provides in relevant part as follows:

Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

"[T]he party opposing the summary judgment motion must do more than simply show that there is some 'metaphysical doubt as to the material facts.'" *Highland Capital, Inc. v. Franklin Nat'l Bank*, 350 F.3d 558, 564 (6th Cir. 2003) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)) (internal quotation marks omitted). A party opposing a motion for summary judgment must designate specific facts in affidavits, depositions, or other factual material showing "evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).[18] If the non-moving party, after sufficient opportunity for discovery, is unable to make this showing, summary judgment is clearly proper. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). "Thus, the mere existence of a scintilla of evidence in support of the [opposing party]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [opposing party]." *Highland Capital Inc. v. Franklin National Bank,* 350 F.3d at 546 (quoting 477 U.S. at 252) (quotations omitted).[19]

1. Identifying the *material* facts.

The first step to setting forth specific facts showing that there is a genuine issue for trial is to identify those facts which are *material* to the claim under attack. Materiality is determined by the underlying substantive law. *Boyd v. Baeppler*, 215 F.3d 594, 599 (6th Cir. 2000). Material facts are "those facts that might affect the outcome of the action under governing law." *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F3d 1241, 1245 (6th Cir. 1995), *quoting Anderson v. Liberty Lobby, Inc.*, 477 US 242, 248, 106 S Ct 2505, 91 L Ed 2d 202 (1986). *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001).

2. Scouring the record to identify *genuine* disputes.

The second step to preparing an effective response to the employer's motion is to diligently search the record to identify any evidence suggesting that a *genuine* dispute exists as to the material facts. "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., supra*; *see also*, *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289, 88 S Ct 1575, 20 L Ed 2d 569 (1968)

["(I)t is true that the issue of material fact required by Rule 56)(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."]

"In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.' Such a motion, whether or not accompanied by affidavits, will be 'made and supported as provided in this rule,' and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing and there is a genuine issue for trial.'" *Celotex Corp. v. Catrett, supra* at 324.

Irrelevant or unnecessary factual disputes do not create genuine issues of material fact. *St. Francis Health Care Centre v. Shalala*, 205 F.3d 937, 943 (6th Cir. 2000). In a defensive motion for summary judgment, the party who bears the burden of proof must present a jury question as to each element of the claim. *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000). Failure to present a jury question as to an essential element of a claim renders all other facts immaterial for summary judgment purposes. *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 895 (6th Cir. 1991).

A search of the record in this regard must necessarily include all of the sources mentioned in the rule, including the pleadings, affidavits, depositions, answers to interrogatories, admissions, and other documentary evidence on file.[20] If the plaintiff has been adequately prepared for his deposition, the plaintiff's deposition transcript should be a fertile source of "specific facts showing that there is a genuine issue for trial." Documents produced by the employer in response to Requests for Production are another fertile source, particularly for circumstantial evidence suggesting that similarly situated employees of another race or gender were treated differently. Occasionally, even the depositions of the employer's key decision makers (particularly "unvarnished" testimony taken early in the case) will turn up admissions that can be used to show that genuine issues of material fact remain for trial.

3. Preparing affidavits to show a genuine issue as to the material facts.

When a search of the already existing record does not disclose evidence suggesting that a genuine issue of material fact exists or where that search reveals that the factual disputes are immaterial or inconsequential, a third step to preparing an effective response to the employer's motion is the preparation of opposing affidavits.[21] Such affidavits should conform generally to Rule 56(c)(4) and the standards previously discussed for scrutinizing the employer's affidavits: (1) the affidavits must be sworn; (2) the affidavits must be based upon the affiant's personal knowledge and otherwise set forth facts and testimony that would be admissible at trial; (3) the affidavits must show affirmatively that the affiant is competent to testify to the matters stated therein; and (4) the affidavits must not contradict the affiant's prior, sworn answers to interrogatories or deposition testimony.[22] However, as the United States Supreme Court indicated in *Celotex Corp v. Catrett*, *supra*, "the non-moving party [need not] produce evidence in a form that would be admissible at trial in order to avoid summary judgment; "instead its evidence must be reduc[ible] to admissible evidence." *US v. Four Parcels of Real Property*, 941 F2d 1428, 1444 (11th Cir. 1991), quoting in part *Celotex Corp v. Catrett*, *supra* at 324, 327; *Alexander v. Care Source*, 576 F.3d 551, 558 (6th Cir. 2009).[23] In preparing opposing affidavits, plaintiff's counsel must be mindful that neither "conclusory allegations" [*Lujan v. National Wildlife Federation*, 497 US 871, 888-889 (1990)] nor speculation and conjecture will be sufficient to defeat the employer's motion for summary judgment. *See Arendale v. City of Memphis*, 519 F.3d 587, 605 (6th Cir. 2008); *Ackerman v. Diamond Shamrock Corp.*, 670 F2d 66, 70 (CA 6, 1982) ("Nothing in the record, other than personal conclusions by Ackerman, suggests that Ackerman's age in any way was a factor in the decision."); *Locke v. Commercial Union Ins. Co.*, 676 F2d 205, 206 (CA 6, 1982) ("The plaintiff did nothing more than state his conclusion that he was terminated because of age.")[24]

4. When an employee is not immediately able to present by affidavit facts showing a genuine issue for trial.

Rule 56 governing summary judgment makes allowance for a party who is not immediately able to procure affidavits showing that a genuine issue of material fact remains for trial. Fed R Civ P 56(d), provides in pertinent part as follows:

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the United States Supreme Court recognized that the adverse party's obligation under then Rule 56(e) "to set forth specific facts showing that there is a genuine issue for trial" is "in turn qualified by then Rule 56(f)' s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Id.*, at 250 n. 5; *see also*, *Celotex v. Catrett*, 477 US 317, 326 (1986). Relying upon this provision, the United States Court of Appeals for the Sixth Circuit overturned a grant of summary judgment in *Glen Eden Hospital, Inc. v. Blue Cross & Blue Shield of Michigan, Inc.*, 740 F2d 423 (6th Cir. 1984). There the nonmoving party's opportunity for the discovery necessary to oppose the motion had been impeded by preliminary injunction proceedings followed by an interlocutory appeal. *Id.*, at 427. In response to the motion, the nonmoving party filed several affidavits stating specifically the additional discovery it sought. *Id.*

The Sixth Circuit ruled that the district court had abused its discretion in declining to permit the nonmoving party to conduct further discovery. *Id.* at 428. The court concluded that the nonmoving party's inactivity during the period of the interlocutory appeal did not indicate that it had completed its discovery on all issues in the case. *Id.* It found that summary judgment was premature, given the nonmoving party's Rule 56(f) affidavit(s) pointing out the areas in which it was seeking additional information. *Id.*, *see also Centra, Inc. v. Estrin*, 538 F.3d 402, 419-421 (6th Cir. 2008); *Yashon v. Gregory*, 737 F.2d 547, 552 (6th Cir. 1984);[25] *but see Care To Live v. Food & Drug Administration*, 631 F.3d 336, 344-345 (6th Cir. 2011); *Libertarian Party of NM v. Herrera*, 506 F.3d 1303, 1307-1308 (10th Cir. 2007); *Couden v. Duffy*, 446 F.3d 483, 500 n.12 (3rd Cir. 2006); *Tatum v. City & County of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006).

Other circuits have applied Rule 56(f) (now 56(d)) to the same effect. See, *Farmer v. Brennan*, 81 F3d 1444, 14494452 (7th Cir.

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1996); *Resolution Trust Corp. v. North Bridge Associates*, 22 F3d 1198, 1203-1209 (1st Cir. 1994); *Wichita Falls Office Associates v. Banc One Corn.*, 978 F2d 915, 918-920 (5th Cir. 1992), *cert. denied*, 508 US 910, 113 S Ct 2340, 124 L Ed 2d 251 (1993)("Such 'continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course' unless 'the nonmoving party has not diligently pursued discovery of the evidence. '" *Id.* at 919 n. 4, *quoting in part International Shortstop, Inc. v. Rally's Inc.*, 939 F2d 1257, 1267 (5th Cir. 1991), *cert. denied*, 502 US 1059, 112 S Ct 936, 117 L Ed 2d 107 (1992); *Garrett v. City and County of San Francisco*, 818 F2d 1515, 1518-1519 (9th Cir. 1987); *Visa International Service Assn. v. Bankcard Holders of America*, 784 F2d 1472, 14751476 (9th Cir. 1986)("The courts which have denied a Rule 56(f) application for lack of sufficient showing to support further discovery appear to have done so where it was clear that the evidence sought was almost certain nonexistent or was the object of pure speculation. "); *Patty Precision v. Brown & Sharpe Mfg. Co.*, 742 F2d 1260, 1264-1265 (10th Cir. 1984); *Sam Wong & Son, Inc. v. N.Y. Mercantile Exchange*, 735 F2d 653, 678 (2nd Cir. 1984); *Londrigan v. Federal Bureau of Investigation*, 670 F2d 1164,1175-1176 (D.C. Cir. 1981). In each of these cases, a district court's grant of summary judgment was reversed on appeal, based upon the court's failure to permit the nonmoving party to conduct additional discovery after filing an affidavit under Rule 56(f).[26]

5. When summary judgment may be appropriate with respect to some but not all claims or issues.

Another provision of Rule 56 which plaintiffs' counsel may occasionally employ to their advantage is Rule 56(g).[27] That subdivision of the rule comes into play when the Court determines that it is impossible to fully resolve all of the claims or issues in the case upon a motion for summary judgment. The purpose of Rule 56(g) is to allow the Court to salvage some results from the effort involved in denying the motion for summary judgment by entering an order, controlling at trial, which specifies the facts that appear without substantial controversy. *See*, *Lytle v. Freedom International Carrier, S.A.*, 519 F2d 129 (6th Cir. 1975).

In a close case, it may be useful to remind the Court of this alternative to granting the employer's motion for summary judgment. Remembering that the courts use summary judgment as a means of docket control, providing the court with an alternative to a lengthy trial of all claims or issues in the case may make the prospect of denying the employer's motion for summary judgment more attractive. *See, e.g., Flanders & Medeiros, Inc. v. Bogosian*, 65 F3d 198, 204 (1st Cir. 1995). In this respect, an order under Rule 56(g) is not unlike a pretrial order under Fed. R. Civ. P. 16, as the Courts have recognized. *See, e.g., Rivera-Flores v. Puerto Rico Telephone Co.*, 64 F3d 742, 747-748 (1st Cir. 1995); *Cohen v. Board of Trustees of the University of Medicine and Dentistry of New Jersey*, 867 F2d 1455, 1463 (3rd Cir. 1989).[28]

B. USING THE RULE 56 PROCEDURAL CASE LAW TO DEFEAT THE EMPLOYER'S INEVITABLE MOTION FOR SUMMARY JUDGMENT

Certain of the caselaw developed under Rule 56 may also be of assistance in showing that a genuine issue of material fact remains for trial.

1. Caselaw suggesting that in determining whether a genuine issue of material fact exists, a Court must examine the entire record in the light most favorable to the nonmoving party.

In ruling upon motions under Rule 56, federal courts have agreed that trial courts should examine the entire record in the light most favorable to the nonmoving party. *Tolan v. Cotton*,_US_, 134 S.Ct. 1861, 1866 (2014); *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) ["On a motion for summary judgment, 'facts must be viewed in the light most favorable to the non-moving party only if there is a "genuine dispute as to those facts."'" (citations omitted)]; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 US 574, 587 (1986) ("[O]n summary judgment the inferences to be drawn from the underlying facts. . . must be viewed in the light most favorable to the party opposing the motion." (citation omitted)); *Jackson v VHS Detroit Receiving Hospital Inc.*,_F3d_, 2016 WL 700411 (6th Cir. 2016);*Wasek v. Arrow Energy Services, Inc.*, 682 F.3d 463, 467 (6th Cir. 2012) (same); *Baden-Winterwood v. Lifetime Fitness*, 566 F.3d 618, 626 (6th Cir. 2009)(same); *United States v. Petroff-Kline*, 557 F.3d 285, 290 (6th Cir. 2009) (same); *Relford v. Lexington-Fayette Urban County Government*, 390 F.3d 452, 457 (6th Cir. 2004) (same); *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 534 (6th Cir. 2002) (same); *Tinker v. Sears Roebuck & Co.*, 127 F3d 519, 521 (6th Cir. 1997) (same); *Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F3d 1241, 1245 (6th Cir. 1995) (same).

2. Caselaw suggesting that a reviewing court should be liberal in finding that a genuine issue of material fact exists, giving the benefit of all reasonable doubt to the nonmoving party.

Hunt v. Cromartie, 526 U.S. 541, 552 (1999) [". . . in ruling on a motion for summary judgment, the non-moving party's evidence 'is to be believed, and all justifiable inferences are to be drawn in [that party's] favor.'" (citation omitted)]; *Wasek v. Arrow Energy Services, Inc.*, 682 F.3d 463, 467 (6th Cir. 2012) (Court must draw all reasonable inferences to the nonmoving party's benefit); *DeCintio v. Westchester County Medical Center*, 821 F2d 111, 114 n 4 (2nd Cir.), *cert. denied*, 484 US 965 (1987); *Russo v. City of Cincinnati*, 953 F2d 1036, 1042 (6th Cir. 1992) ("The evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor."); *Mozert v. Hawkins County Public Schools*, 765 F2d 75,78 (6th Cir. 1985) ("the papers supporting the movant are closely scrutinized, whereas the nonmovants' are treated indulgently.)

3. Caselaw suggesting that in determining whether a genuine issue of material fact exists, a Court must avoid weighing evidence or making factual findings, thereby substituting trial by affidavit or deposition for a jury trial.

Federal courts have also recognized that where the evidence before the trial court upon a motion for summary judgment is conflicting, the court must avoid weighing the evidence or making findings of fact, and thereby substituting trial by affidavit or deposition for a jury trial. *Tolan v. Cotton*,__US__, 134 S.Ct. 1861, 1866 (2014) ("By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party, Anderson, 477 US at 249, 106 S.Ct. 2505"); "*Moran v. Al Basit LLC* 788 F.3d 201, 204 (6th Cir. 2016). *Spengler v. Worthington Cylinders*, 615 F.3d 481, 489 (6th Cir. 2010) ("In reviewing the district court's decision, we may not 'weigh the evidence, pass on the credibility of witnesses, or substitute [our] judgment for that of the jury'" *quoting in part Imwalle v. Reliance Medical Products, Inc.*, 515 F.3d 531, 543 (6th Cir. 2008) (internal citation omitted); *Upshaw v. Ford Motor*

Co., 576 F.3d 576, 592 (6th Cir. 2009) ("In considering a motion for summary judgment, 'the judge's function . . . is limited to determining whether sufficient evidence has been presented to make the issue a proper jury question, and not to judge the evidence and make findings of fact," *quoting in part Bultema v. United States*, 359 F.3d 379, 382 (6th Cir. 2004) (internal citation omitted); *Briggs v. Potter*, 463 F.3d 507, 513 (6th Cir. 2006) ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether [the judge] is ruling on a motion for summary judgment or for a direct verdict," *quoting Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 255 (1986); *Talley v. Bravo Pitino Restaurant, Ltd*., *supra* at 1245; *Hanover Ins. Co. v. American Engineering Co*., 33 F.3d 727, 732 (6th Cir. 1994) ("...the district judge improperly weighed disputed evidence, decided questions of credibility, and drew inferences about the knowledge and intent of the parties from conflicting evidence adversely to respondent. These are exclusive functions of the trier of fact to be discharged after consideration of the live testimony and all other evidence presented in an adversarial trial environment"); *see also Stewart v. RCA Corp*., 790 F2d 624 (7th Cir. 1986) (noting that while Fed. R. Civ. P. 43(e) allows a trial court to take oral testimony upon a motion, it does not allow the court to resolve factual disputes on a motion for summary judgment, particularly where a jury rather than the court is likely to be the ultimate factfinder).

4. Case law suggesting that summary judgment is inappropriate where the truth of a material factual assertion of a moving party's affidavit depends upon the affiant's credibility.

Federal courts likewise agree that summary judgment is not favored where the credibility of witnesses is critical, as is often the case in employment discrimination cases. *See Anderson v. Liberty Lobby*, *supra* at 255 ("Credibility determinations, the weighing of the evidence and the drawing of legitimate of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or a directed verdict,"); *Sailor v. Arkansas Natural Gas Corp*., 321 US 620, 627-628 (1944); *Yazdian v. ConMed Endoscopic Techs, Inc*., 793 F.3d 634 (6th Cir. 2015) ("we must abstain from making credibility determinations, weighing evidence, and 'drawing of legitimate inferences in favor of the moving party because those are 'jury functions, not those of a judge,'" *quoting in part Anderson v. Liberty Lobby, supra*, at 255; *Tilley v. Kalamazoo County Road Commission*, 777 F.3d 303, 314 (6th Cir. 2015) (same); *Payne v. Novartis Pharms Corp*., 767 F.3d 526, 530 (6th Cir. 2014) (same); *Montell v. Diversified Clinical Services*, 757 F.3d 497, 503 (6th Cir. 2014) (same); *Miami V alley Fair Housing Center, Inc. v. Connor Group*, 725 F.3d 571, 578 (6th Cir. 2013) (same); *Oldham v, West*, 47 F3d 985, 988-89 (8th Cir. 1995); *Crawford v. Runyon*, 37 F3d 1341 (8th Cir. 1994); *Leonard v. Dixie Well Service & Supply, Inc*., 828 F2d 291, 294 (5th Cir. 1987) ("The district judge erred in basing his decision on finding Dixie Well's documentary evidence inherently more 'reliable' or 'accurate' than Leonard's and his co-worker's testimony and sworn statements from memory. The party opposing a motion for summary judgment, with evidence competent under Rule 56, is to be believed; it is for the jury at trial, not for the judge on a pre-trial motion, to decide whose evidence is more credible"); *Losch v. Borouah of Parkesburg, Pa*., 736 F2d 903, 909 (3rd Cir. 1984) (while summary judgment may be based on affidavits, conflicts of credibility should not be resolved on the motion for summary judgment unless the opponent's evidence is 'too incredible to be believed by reasonable minds.'"); *Stepanischen v. Merchants Despatch Transportation Co*., 722 F2d 922, 928 (1st Cir. 1983).

In *Oldham v. West*, *supra*, for example, an employee of the Army Aviation Troop Command complained that he had been subject to retaliatory adverse treatment because he had testified on behalf of another employee, a black female, at an EEO hearing. *Id*. Although the plaintiff's affidavit presented evidence that all of the adverse employment decisions were made by officials who were aware of his EEO testimony and that these decisions may have been made in retaliation for that testimony, the district court credited the employer's contrary affidavits and granted its motion for summary judgment. *Id*. at 988. The court of appeals reversed, noting that "[b]y accepting the defendant's version of the facts, the judge necessarily resolved any credibility issues in favor of all the defendant's witnesses and 'such a credibility determination is inappropriate in ruling on a motion for summary judgment." *Id*. at 988-989 (citation omitted).[29]

5. Caselaw suggesting that claims or defenses which turn on the moving party's state of mind are not well suited for summary judgment.

Most federal courts are also in agreement that cases involving motive or intent, such as cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*., are ill-suited for resolution by motions for summary judgment. *See*, *First National Bank v. Cities Service Co*., 391 US 253, 284-285 (1968) ("Where the crucial question was motive, summary judgment was prematurely granted against the plaintiff, notwithstanding the fact that there was substantial evidence tending to show the nonexistence of conspiratorial behavior"); *Barker v. Macon Resources, Inc*., 760 F.3d 674, 678 (7th Cir. 2014) ("Any inferences about the director's motivation here are for the trier of fact."); *Scarbrough v. Morgan County Bd of Ed*., 470 F.3d 250, 259 (6th Cir. 2006); *Forsyth v. Federation Emp't v. Guidance Serv*., 409 F.3d 565, 569-70 (2d Cir. 2005) (more caution should be exercised in affirming grant of summary judgment in discrimination case because smoking gun evidence of discriminatory intent is rare and most often must be inferred); *Back v. Hastings on Hudson Union Free Sch. Dist*., 365 F.3d 107, 124 (2d Cir. 2004) (unless defendants' proffered nondiscriminatory reason for adverse employment action is dispostive and forecloses any issue of material fact, summary judgment is inappropriate on employment discrimination claim); *Wallace v. SMC Pneumatics*, 103 F3d 1394 (7th Cir. 1997); *Wohl v. Spectrum Mfg., Inc*., 94 F3d 353, 355 (7th Cir. 1996) ("We apply the summary judgment standard rigorously in employment discrimination cases such as this because intent and credibility are crucial issues."); *Marzano v. Computer Science Corp*., 91 F3d 497, 509-510 (3d Cir. 1996) ("Employment discrimination cases center around a single question: why did the employer take an adverse employment action against plaintiff? Because this is clearly a factual question, summary judgment is in fact rarely appropriate in this type of case. Simply by pointing to evidence which calls into question the defendant's intent, the plaintiff raises an issue of material fact which, if genuine, is sufficient to preclude summary judgment." (citation omitted)]; *International Shortstop, Inc v. Rally's, Inc*., 939 F2d 1257, 1265 (5th Cir. 1991); *Canderm Pharmacal v. Elder Pharmaceuticals, Inc*., 862 F2d 597, 601 (6th Cir. 1988); *Shah v. General Electric Co*., 816 F2d 264, 271 (6th Cir. 1987); *Smith v. Hudson*, 600 F2d 60, 66 (6th Cir.), *cert. dismissed*, 444 US 986 (1979); *see especially*, *Gallo v. Prudential Residential Services Ltd Partnership*, 22 F3d 1219, 1223-1224 (2d Cir 1994):

Considering how often we must reverse a grant of summary judgment, the rules for when this provisional remedy may be used apparently need to be repeated. First, summary judgment may not

(Continued on page 8)

SUMMARY JUDGMENT: DEFEATING THE EMPLOYER'S INEVITABLE MOTION (Part II)

(Continued from page 7)

be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Second, the burden is upon the moving party to demonstrate that no genuine issue respecting any material fact exists. . . . Third, all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought. . . . Fourth, the moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case. . . .

[W]hen deciding whether this drastic provisional remedy should be granted in a discrimination case, additional considerations should be taken into account. A trial court must be cautious about granting summary judgment to an employer when, as here, its intent is at issue. . . . Because writings directly supporting a claim of intentional discrimination are rarely, if ever, found among an employer's corporate papers, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination.[30]

C. USING THE SUBSTANTIVE LAW TO DEFEAT THE EMPLOYER'S INEVITABLE MOTION FOR SUMMARY JUDGMENT.

In *St. Mary's Honor Center v. Hicks*, 509 US 502 (1993), the Supreme Court's recent pronouncement on the circumstantial evidence (*McDonnell-Douglas*) approach to proving intentional discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 USC §2000e et seq., the Court concluded that "(t)he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the employer's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination and . . upon such rejection, no additional proof of discrimination is required." *Id*. at 511.

Because *St. Mary*'s recognizes that the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a *prima facie* case and showing of pretext without more, the majority of federal appellate courts have concluded that summary judgment is inappropriate in a Title VII case whenever plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true. *See Combs v. Plantation Patterns*, 106 F3d 1519, 1528-1538 (11th Cir. 1997), *cert denied*, 522 US 1045 (1998) (and cases cited at pp 1535-1536); *Sheridan v. E I Dupont de Nemours and Co*., 100 F3d 1061, 1065-1072 (3rd Cir. 1996)(en banc);[31] *Randle v. City of Aurora*, 69 F3d 441, 451-452 (10th Cir. 1995); *Barbour v. Merrill*, 48 F3d 1270, 1277 (DC Cir. 1995); *EEOC v. Ethan Allen, Inc*., 44 F3d 116, 120 (2nd Cir. 1994); *Howard v. B P Oil Co., Inc*., 32 F3d 520, 526 (11th Cir. 1994); *Gaworski v. ITT Commercial Fin. Corp*., 11 F3d 1104, 1110 (8th Cir.), *cert denied* 513 US 946 (1994); *Anderson v. Baxter Healthcare Corp*., 13 F3d 1120, 1124 (7th Cir. 1994); *Mitchell v. Data General Corp*., 12 F3d 1310, 1317 (4th Cir. 1993); *Washington v. Garrett*, 10 F3d 1421, 1433 (9th Cir. 1993) ("Because, as *St. Mary*'s recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff establishes a *prima facie* case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment."). *See especially*, *Risch v. Royal Oak Police Dept*., 581 F.3d 383, 390-394 (6th Cir. 2009); *Abbott v. Crown Motor Co., Inc*., 348 F.3d 537, 542-545 (6th Cir. 2003) (reversing summary judgment to employer); *Hopson v. Daimler Chrysler Corp*., 306 F.3d 427, 433-438 (6th Cir. 2002) (reversing summary judgment to employer); *Kline v. Tennessee Valley Authority*, 128 F3d 337, 343-352 (6th Cir. 1997); *Tinker v. Sears Roebuck & Co*., 127 F3d 519, 524-525 (6th Cir. 1997); *Talley v. Bravo Pitino Restaurant, Ltd*., *supra* at 1248; *but see*, *Noble v. Brinker International, Inc*., 391 F.3d 715, 724-728 (6th Cir. 2004).

In *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133 (2000), the Supreme Court addressed the type and amount of evidence necessary to sustain a jury verdict in an individual disparate treatment case under the ADEA. The Supreme Court also commented in *Reeves* on principles applicable generally to motions for judgment as a matter of law, noting that "the standard for granting summary judgment [under Rule 56] 'mirrors' the standard for judgment as a matter of law." *Id*. at 150 (citation omitted).

Addressing what appeared to be differing approaches among the circuits about the evidence a court is to consider in ruling on a motion for judgment as a matter of law, the Court held that the trial court must review all of the evidence in the record. In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence . . . . Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. . . . That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from disinterested witnesses." *Id*. at 150. (internal citations omitted)

Reeves also clarified the application of its earlier decision in *St. Mary's Honor Center v. Hicks, supra*. In *Reeves*, the court of appeals had proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendants' legitimate, non-discriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination. *Id*. at 146. The Supreme Court concluded that "(i)n so reasoning, the Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." *Id*.

The Supreme Court emphasized what it had said in *St. Marys*: while the fact finder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff, it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation:

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.

Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. *Id*. at 147-148 (internal citations omitted).

The Court went on to say that such a showing by the plaintiff will not *always* be adequate to sustain a jury's finding of liability. *Id*. Rather, the appropriateness of judgment as a matter of law in any particular case will depend on a number of factors, including the strength of the prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. The Court refrained from enumerating all circumstances and factors that might be weighed in this analysis. It observed by way of example, however, that the employer would be entitled to judgment as a matter of law if the record conclusively revealed some other nondiscriminatory reason for the employer's decision or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. Instead, the Court simply concluded that because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals had erred in proceeding from the premise that a plaintiff must always introduce additional independent evidence of discrimination. *Id*. at 149.

CONCLUSION

Defense motions for summary judgment have become "inevitable" in employment litigation. Anxious to avoid jury trials, employers and their attorneys file motions for summary judgment in nearly every case. These motions play a critical role in employment litigation because they determine whether or not the applicant/employee will ever get to tell her story to a group of his peers.

Successful prosecution of an employee's claim(s) often depends upon defeating the employer's inevitable motion for summary judgment. In order to do so, Plaintiff's counsel must anticipate the employer's motion at every step in the process, including the evaluation of the plaintiff' s claims, the drafting of a complaint, and the conduct of discovery, particularly the preparation of the plaintiff for her deposition. Once the employer's motion for summary judgment has been filed, plaintiff's counsel must carefully scrutinize the motion and all the supporting papers for compliance with the rules and then prepare an effective response, drawing upon the applicable court rules, the "procedural" caselaw which has developed as well as the underlying "substantive" law.

—END NOTES—

18 Rule 56(c)(1)(A) has been viewed as incorporating a "specificity requirement," under which a party opposing a properly supported motion for summary judgment has an obligation to identify specific facts showing a genuine issue for trial. *Crossley v. Georgia Pacific Corp*., 355 F.3d 1112, 1113-1114 (8th Cir. 2004). Merely attaching six complete deposition transcripts to a response and inviting the district judge to read them in their entirety, without designating which specific facts contained therein created a genuine issue as to pretext or established a reasonable inference of retaliation, did not satisfy the Rule 56 specificity requirement. *Id*.

19 Keep in mind that the United States Supreme Court has acknowledged that "even in the absence of a factual dispute, a district court has the power to 'deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.'" *Lind v. United Parcel Service, Inc*., 254 F.3d 1281, 1285 (11th Cir. 2001), quoting in part, *Black v. J. I. Case Co*., 22 F.3d 568, 572 (5th Cir. 1994), quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986) (and cases cited therein).

20 As indicated above, a verified complaint may be treated as an affidavit, assuming it otherwise meets the requirements of Rule 56(c)(4). See *Ford v. Wilson*, 90 F3d 245, 247 (7th Cir. 1996), cert denied, 520 US 1105 (1997); *Schroeder v. McDonald*, 55 F3d 454, 460 (9th Cir. 1995); *Hooks v. Hooks*, 771 F2d 935, 946, (6th Cir. 1985). However, as the language of Rule 56(c)(1)(A) makes clear, an employee may not rely exclusively upon the allegations of her complaint to create the issue(s) of fact essential to defeat the employer's motion for summary judgment. *Schoch v. First Fidelity Bancorporation*, 912 F2d 654, 657 (3rd Cir. 1990).

21 Under such circumstances, an alternative strategy is for the applicant/employee to file a cross-motion for summary judgment. This strategy is best reserved for those exceptional cases where the facts are clearly undisputed and the issue dividing the parties is really a question of law. The obvious downside to such an approach is that the jury will play no role in the resolution of liability issue(s). Moreover, assuming that the employer's motion for summary judgment is later granted, filing a cross-motion for summary disposition will make it more difficult for plaintiff to argue persuasively on appeal that factual issues remain for trial. But see, *BF Goodrich Co. v. US Filler Corp*., 245 F.3d 587, 593 (6th Cir. 2001) ("when parties file cross motions for summary judgment, 'the making of such contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination, (of) whether genuine issues of material fact exist.'" (citation omitted); *Itco Corp. v. Michelin Tire Corp*., 722 F2d 42, 45 n 3 (4th Cir. 1983), *cert denied*, 469 US 1215 (1985) (Court is not permitted to resolve genuine issues of material fact on a motion for summary judgment, even where both parties have filed cross motions for summary judgment).

22 Although Rule 56(h) provides for an award of reasonable expenses, including attorneys' fees, against a party who submits an affidavit or declaration in bad faith or solely for delay, at least one appellate court has concluded that an employee's summary judgment declaration which indirectly contradicted his earlier deposition testimony was not submitted in bad faith or solely for the purpose or delay as would justify an award of attorney's fees under Rule 56(h). *Turner v. Baylor Richardson Medical Center*, 476 F.3d 337, 349 (5th Cir. 2007).

23 An instructive example is *Catrett v. Johns-Manville Sales Corp*., 826 F2d 33 (DC Cir. 1987), the D.C. Circuit decision overturning summary judgment on remand from the Supreme Court's *Celotex* opinion. In responding to defendant Celotex's Rule 56 motion, plaintiff Myrtle Catrett put forward a letter from T.R. Hoff, an employee of the decedent Catrett's employer, to a Mr. O'Keefe of Aetna Casualty & Surety, the employer's insurer and stated in a supplemental answer to interrogatories an intention to call Mr. Hoff as a witness at the trial. The letter reported that Catrett worked for the employer for one year and that his duties were supervising and training new workers in the application of an asbestos product, Firebar Fireproofing. The majority of a divided D.C. Circuit panel ruled that the trial court could consider the Hoff letter, even if inadmissible, because the document was ultimately reducible to an admissible form through Hoff's projected appearance as a witness at trial. While the *Catrett* majority also emphasized that "Celotex never objected to the District Court's consideration of the Hoff letter," *Id*. at 37, it would be inaccurate to suggest that the only reason the document could be considered was because of Celotex's waiver of objection. Rather, it appears equally dispositive that the hearsay declarant, Hoff, was listed by the plaintiff as a trial witness. Because Rule 56(c) clearly permits consideration of "answers to interrogatories," there is no doubt that the Hoff evidentiary input was potentially admissible at trial. This would seem consistent with Justice Rehnquist's earlier *Celotex* opinion, which appeared far more concerned with the content of summary judgment evidence than its form.

24 In preparing affidavits for the plaintiff or other critical fact witnesses, plaintiff's counsel must also be mindful of the purposes to which such affidavits will be put by the employer, assuming its motion for summary judgment is denied. Such an affidavit will undoubtedly be used for purposes of cross-examination at trial, should the affiant's trial testimony deviate from the affidavit in any material respect. See FRE 613; 801(d)(1)(A).

25 The Sixth Circuit has also recognized a trial court's discretion to consider opposing affidavits submitted in an untimely fashion. See *Hooks v. Hooks*, 771 F2d 935, 946 (6th Cir. 1985). However, unless objection is waived or an enlargement of time is sought under Rule 6(b), a court is usually limited to considering affidavits or other summary judgment evidence filed seven days prior to the hearing on the motion. See Fed. R. Civ. P. 6(c)(2); *Lujan v. National Wildlife Federation*, 497 US 871, 895-898 (1990).

26 Another provision of revised Rule 56 is Rule 56(e), which provides an alternative to granting the employer's motion when the court decides that plaintiff has failed to properly address the employer's assertion of fact:

> (e) Failing to Properly Support or Address a Fact: If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
>
> (1) give an opportunity to properly support or address the fact;
>
> (2) consider the fact undisputed for purposes of the motion;
>
> (3) grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

27 Rule 56(g) provides as follows:

> (g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact – including an item of damages or other relief – that is not genuinely in dispute and treating the fact as established in the case.

28 While a Court retains jurisdiction to modify an order granting partial summary judgment under Rule 56(g), the court must first inform the parties and provide them an opportunity to present evidence with respect to the newly revived issue. *Alberty-Velez v. Corporacion de Puerto Rico Para La Difusion Publica, et al*., 242 F.3d 418, 421-426 (1st Cir. 2000).

29 The Eighth Circuit also made the following observation about summary judgment generally in employment discrimination cases:

> As we noted in *Crawford* [*v. Runyon*, 37 F3d 1338 (8th Cir. 1994)], discrimination cases are frequently not supported by direct evidence. Because plaintiffs must often rely on inferences, and because courts should not grant summary judgment unless the evidence could not support any reasonable inference for the non-movant, we cautioned that "summary judgment should seldom be used in employment-discrimination cases." 37 F3d at 1341.

30 *But see Torgerson v. City of Rochester,* 643 F.3d 1031, 1043-1044 (8th Cir. 2011) ("(s)ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action;" moreover, "(t)here is 'no discrimination case' exception to the application of summary judgment, which is a useful pretrial tool to determine whether any case, including one alleging discrimination; merits a trial.")

31 "We routinely expect that a party give honest testimony in a court of law; there is no reason to expect less of an employer charged with unlawful discrimination. If the employer fails to come forth with the true and credible explanation and instead keeps a hidden agenda, it does so at its own peril. Under those circumstances, there is no policy to be served by refusing to permit the jury to infer that the real motivation is the one that the plaintiff has charged."

Sheridan, 100 F3d at 1069 ■

APPELLATE REVIEW OF MERC CASES

(APRIL 2015–FEBRUARY 2016)

(Part II)

D. Lynn Morison and Ashley M. Olszewski
Michigan Bureau of Employment Relations

IV. OTHER DUTY TO BARGAIN ISSUES

A. *Port Huron Education Association v Port Huron Area School District,*

(Michigan Court of Appeals, Docket No. 325022, 29 MPER 55, issued February 16, 2016, Judges Hoekstra, Meter and M. J. Kelly; MERC Case No. C10 J-255, decision issued November 19, 2014; 28 MPER 45.)

In an unpublished opinion, the Court of Appeals affirmed MERC's finding that the employer did not violate its duty to bargain under PERA by unilaterally subcontracting bargaining unit work performed by school psychologists.

The union and the employer were parties to a collective bargaining agreement that expired August 15, 2010. Six school psychologists were included in the bargaining unit represented by the union. In order to generate cost savings, the employer decided to contract with its local intermediate school district (ISD), the Regional Educational Service Agency of St. Clair County (RESA), to provide psychological services to its students. The union requested information from the employer regarding its decision, and after initially denying that it was transferring school psychologists to the RESA, the employer informed the union that it intended to obtain psychological services from the RESA. As a result, the six school psychologists were laid off at the end of the 2009-2010 school year, and the union filed an unfair labor practice charge.

The ALJ found that the employer did not have an obligation under PERA to bargain with the union over the decision to enter into an arrangement with the RESA to provide psychological evaluations and testing for the employer's special education students because the union failed to make a timely bargaining demand. The ALJ also held that the employer did not violate PERA by failing to provide the union with information about the subcontracting of unit work. Relying on *Bay City Educ Ass'n v Bay City Public Sch*, 430 Mich 370, (1988), the ALJ found that the employer's transfer of the employer's responsibility for providing psychological services was a matter of managerial prerogative. The ALJ explained that the obligation to provide psychological services to special education students was a responsibility of the ISD as well as that of the local school system. Therefore, requiring the employer to bargain over its decision to contract with the RESA would conflict with the employer's right to make decisions about educational policy and interfere with the RESA's ability to meet its own responsibilities under the School Code.

Agreeing with the ALJ's findings, the Commission stated that once a local school board transfers responsibility to its ISD, the ISD controls the manner in which the work is performed. The employer's decision to contract with the RESA to provide psychological evaluations and testing for special education students was an educational policy decision as provided for by MCL 380.1751, and, therefore, was not subject to the duty to bargain. The Commission agreed with the ALJ that the employer did not breach its duty to bargain by failing to provide the union with information because the employer did provide the information that was specifically requested by the union. The employer's initial assertion that there was no evidence to support the claim that the school psychologist positions were being transferred was a true statement when it was made and, therefore, was not an unlawful denial of the union's request for information.

On appeal, the Court disagreed with the union's contention that the employer was required to bargain before transferring work to the RESA and found the ALJ's and the Commission's reliance on *Bay City Educ Ass'n v Bay City Public Sch,* 430 Mich 370, (1988) to be persuasive. The Court agreed with the rationales stated by MERC and the ALJ for concluding that requiring the employer to bargain with the union over contracting with the RESA would conflict with the employer's right to make decisions about educational policy and interfere with the RESA's ability to perform its own statutory duties under the School Code. Accordingly, the Court found that the employer did not have a duty to bargain over the decision to enter into an arrangement with the RESA to provide psychological evaluations and testing for Respondent's special education students. The union also argued that MERC erred by finding that it failed to make a timely demand to bargain. Given its decision that the employer was not obligated to bargain with the union regarding its contract with the RESA, the Court found that the issue is moot. Nevertheless, the Court found no error in MERC's decision; it noted the union executive director's testimony that she was aware that the school psychologists might be laid off, but she did not demand to bargain over the issue. The Court also failed to find merit in the union's argument that the employer failed to provide documents in response to the union's requests for information. Again, the Court pointed to the executive director's admissions. She acknowledged that the responses she received to two of her three letters to the employer were both truthful at the time and that the employer provided her with all the information she requested in its response to her third letter. Accordingly, the Court affirmed MERC's decision

V. REPRESENTATION AND UNIT PLACEMENT

A. *Faust Public Library v AFSCME Council 25,*

(Michigan Court of Appeals, Docket No. 318467; issued July 23, 2015; 29 MPER 6, Judges Jansen, Meter and Beckering; MERC Case No. R09 D-053, decision issued September 16, 2013; 27 MPER 19.)

AFSCME Council 25 filed an election petition seeking to represent a unit of employees of the Faust Public Library. An election was conducted and a majority of the employees rejected the union. The union then filed an unfair labor practice charge alleging that the employer had retaliated against employees for engaging in union activity and interfered with the election. To settle the matter, the union and the employer agreed that a new election would be held in which the employer promised to remain neutral. A new election was conducted; thirteen eligible voters voted for the union and thirteen eligible voters voted against the union. The employer had challenged the ballots of three employees, K, M and H, asserting that each of the three was a supervisor who should be excluded from the unit. The union did not dispute that two of these employees, K and M, were supervisors. The only position whose supervisory status remained in dispute was H, the head of children's services.

The Commission found that the head of the children's services department position, held by H, did not qualify as a statutory supervisor because she did not perform duties indicative of supervisory status. She was not involved in hiring or firing, never disciplined or recommended discipline of an employee, and was never told that she was expected to participate in hiring, firing, or disciplining employees. The Commission ordered that her ballot be opened and counted with the election results.

On appeal, the employer challenged MERC's findings as to H's status. The Court of Appeals agreed with MERC that H's po-

sition was non-supervisory. The employer also argued that MERC erred by rejecting its alternative contention that the three department head positions must all be deemed either supervisory or nonsupervisory. During the proceedings before the ALJ, since the employer and the union both asserted that the positions held by K and M were supervisory, the ALJ did not allow the employer to present evidence concerning the duties and responsibilities of the other two department heads. The employer contended that the ALJ erred by failing to let it present evidence that the duties and authority of the three department head positions were identical. The Court of Appeals agreed with the employer to the extent that the employer contended that it should have been permitted to present evidence concerning the other two positions. The Court found that MERC was obligated to separately determine whether each of the three department heads were eligible voters, and found that MERC erred by precluding the employer from presenting evidence relevant to the supervisory or non-supervisory status of K and M. As a result, the Court vacated the portions of MERC's decision that refused to consider the employer's alternative claim. The Court remanded the matter to MERC for it to consider the status of K and M, and determine whether each individual is an eligible voter.

VI. UNFAIR LABOR PRACTICE CHARGES ALLEGING INTERFERENCE WITH OR DISCRIMINATION FOR PROTECTED CONCERTED ACTIVITY

A. *AFSCME Council 25, Local 1583 v James Yunkman, Glen Ford and Fred Zelanka,*

(Michigan Court of Appeals, Docket Nos. 320626, 320655, 320658, 324291, 324323, 324350, May 26, 2015, 28 MPER 80, Judges Murphy, Stephens and Gadola; MERC Case Nos. CU13 C-011, CU13 C-012, CU13 C-013, decision issued October 8, 2014, 28 MPER 33; MERC Case Nos. CU10 G-032, CU10 G-033, CU10 G-034, decision issued February 12, 2014, 27 MPER 48.)

In an unpublished opinion consolidating the charging parties' appeals of two MERC decisions, the Court of Appeals affirmed MERC's findings in each case. The Court agreed with MERC's conclusion that the union did not violate its duty of fair representation.

James Yunkman, Glen Ford, and Fred Zelanka (charging parties) were employees of the University of Michigan and members of AFSCME Council 25 (the union). The charging parties circulated a decertification petition to have the union removed as their representative. By doing so, the union alleged that the charging parties violated its constitution, and initiated a series of trials against them. As a result, the charging parties were expelled from the union. They subsequently filed unfair labor practice charges. Years later, but before MERC rendered its decision on the first matter, a contract ratification election was held. The union barred the charging parties from voting since they were no longer union members. The charging parties then filed their second unfair labor practice charge.

The ALJ found that the charging parties' expulsion from the union was an internal union matter outside the scope of PERA. Thus, the ALJ concluded that the charge failed to state a claim upon which relief could be granted and recommended that the charge be dismissed. In their exceptions, the charging parties contended that the union failed to follow procedural rules in its internal trial processes and asserted that the union violated the Elliot-Larsen Civil Rights Act (ELCRA), the Labor Management Reporting and Disclosure Act (LMRDA), and the National Labor Relations Act (NLRA). The Commission agreed with the ALJ's findings, and did not find merit to charging parties' exceptions. It ruled that because the union's actions did not have a direct effect on the terms and conditions of the charging parties' employment, the union did not violate PERA by expelling them from union membership.

On appeal, the Court of Appeals agreed with MERC and found that the union has the right under PERA to prescribe its membership rules. Although the charging parties sought to challenge MERC's conclusion that it had no jurisdiction over internal union matters, the Court found that the charging parties' arguments were insufficient to justify "substantively address[ing], let alone possibly overrul[ing] numerous decisions by the MERC regarding internal matters, absent properly preserved arguments and adequate briefing." The Court agreed with the Commission that the charging parties failed to state a claim upon which relief can be granted because internal union matters are outside the scope of PERA, as are any claims under ELCRA, LMRDA, or the NLRA.

In the second case, the Commission agreed with the ALJ's finding that the union did not violate its duty of fair representation by refusing to allow the charging parties to vote in the contract ratification election because they were not union members. The Commission held that because it previously determined that the union's prior expulsion of the charging parties from the union was lawful, the doctrine of collateral estoppel prohibited the charging parties from litigating that matter again. On appeal, the Court of Appeals agreed with the Commission's findings. The Court found that each element of collateral estoppel was satisfied, and therefore, the charging parties were barred from re-litigating the issue as to whether the union properly expelled them from membership. The Court of Appeals added that there is no provision in PERA that supports the charging parties assertion that non-members have a protected right to vote in a ratification election. The Court therefore affirmed MERC's finding that the union did not breach its duty of fair representation.

B. *AFSCME Council 25, Local 2394 v Neil Sweat,*

(Michigan Court of Appeals, Docket No. 323933, issued February 2, 2016, Judges Shapiro, O'Connell and Borrello; MERC Case No. CU10 I-039, decision issued September 11, 2014, 28 MPER 25.)

In an unpublished opinion, the Court of Appeals affirmed MERC's dismissal of the unfair labor practice charge, which alleged that the union violated its duty of fair representation.

The charging party, Neil Sweat, was an employee of the Detroit Housing Commission and was a member of the bargaining unit represented by the union, AFSCME Local 2394. As part of his job duties, Sweat was solely responsible for the timely processing of tenants' rent checks. In 2008, Sweat was suspended for failing to process to rent checks and failing to perform certain other duties. Sweat grieved the suspension with the union's assistance. In 2009, he failed to turn in a batch of rent checks that he was responsible for collecting. As a result, his employer erroneously assessed tenants $750 in late fees. When the checks were discovered later, the Employer had to remove the assessments from the tenants' accounts. As a result of these infractions, Sweat was suspended. The union grieved the suspension, Sweat's employer denied the grievance as untimely and he was discharged. The union contended that there was a basis in the contract for finding that the grievance was timely. However, the union ultimately decided not to pursue the matter to arbitration after determining that the grievance otherwise lacked merit. Sweat then filed an unfair labor practice charge alleging that the union violated its duty of fair representation by failing to take the matter to arbitration.

The ALJ found that Sweat failed to provide any evidence to show that the union violated its duty of fair representation, and

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(Continued from page 11)

failed to allege facts establishing that the union's decision to not advance the grievance to arbitration was arbitrary, discriminatory or in bad faith. The Commission agreed with the ALJ's findings and dismissed the charge.

On appeal, the Court found that the union did not breach its duty of fair representation by failing to advance Sweat's grievances to arbitration. After a recitation of the law concerning duty of fair representation claims, the Court stated that a union has "considerable discretion" to determine which grievances it should arbitrate, and has the right to assess each grievance on its individual merit. The Court particularly noted that for an individual to "prevail on a claim of unfair representation, the employee must establish not only a breach of the duty of fair representation but also a breach of the collective bargaining agreement." Finding that the ALJ correctly noted that Sweat's employer was entitled to suspend him in 2008, and to terminate him one year later, the Court found that Sweat failed to demonstrate a contract breach by his employer. Thus, the Court explained that without demonstrating a contract breach, Sweat could not prevail on his duty of fair representation claim against the union. The Court also found that Sweat did not provide evidence to demonstrate that the union's failure to arbitrate Sweat's grievance was hostile, discriminatory, arbitrary, or in bad faith. The Court concluded that Sweat failed to offer any evidence that was sufficient to create a question of material fact as to whether the union breached its duty of fair representation and affirmed MERC's dismissal of the charge.

C. *Detroit Housing Commission –and- Neil Sweat,*

(Michigan Court of Appeals, Docket No. 323453, issued February 2, 2016, Judges Shapiro, O'Connell and Borrello; MERC Case No. C11 C-051, decision issued August 14, 2014, 28 MPER 10.)

In an unpublished opinion, the Court of Appeals affirmed MERC's dismissal of the unfair labor practice charge and found that the charging party, Neil Sweat, failed to state a claim upon which relief could be granted under PERA.

Sweat was an employee of the Detroit Housing Commission and a member of a bargaining unit represented by AFSCME. In 2008, after failing to complete his job duties adequately, Sweat was placed on a thirty-day suspension. In 2009, Sweat was terminated by the employer for failing to timely process rental checks, resulting in $750 in late fees erroneously assessed to tenants. It was not until March 2011, that Sweat filed an unfair labor practice charge alleging that his termination was wrongful and that the employer discriminated against him due to his age and disability.

The ALJ dismissed the charge as untimely because Sweat had been fired by the employer in May 2009, but did not file his charge until March 2011. Sweat asserted that his charge was timely, and contended that he had to exhaust his internal union remedies before filing an unfair labor practice charge. Since the six-month limitations period is statutory, the Commission concluded that Sweat's charge was time-barred. Accordingly, the Commission agreed with the ALJ's conclusion that Sweat failed to state a claim upon which relief could be granted under PERA and dismissed the charge.

On appeal, Sweat contended that the Commission erred in failing to find that the employer had committed an unfair labor practice. Agreeing with the Commission's findings, the Court found that Sweat failed to state a cognizable claim under PERA. The Court pointed out that Sweat did not assert that he was engaged in PERA protected activity, and failed to plead any facts to establish that involvement in union activity resulted in his termination. The Court explained that, under PERA, an employee may be discharged for any reason or no reason as long as the employee is not discharged for exercising rights protected by § 9 of PERA. Sweat also contended that the Commission erred in dismissing his charge because he raised a hybrid claim in which he alleged that his employer violated the collective bargaining agreement and his union breached its duty of fair representation. The Court found no merit to that claim and explained that treating Sweat's charge as a hybrid claim did not give MERC jurisdiction over a claim that did not involve an unfair labor practice under PERA. The Court explained that Sweat's pleadings failed to allege that his termination was for reasons prohibited by § 10(1) of PERA. The Court concluded that no factual development could justify Sweat's claim for relief under PERA. Having decided that Sweat failed to state a claim upon which relief could be granted under PERA, the Court noted that it did not need to address the statute of limitations issue. ■

MICHIGAN SUPREME COURT UPDATE

Richard Hooker
Varnum

***Arbuckle v General Motors LLC*, 2016 WL 3866110 (Mich, 7/15/16), rev'g Mich App No. 310611 (2/10/15 - unpub)**

This case arose over Defendant GM's coordination of Plaintiff's open worker's compensation award with disability pension benefits Plaintiff also received from GM's pension plan. Plaintiff had begun receiving both benefits upon his retirement in 1993, but no coordination of the two benefits had occurred prior to 2010, due to GM's commitments in a series of collective bargaining agreements it would not do so. Such contractual commitments are permissible under MCL 418.354(14), the section of the Workers Disability Compensation Act that otherwise calls for coordination.

With GM's impending bankruptcy in 2009, however, it agreed with the UAW to amend the pertinent contractual commitment and begin coordinating the two benefits for "…*all* retirees who retired prior to January 1, 2010, regardless of their date of retirement or date of injury…." (*emphasis* in original). Plaintiff then brought this action in the Workers Compensation forum, protesting the newly instituted coordination of benefits. Eventually, the Michigan Compensation Appellate Commission found coordination proper, but the Court of Appeals reversed.

Following GM's Application For Leave to Appeal, the Supreme Court first requested briefing on the questions of whether plaintiff's action is preempted by federal law and whether the action is governed by state or federal law. Once it was satisfied the answers were "yes" and "federal law," the Court went on to find that coordination of the two benefits was permissible under GM's 2009 agreement with the UAW, since Plaintiff's "right" to be free from coordination had expired with the 1990-1993 collective bargaining agreement in effect when he had retired. The Court also relied on the U.S. Supreme Court's holding in *M&G Polymers*, 574 US ____, 135 S.Ct. 926 (2015), generally disfavoring any presumption of vesting with regard to "status benefits" such as retiree medical coverage.

[*Practioners' Note*]: The Court's Opinion contains an excellent recitation of the law on federal preemption in the labor relations context, a Union's authority to bargain over benefits given to past retirees, and the concurrent jurisdiction of state and federal courts to hear claims governed by federal law.

***Altobelli v Hartmann, et al,* 498 Mich 284 (2016); *rev'g*, 307 Mich App 612, 861 NW2d 913 (2014)**

Plaintiff here was a Senior Principal in the Miller Canfield law firm and a dispute arose in the context of his wish to take a leave of absence to work as an Assistant Football Coach at the University of Alabama. After initiating the arbitration process specified in the firm's Operating Agreement, he then brought suit in Ingham County against several Managing Principals of the firm in their individual capacities on a variety of tort theories. Both the trial court and the Court of Appeals spurned the Defendant's arguments that Plaintiff was bound by the Operating Agreement to arbitrate his claims.

In a unanimous Opinion, the Court reversed and remanded the matter to the trial court for the purpose of ordering the parties into arbitration. Citing the opinions of multiple federal circuits, the Court noted that business entities can only act through their employees and an arbitration agreement would be of little value if it didn't extend to them when acting in their official capacities. The Court went on to analyze a) *who* was included in the scope of the arbitration clause and b) *what* subject matter was covered by the arbitration clause, deciding both issues in favor of arbitration and, therefore, the Defendants.

The lesson for practitioners is perhaps obvious, but bears repeating: draft arbitration clauses broadly with regard to the *who* and the *what*.

***Mich Ass'n of Gov'tal Employees v State of Michigan & Office of the State Employer*, 499 Mich 931 (2016), *rev'g & rem'g*, COA No. 304920 (unpub 6/20/13)**

This case involved a claim by non-UAW represented state employees and Plaintiff, who enjoys limited recognition for the purpose of representing those employees. Under various Michigan Civil Service Rules, Defendant Office of the State Employer (OSE) is required to meet and confer with such employees on the matter of their compensation. Those Rules also permit the parties to enter into a consensus agreement to recommend compensation adjustments to the Civil Service Commission's Coordinated Compensation Panel (CCP), which then makes compensation recommendations to the Commission. Under Const. 1963, Article 11, §5, the Commission is given plenary authority to set the employees' terms and conditions of employment.

In 2007, the parties reached a concensus agreement on compensation for fiscal years 2009-2011: 0%; 1%; and 3%. All went well thereafter, until the Commission, based on OSE's recommendation, decided no increase for 2011 was the appropriate decision.

Plaintiff then brought companion proceedings against Defendants: 1) unfair labor practice charges before MERC; and 2) breach of contract and other claims before the Court of Claims. MERC found Defendants had refused to bargain in good faith, but opined it had no authority to order compensation as backpay. The Court of Claims granted summary disposition to Plaintiff on its breach of contract claim and reserved the issue of damages for trial. On appeal by the Defendants, the Court of Appeals affirmed.

The Supreme Court, in lieu of granting leave to appeal, reversed the Court of Appeals and remanded the matter to the Court of Claims for issuance of an order granting Defendants summary disposition. The Court noted the Commission's "plenary and absolute" authority to set rates of compensation and determine the procedures by which it makes those decisions, going on to hold:

> The plaintiff's breach of contract claim arises out of the exclusive constitutional authority of the Civil Service Commission to 'fix rates of compensation' for the classified service. ***. Judicial incursion into that process is 'unavailing." ***

[Author's Note: so much for the power of MERC and the rights of limited recognition and representation!]

***Innovation Ventures LLC v Liquid Manufacturing LLC, et al*, 2016 WL 3765943 (Mich, 7/14/16), *rev'g,* Mich App No. 315519 (2014).**

This case involved the popular "5 Hour Energy" drinks. It also involved a very complex factual scenario and the Plaintiff's attempts to enforce multiple nondisclosure and noncompetition covenants against multiple Defendants in the context of multiple commercial contracts between Plaintiff and Defendants. The trial court had granted and the Court of Appeals affirmed summary disposition for Defendants K&L Development and Krause, finding both a lack of consideration and the restrictive covenants' unreasonableness. The courts also approved summary disposition for Defendant Liquid Manufacturing, primarily due to their mutual finding Liquid Manufacturing had permission from Plaintiff to manufacture the subject products.

The Supreme Court reversed, finding: 1) there had been consideration as between Plaintiff and Defendants because the parties had actually performed under the contracts containing the restrictive covenants; 2) the restrictive covenants themselves were not unreasonable under applicable legal standards; 3) there existed material issues of fact as to whether K&L had breached the nondisclosure covenant; and 4) there existed material issues of fact as to whether Liquid Manufacturing had violated the noncompetition covenant by manufacturing certain of the subject products.

Of singular significance to the legal profession, however, is the Court's ruling that the standards for enforceability of restrictive covenants in employment agreements do not apply to such restrictive covenants in general commercial contracts between business entities. The latter, the Court held, are governed by a "rule of reason" commonly invoked by federal courts, citing most prominently, the U.S. Supreme Court's opinion in *State Oil Co v Khan,* 522 US 3, 118 S.Ct. 275 (1997) ("…[Courts] must 'tak[e] into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature and effect.") and the Sixth Circuit's opinion in *Perceptron, Inc v Sensor Adaptive Machines, Inc*, 221 F3d 913, 919 (6th Cir 2000). *Innovation Ventures, supra,* Slip Op at 20-21.

<u>One to Watch?</u>

***AFT Michigan, et al v State of Michigan, et al*, 2016 WL 3176812 (Mich App, 6-7-16), *on rem,* 497 Mich 197; 866 NW2d 782 (2015).**

In 2015, the Supreme Court unanimously affirmed lower court holdings and rejected a constitutional challenge to 2012 PA 300, the legislature's response to the Plaintiffs' earlier constitutional challenge of that Act's predecessor, 2010 PA 75. The Supreme Court then remanded the case to the Court of Appeals for decision on any remaining aspects of the case, including the earlier constitutional challenge. (*See, LaborLawNotes, ____ 2015 Issue*).

The Court of Appeals issued its decision on remand June 7, the majority finding the matter was not moot and ruling 2010 PA 75 constitutionally infirm on Contracts Clause, Takings Clause and Due Process bases. Since Judge Saad filed a well-crafted, separate opinion concurring on the issue of mootness but dissenting on the constitutional issues, it is not surprising an Application for Leave to Appeal from Plaintiff has been granted. 882 NW2d (Mich, 8/12/16). ■

LEGAL CHALLENGES TO FOLLOW — FEDERAL AGENCIES TRY TO EXPAND JOINT EMPLOYER LIABILITY

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A number of federal government agencies have aggressively tried over the tenure of the Obama Administration to expand their power through regulatory changes, agency interpretations, and enforcement policies. Earlier this year, the Department of Labor's (DOL's) Wage and Hour Division, through its Administrator's Interpretation (AI), expanded the circumstances under which a company can be deemed a joint employer under the Fair Labor Standards Act (FLSA) over workers the company believes were employed by a separate sourcing or staffing entity with which it contracts (www.dol.gov/whd/jointemploymentai.pdf). This comes on the heels of the National Labor Relations Board's (NLRB's) efforts to hold McDonald's responsible for alleged labor violations by its independently owned franchisees. And the NLRB's 2015 decision in *Browning-Ferris Industries of California*, 362 NLRB No. 186, purported to lighten the requirements for showing joint employer status under the National Labor Relations Act (NLRA) between an employer and a staffing firm's employees.

Joint employment is not expressly defined in the FLSA or in the NLRA. Joint employment for FLSA purposes, according to the DOL, involves a situation where a worker stands in an employment relationship to two or more persons at the same time. All joint employers become jointly and individually responsible for full compliance with the FLSA, including overtime pay. Unwitting joint employers may find themselves embroiled in a wage and hour action by workers they never thought they employed. For example, hours performed by an employee for subcontractor-employer "A" may be aggregated with hours performed for manufacturer-joint employer "B" for overtime purposes. Some employers who are perceived as "deep pockets" may be pulled into wage and hour lawsuits by employees of defunct or noncompliant subsidiaries, franchisees, subcontractors, or staffing firms.

Over the past 70 years, courts and the DOL have struggled to consistently articulate a test for determining joint employment. As a general matter, tests have evolved over time from narrow "control" factors to a broader view of the "economic reality" of the relationship between the putative joint employers. Federal appellate courts have adopted a variety of multi-factor tests, some centering on "control," e.g., power to hire and fire, supervise, schedule, determine rates, maintain records, etc.; and others looking more broadly at such "economic reality" factors as opportunity for profit or loss, investment in equipment, ownership of facilities where work occurs, and whether the jobs performed are integral to the business.

In the new AI, the Wage and Hour Division suggests that courts abandon control-based joint employer tests in favor of a single uniform list of "economic reality factors," with a focus on unassociated companies that contract with each other for the provision of services. The AI announces that "any formulation must address the 'ultimate inquiry' of economic dependence." Before addressing these "economic reality" factors, however, the AI offers the position that joint employment is automatically established where an "intermediary employer (who may be an individual responsible for providing labor) is actually an employee of the potential joint employer." The AI offers the example of a drywall subcontractor who is not actually an independent contractor but is instead an employee of the higher-tier contractor. In this scenario, the employees of the drywaller will be deemed employees of the higher-tier employer as well. Under such circumstances, "all of the intermediary employer's employees are employees of the potential joint employer too, and there is no need to conduct a vertical joint employment analysis." This per se approach by the DOL suggests caution by contracting only with a bona fide vendor who retains exclusive control over its own workers.

The joint employer factors now urged by the AI are those previously articulated in the Migrant and Seasonal Agricultural Worker Protection Act regulations:

- Directing, controlling, or supervising the work performed;
- Controlling employment conditions;
- Permanency and duration of relationship;
- Repetitive and rote nature of work;
- Integral to joint employer's business;
- Work performed on premises; and
- Performing administrative functions commonly performed by employers.

Most importantly, according to the AI, "the analysis must determine whether, as a matter of economic reality, the employee is economically dependent on the potential joint employer." Where does this end? Do the employees of a janitorial service become jointly employed by the building at which they work merely because their employer is economically dependent on its contract with the building owner?

Although the concept and characteristics of joint employment are factually and legally complex, and it is unlikely that all courts will adopt the AI's approach, there is absolutely no question where the DOL is headed. The AI unabashedly announces that its intent is to expand statutory coverage of the FLSA so that it can collect wages from larger deep-pocket businesses: "Where joint employment exists, one employer may also be larger and more established, with a greater ability to implement policy or systemic changes to ensure compliance. Thus, [the Division] may consider joint employment to achieve statutory coverage, financial recovery, and future compliance, and to hold all responsible parties accountable for their legal obligations."

The current Wage and Hour Administrator, who was appointed in 2014, has for years advocated for increased enforcement of existing employment laws and the passage of new legislation to broaden the responsibility of large companies, arguing that companies that control the quality, production, and delivery of services should also bear the responsibility for all employment issues. Apparently ignoring the more difficult and time-consuming legislative route, the Administrator has now announced the agency's enforcement priority through this AI.

The DOL's impact does not stop with the FLSA. According to its own summary, the DOL administers and enforces more than 180 federal laws, affecting 10 million employers and 125 million workers. In addition to the FLSA, the DOL's familiar statutes include the Occupational Safety and Health Act (OSHA), the Family

and Medical Leave Act (FMLA), the Employee Retirement Income Security Act (ERISA), and the Labor Management Reporting and Disclosure Act (LMRDA). The FMLA explicitly adopts definitions from the FLSA. A company that is not large enough to be covered by the FMLA (50 employees within a 75-mile radius) could find itself in an alleged joint employment relationship that, when combined with employees of a company with which it contracts, is found by the DOL to meet the coverage threshold. OSHA guidance warns that staffing agencies and host employers may be jointly responsible for maintaining a safe work environment for temporary contract workers and that both employers can be held responsible for unsafe work conditions.

Meanwhile, the NLRB continues its aggressive focus on the world's largest franchisor, McDonald's. The Board's general counsel is trying to hold McDonald's liable for any violations of the NLRA that one of its franchisees commits and also to allow workers to unionize and bargain with both the franchisee and the franchisor. The litigation began with protests by workers at a McDonald's franchise in New York City who sought higher wages and were then allegedly retaliated against by the franchisee's managers who threatened to fire the workers if protests continued. The NLRB charged McDonald's for acting in conjunction with its franchisee to retaliate by reducing hours, discharging employees, and committing other coercive conduct.

Like many fast-food businesses across the country, McDonald's contractually requires its franchisees to run restaurants in a manner that ensures consistent appearances, food products, quality, and other aspects of the business to create a common dining experience and to uphold its brand and image. To the extent this spills over into areas of employment, such as staffing systems, hiring software, and optimal scheduling, the joint employer doctrine can come into play. The outcome of the McDonald's case could have huge ramifications for franchisors throughout the country.

The NLRB is simultaneously trying more generally to broaden its joint employer test, beginning with its 2015 decision involving Browning-Ferris Industries (BFI), a waste management and recycling company that utilized a subcontractor to sort recyclable materials and clean its facility. For three decades prior to the BFI case, employers utilizing the services of temp agencies were not responsible for union organization, collective bargaining, and other NLRA-based rights of the temp agency's employees — unless the higher-tier employer exercised "direct and immediate" control over the terms and conditions of their work. In the BFI case, the Board majority concluded that joint employer status can now be shown by "indirect control," which the majority found was present there because, among other things:

- BFI required the subcontractor's workers to pass a drug screen;
- The work was performed on BFI's premises;
- The subcontractor was prohibited from hiring anyone BFI deemed ineligible for hire;
- BFI reserved the right to direct the subcontractor to discontinue the use of specific employees of the subcontractor;
- BFI's supervisors oversaw and controlled the subcontractor's employees' day-to-day activities;
- BFI set productivity standards for the subcontractor's employees;
- BFI exercised control over safety compliance; and
- BFI prohibited the subcontractor from paying its employees more than BFI paid its own employees for similar work.

The Board's dissenting members in the BFI case expressed concern about this "sea change" in labor and business relationships. The dissenters also expressed concern that the majority's reasoning could be applied to franchisor contracts, like those in the fast-food restaurant industry. Nonetheless, one can also question whether the BFI case was a good vehicle for expanding the NLRB's joint employer test, since BFI's role in the day-to-day terms and conditions of the subcontractor's employees' work was quite intricate and intense—and could well have satisfied the old joint employer test followed by the Board for the past 30 years. In any event, BFI has appealed the Board's decision, so we may soon have a federal appellate court's judgment regarding the NLRB's joint employer test.

Employers that outsource integral functions or contract for services in a way that brings the contractor's employees on site should review these relationships, including indemnification provisions in their contracts, and take appropriate steps to manage potential joint employment liabilities. ■

SIXTH CIRCUIT UPDATE

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Federal Law Applies to Determine Whether Employer Has Agreed to Arbitrate Under a CBA

In *Sheet Metal Employers Industrial Promotion Fund v Absolut Balancing Co*, Docket No. 15-1682 (July 18, 2016), several multi-employer fringe benefit funds filed a grievance alleging that a group of employers failed to contribute to the funds, as required by a collective bargaining agreement ("CBA"). The five employers named as defendants did not particulate in the arbitration proceedings, and instead sent a letter to the arbitrator maintaining that they were not parties to the CBA and thus the CBA did not apply to them. After the arbitrator issued two decisions finding the employers liable for failure to contribute to the funds, the funds filed a lawsuit to confirm the arbitration award. The U.S. District Court for the Eastern District of Michigan found that state law applied to the issue of whether the employer defendants were parties to the contract and denied cross-motions for summary judgment. On interlocutory appeal, the Sixth Circuit ruled, "[g]iven the 'central role of arbitration in effectuating national labor policy,' it is appropriate to apply federal law, not state law, to determine whether parties have agreed to arbitrate under a CBA." Thus, the Sixth Circuit reversed and remanded.

Federal Employee's Title VII Complaint Untimely When Filed One Day Late

In *Rembisz v Lew*, Docket No. 15-2279 (July 27, 2016), the EEOC served a right-to-sue notice by first class and certified mail to a former criminal investigator for the IRS on March 15, 2013, who had filed an administrative charge of discrimination. Applying a presumption that the 90-day limitations period begins to run on the fifth day after mailing, the court found that the presumptive limitations period started March 20, 2013. A certified mail receipt showed, however, that the investigator actually received the notice on March 22. Because the investigator filed his complaint on June 21, 2013, the U.S. District Court for the Eastern District of Michigan dismissed the case as untimely.

The Sixth Circuit affirmed because the case was filed 91 days after March 22. In doing so, the Sixth Circuit rejected the investigator's argument that his claim was timely because he filed it 90 days after his attorney received the notice, concluding that a final agency action is received when it is delivered to the claimant or the attorney, whichever occurs first. ■

BENEFIT SUSPENSIONS UNDER THE 2014 MULTIEMPLOYER PENSION REFORM ACT

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I. THE 2014 MPRA

Congress passed the Multiemployer Pension Reform Act ("MRPA") in the closing days of the 2014 legislative session.[1] Multiemployer (or "Taft-Hartley") pension plans – the focus of the MPRA – are plans with at least two contributing employers governed by collective bargaining agreements. Multiemployer pension plans are commonly found in the construction and trucking industries, as well as in the food, textiles, printing and publishing, and entertainment and communications industries.

Like many others, multiemployer pension plans suffered financially from the 2008 recession, and many were left underfunded, i.e., with assets actuarially-determined to be insufficient to meet vested benefit obligations. Underfunding threatens benefit payments to current and future retirees, as well as the solvency of the federal agency that guarantees pensions, the Pension Benefit Guarantee Corporation ("PBGC"). The MPRA was designed to address these problems by letting "deeply underfunded multiemployer plans avoid bankruptcy and termination, and by doing so to keep solvent the multiemployer pension insurance fund overseen by the [PBGC], the federal pension insurance program."[2]

The MPRA, among other things, allows severely underfunded multiemployer pension plans to reduce or "suspend" benefits being paid to retirees. Before the MRPA, ERISA's "anti-cutback" rule generally prohibited pension plans from reducing benefits to participants and beneficiaries in pay status.[3] But, under the MPRA, if a pension plan is in "critical and declining" status – i.e., likely to become insolvent during the next 15 years – the plan may seek Treasury Department approval to suspend benefits.[4]

But, there are limits to cuts for older retirees and participants receiving disability benefits. And, as discussed ahead, a plan may not reduce benefits below 110 percent of the PBGC premium.

Decisions about benefit suspensions have a deeply human aspect, as any benefit reduction – whether an MPRA benefit suspension or PBGC receivership – will impact retirees' lives. Many retirees are on fixed incomes, with pensions earned over many years, often by the sort of labor that exacts a serious physical toll. Still, voluntary suspensions initiated by plan trustees will often be the best alternative, preferable to insolvency.

At this writing, seven multiemployer pension plans have applied for permission to suspend benefits. Two have been denied, one has been withdrawn, and four are "in review."[5]

II. CENTRAL STATES PENSION FUND

The Central States Fund is one of – if not the – largest multiemployer pension funds in the country. It has assets of over $17 billion and covers over 400,000 participants in the trucking industry. It has also suffered financially for many years, and is in critical and declining status under the MPRA.

Central States Pension Fund submitted a September 25, 2015 application to Treasury to suspend pension benefits. The proposed suspension would have affected over 250,000 retirees, and would have cut some benefits up to 50 percent.

Treasury rejected Central States' application on May 6, 2016 because it failed to meet MPRA requirements. Specifically, Treasury found that Central States' application: (1) was not reasonably estimated to avoid insolvency, because several actuarial assumptions were not reasonable, (2) did not evenly distribute benefit reductions – there were several levels of benefit reductions – and failed to adequately explain why certain groups received less favorable treatment, and (3) called for notices to plan participants about the proposed benefit reductions that were not written in a manner "so as to be understood by the average plan participant."[6]

Central States released a statement saying it would not resubmit another plan and that "due to the passage of time, Central States can no longer develop and implement a new plan that complies" with the MRPA.[7]

The statement explained that the rejected "rescue plan was a proposal of last resort… and was based on a realistic assessment that benefit reductions under a rescue plan were the only available, practical way to avoid the hardship and countless personal tragedies that will result if the pension fund runs out of money."

For now, it's unclear what Central States' next steps will be.

III. ROAD CARRIERS PENSION PLAN

Treasury denied another multiemployer pension plan's application to suspend benefits on June 24, 2016. The Road Carries Local 707 Pension Plan sought approval to suspend benefits on March 15, 2016. The plan expects to be insolvent by February 2017.

Treasury denied the Road Carriers' application, in part, for the same reason it denied Central States application.[8] Specifically, Treasury found that the proposed benefit suspensions were insufficient to allow the plan to avoid insolvency.

IV. THE CONSEQUENCES OF DISAPPROVAL

So in essence, the Central States and the Road Carriers applications were rejected for purported failure to demonstrate that the proposed benefit suspensions were likely to be effective. As the applications were denied, it is possible that one or both of these plans will become insolvent and fall into PBGC receivership because they cannot suspend benefits.

The MPRA was designed to avoid this outcome and allow deeply troubled multiemployer pension plans a way to save themselves and provide a level of benefits higher than the PBGC maximum, while at the same time, not placing additional burdens on the already-troubled PBGC multiemployer program. The potential insolvency of both Central States and the Road Carriers has implications for both the plans themselves, and the PBGC's multiemployer program.

V. THE PBGC GUARANTEE AND THE MPRA

The PBGC is the insurer of last resort for insolvent pension plans. It has separate "insurance" programs for single employer plans and multiemployer plans. The multiemployer program is

funded solely by premiums paid by multiemployer plans. In 2015, the multiemployer program paid $103 million in financial assistance to 54,000 retires from 57 multiemployer plans.[9]

The PBGC's multiemployer program guarantees certain minimum benefits to participants in insolvent plans. That guaranteed benefit is capped at $12,870 per year.[10] For comparison, the maximum annual benefit under the PBGC's single employer program is $60,136.[11]

And like the Central States and Road Carriers, the PBGC's multiemployer program is financially troubled. This is so even though the MPRA doubled the premium multiemployer plans pay from $13 to $26 per year per individual. The PBGC's most recent five year report to Congress states:

> Although timing is uncertain, PBGC projects that current premiums will ultimately be inadequate to maintain benefit guarantee levels. However given the projected extension of the PBGC's Multiemployer Program solvency due to the [MPRA], the uncertainty of how plans will use the suspension [and other] provisions incorporated in MRPA… it is not possible to determine now what corresponding changes in PBGC's multiemployer program will be necessary or appropriate.[12]

A more recent PBGC report to Congress suggests the multiemployer program could run out of money by 2025. Further, PBGC estimates that to avoid cuts to the guaranteed benefit ($12,870), the premium may have to be increased by as much as 552 percent. Central States insolvency would likely move that timeline forward.[13]

VI. WHAT'S NEXT?

The PBGC is underfunded, and Treasury has yet to allow a multiemployer plan to suspend benefits, which is the MRPA's hallmark. Of course, benefit suspensions should not be taken lightly because of their significant impact on the retirees' lives. That is no doubt part of the reason Treasury reviews them. But voluntary suspensions by pension plans will almost certainly be less draconian than if the PBGC takes over an insolvent plan.

That's because voluntary benefit suspensions cannot be less than 110 percent of the PBGC maximum benefit. In many cases, benefit suspensions are likely to be less drastic. Central States, for instance, proposed "only" a 50 percent reduction. And, MRPA benefit suspensions have additional protections for the most vulnerable retirees, those over 80 and those receiving disability benefits.

Further, allowing pension plans to design their own "rescue" means that plan trustees – those with a fiduciary duty to participants – will make decisions about benefit reductions. This helps ensure the suspensions will be the minimum necessary to forestall insolvency (as opposed to the more "one size fits all" PBGC approach). Trustees must face participants and beneficiaries, and may know many personally, providing a strong inventive for action that will permit a plan to survive and one day reverse the suspension.[14] Finally, voluntary suspensions are intended to relieve the financially-troubled PBGC of having to fund benefits of insolvent plans.

It's possible that Treasury denied Central States and the Road Carriers applications because it genuinely believed that the proposed suspensions failed to meet MPRA requirements and will not forestall the plans' insolvency. But given the reasons outlined above, it makes sense – both to protect plan participants and the PBGC – to allow plan Trustees to exercise their discretion in making benefit cuts. It's also possible that Treasury denied these applications to hold out for a "better deal" from the plans; i.e., one that reduced benefits further to make it more likely the plans would avoid insolvency longer. But that would seem to be dangerous brinksmanship, especially given Central States' position that it will not resubmit a proposal to suspend benefits. Or maybe it's just politics.[15]

There are four more benefit suspension applications pending. Treasury's responses will be interesting. If Treasury denies these applications, and if the plans do not submit new suspension applications, PBGC receivership is a potential – perhaps even the inevitable – outcome. And PBGC cuts would be greater than the proposed benefit suspensions, and will almost certainly have a more severe negative impact on retirees.

—END NOTES—

1 The bill, attached to the Consolidated and Further Continuing Appropriations Act of 2015 (the "Omnibus Bill") was passed by Congress on December 13, 2014 and signed into law on December 16, 2014. The full text of the MRPA is incorporated into various sections of ERISA and the Internal Revenue Code.

2 SHRM Online Report, *Law to Let Multiemployer Pensions Cut Benefits Signed*, December 15, 2015, Society For Human Resource Management, *available at* https://www.shrm.org/hrdisciplines/benefits/articles/pages/multiemployer-pension-payouts.aspx.

3 *See* ERISA § 204(g), IRC § 411(d)(6).

4 *See* IRC § 432(9).

5 *See* https://www.treasury.gov/services/Pages/Plan-Applications.aspx.

6 Letter from Kenneth R. Feinberg to the Board of Trustees, Central States, Southeast and Southwest Areas Pension Plan, dated May 6, 2016, *available at* https://www.treasury.gov/services/Responses2/Central%20States%20Notification%20Letter.pdf.

7 The full statement is *available at* http://www.cspensionrescue.com/.

8 The Road Carriers application also asked to be "partitioned." Partition is another MPRA tool for troubled pension plans. It allows plans to split into two parts; an old one retaining liability, and a healthy new one. Although this procedural wrinkle distinguishes Road Carriers denial from Central States denial, the result is the same; Road Carriers application was denied because – in part since the partition wasn't granted – the proposed benefit suspensions were not sufficient to avoid insolvency.

9 PBGC Annual Report, 2015, *available at* http://pbgc.gov/Documents/2015-annual-report.pdf#page=2.

10 Multiemployer Insurance Program Facts, *available at* http://pbgc.gov/about/factsheets/page/multi-facts.html.

11 *See* PBGC Annual Report, 2015, supra note 9.

12 Every five years, the PBGC must review the multiemployer program to determine the premium levels needed to maintain current guarantee levels, and whether the guarantees levels can be increased without increasing the premiums. *See* ERISA § 4011A(f)(1). The most recent report, the PBGC Insurance of Multiemployer Plans: A Five Year Report, dated March 2016, is *available at* http://pbgc.gov/documents/Five-Year-Report-2016.pdf.

13 Bjourhus, Jennifer, *Teamsters' Pension Fund Offers no new Rescue Plan*, Minneapolis Star Tribune, pg. 2B, May 20, 2016.

14 Of course, if the suspension will not avoid insolvency, then participants would want to keep their full benefit for as long as possible in order to save money before the plan is taken over by the PBGC. For instance, one participant commented to Treasury about Central States' proposed suspensions:

> "If you're telling me that we will probably eventually go to PBGC whether we take cuts or not and that Central States is not meeting its obligation of preventing bankruptcy, then I now favor NO CUTS AT ALL.… If I'm going to end up on PBGC anyways, I'd rather keep my full benefit until then instead of being cut 50% and ending up in the same plan."

There were nearly 3,000 comments to the Central States' proposal. They are available at http://www.regulations.gov/docketBrowser?rpp=25&po=0&dct=PS&D=TREAS-DO-2015-0009.

15 *See* Letters From Members of Congress Opposing Central States Rescue Plan, February 2, 2016, *available at* http://www.cspensionrescue.com/resources-for-plan-participants/. The letter, signed by 26 U.S. Senators (along with a second letter, signed by 84 Members of the U.S. Congress) states that the Senators "have serious concerns that these devastating cuts will bring severe harm to Central States retirees and set a dangerous precedent for other pension plans around the nation." It asks "treasury to use its existing authority to protect the benefits these individuals have worked for and were promised." However, if Central States becomes insolvent, benefit cuts will almost certainly be greater than proposed by Central States. ■

WHAT ARE THE LIMITS OF WHISTLEBLOWING?

Elizabeth Hardy
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Michigan's Whistleblowers' Protection Act (WPA), which provides protection to employees who report a violation or a suspected violation of law, does not cover suspected "future" violations, according to a recent unanimous opinion of the Michigan Supreme Court in *Barbara Pace v. Jessica Edel-Harrelson, et al*., 499 Mich. 1 (2016) (one Justice not participating). In reversing the Michigan Court of Appeals, the Court held that such inchoate reports fail to qualify as protected activity.

Plaintiff Pace, an employee of SIREN Eaton Shelter, filed a lawsuit alleging that she had been terminated in violation of the WPA for reporting to her superiors and SIREN's executive director Edel-Harrelson that a co-worker, Long, was planning (at some point in the future) to improperly use grant funds to purchase a stove for her daughter. Pace reported co-worker Long's intentions shortly before Pace was terminated. In defending its termination decision, SIREN explained that Pace was terminated because she had exhibited harassing and intimidating conduct toward another co-worker (Hatch), not because of her report about Long's plans to misappropriate grant funds.

The trial court granted SIREN's motion for summary disposition, finding that Pace had failed to engage in WPA-protected activity because she merely suspected that co-worker Long would improperly use grant funds in the future. The Court of Appeals reversed, holding that "where an employee has a good faith and reasonable belief that a violation of the law… is being actively planned, the report of that belief is sufficient to trigger the protections of the WPA." To hold otherwise, wrote the appeals court, would effectively require a plaintiff to (1) report the planned violation without the protections of the WPA; or (2) remain silent until a violation occurs; or (3) undertake an investigation of her own to determine whether and when the planned violation has been completed. The court found the first two options inconsistent with the language of the WPA, and declared the third option "foolish, if not dangerous and potentially unlawful."

The Michigan Supreme Court disagreed, summarily reversing the Court of Appeals. In explaining its holding, the Court wrote:

> This reference . . . to "a violation or a suspected violation of a law" plainly envisions an act or conduct that has actually occurred or is ongoing. A common dictionary defines "violation" in part as "the act of violating: the state of being violated." This definition contemplates an existing act that has occurred or is ongoing. That is, "a violation or a suspected violation" refers to an existing violation. The provision must therefore be read in the context of some conduct or act that has already occurred or is occurring, and not some conduct or act that may or may not occur.

In finding that the WPA does not provide that future, planned, or anticipated acts constitute a suspected violation of the law, the Supreme Court concluded that WPA-protected activity had not occurred because it was undisputed that Pace had not reported an accomplished or ongoing act – only a suspicion that a violation of the law might occur in the future.

The Michigan Court of Appeals recently broke new ground in a published opinion – *McNeil-Marks v. MidMichigan Medical Center-Gratiot*, __ Mich. App. __ (No. 326606 decided 6/16/16) – by holding that reports of legal violations that are made to practicing attorneys constitute protected activity under the WPA. The court's rationale for this surprising holding is that attorneys who are members of the Michigan Bar Association qualify as members of a "public body" for WPA purposes since the Bar is "created by" and "primarily funded by or through" state authority. If this decision withstands appeal, and it likely will not (it did not cite the Supreme Court's *Pace* decision), it would exponentially expand the number and types of claims that qualify as protected activity under the WPA. ■

EMOTION VICTORIOUS OVER REASON

Larry Gagnon

In Case No. 15-2056, partially entitled *G.G. v Gloucester County School Board* (April 19, 2016), the Fourth Circuit Court of Appeals favored emotion over reason. The last time I encountered a court decision this obviously incorrect was *Coalition to Defend Affirmative Action v. Regents of the Univ of Michigan* (Case No. 08-1387, decided July 1, 2011).

There are similarities between the *Coalition* decision and the *Gloucester* decision: both elevated the rights of a sympathetic minority in absolute disregard for the rights of others; both resulted from horrendous misinterpretations of the law; both could easily deliver a negative "benefit" to the victors of the courts' social engineering. My *Coalition* analysis appears in the Spring 2012 *Lawnotes*. Professor St. Antoine's response and my reply appear in the Summer 2012 *Lawnotes*. I encourage anyone to proffer for publication a critique of this article. Honest discourse elevates reason over emotion. Reason's pathway leads to just results with frequency envied by emotion.

1. *Gloucester* revolves around G.G.'s desire to use the boys' restrooms in high school. The Court refers to G.G. as a "transgender boy." Opinion, p. 5. There is no unanimity as to what the phrase "transgender boy" means. The only definition proffered by the Court is that G.G. is "biologically female" but "identifies as male." Opinion, p. 45. The Court does not attempt to provide one or more parameters for identifying as a male.

G.G. has not undergone sex-reassignment surgery and, therefore, is not a "transsexual" (as I believe that term is most constructively defined and as used herein). The Court does not say whether G.G. intends to undergo transsexual surgery.

G.G. is diagnosed with gender dysphoria, a condition characterized by significant distress caused by a conflict between a person's perceived gender identity and anatomical gender. Opinion, p. 49. Throughout the freshman year, G.G. attended school as a girl and appeared to be a healthy attractive girl. Since the end of the freshman year, G.G. has undergone hormone therapy.

Before the sophomore year start, G.G. told school officials that G.G. was a transgender boy. The officials took steps to ensure that G.G. would be treated as a boy by teachers and staff.

Later, at G.G.'s request, school officials allowed G.G. to use the boys' restroom. Some parents contacted the Gloucester County School Board (the Board) seeking to end this practice. Some argued that G.G.'s bathroom use violated the privacy rights of other students. Subsequently, the Board adopted a policy barring G.G.'s use of the boys' restroom and required that students with gender identity issues be provided an alternative appropriate private facility. Opinion, p. 50.

G.G. sued the Board in June 2015. G.G. sought an injunction and claimed the Board discriminated against G.G. in violation of

Title IX of the Education Amendments Act of 1972 and the Equal Protection Clause of the Constitution.

The District Court dismissed G.G.'s Title IX claim and denied the request for a preliminary injunction, but withheld ruling on the motion to dismiss G.G.'s equal protection claim. G.G. appealed.

The Fourth Circuit started its analysis by correctly identifying the legal issue. "At the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity." Opinion, p. 5.

The Court noted that Title IX generally prohibits discrimination on the basis of sex in "any education program or activity receiving Federal financial assistance" and that the Department of Education's (the Department) contemporaneous regulations implementing Title IX permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex." Opinion, p. 6.

Almost 40 years after the Department's implementing regulations, the Office for Civil Rights (OCR) interpreted how this regulation should apply to transgender individuals: "When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity." Opinion, p. 6. In summary, the OCR decreed that a school must allow a transgender boy to use the boys' restrooms and boys' locker rooms and boys' showers — at least "generally," whatever that qualifier might mean.

The government admitted that schools may provide separate restrooms for the male sex and the female sex without running afoul of Title IX. But the government argued that Title IX was ambiguous as to the sex of a transgender student because it did not define a transgender's sex. Opinion, p. 17. The Court bought this argument wholeheartedly. Opinion, p. 21.

2. The easiest approach to resolving any perceived ambiguity in a rule or law is to look to its purpose. If the purpose is clear and such purpose can only be effectuated by one interpretation of the language, no other approach can be justified. Such is the case here. Totally ignoring this dispositive path, the Court attempted to find a single definition of "sex" applicable in all contexts. Opinion, p. 22-23.

Because every word has different meanings in different contexts, the Court's search for an all-purpose definition was inevitably a failure. Having reached this ineluctable result, the Court declared the word "sex" to be sufficiently ambiguous to allow the government to mandate that G.G. is a member of the male sex as "sex" is used in Title IX and implementing regulations. Opinion, p. 26.

Ironically, during its impossible quest for a singularity, the Court discovered that "the word 'sex' was understood *at the time the [implementing] regulation was adopted* to connote male and female and that maleness and femaleness were determined primarily by reference to the factors the district court termed "biological sex," namely reproductive organs,..." Opinion, p. 22 (emphasis added). Had the Court not assumed that a word is ambiguous unless it has only one possible meaning regardless of context, the Court would have reached the same conclusion as the purpose-analysis approach.

Why did the government in the 1970s allow schools to provide separate bathrooms, locker rooms, and showers by sex? What difference would justify such patent discrimination? There can be only one answer: anatomical difference as it relates to reproductive organs (exactly as concluded by the district court). On average, breast size distinguishes sexes too. Other anatomical differences distinguish sex for most but not all individuals, though most of these differences are latent (e.g. red blood cell density, facial hair, post-pubescent adam's apple prominence). None of these secondary gender-affiliated distinctions justify the government-approved discrimination.

3. How many people involved in the creation of the exception for bathrooms, locker rooms, and showers are in agreement with my justification? Anyone who can momentarily ignore G.G.'s emotional draw and allow reason to control will realize the answer. If you are unable to do so, ask any teenager how many dead people are buried in Arlington Cemetery. The teenager will provide the answer to this paragraph's first-posed question.

That G.G. is a sympathetic plaintiff is undeniable. That G.G. is dissatisfied with some aspects of self-image is also beyond debate — but who among us is not? That we should continue to provide separate facilities by sex can be honestly debated. What is beyond debate is that the Fourth Circuit incorrectly analyzed Title IX and its implementing regulations.

4. It is not clear that G.G.'s victory will be a net positive. If it ultimately prevails, this decision will empower G.G. to use boys' restrooms or single-stall restrooms or girls' restrooms; fortunately G.G. may still use the girls' restrooms. (I can assure G.G. that a unisex single-stall bathroom will provide the best atmosphere for the task at hand.) But beyond this unfettered 3-choice discretion, any benefit to G.G. is amorphous, speculative, and likely ephemeral. The anachronistic demonstrably-false prejudices — that men are "better" than women or "more capable" than women or that women must dress a certain way or must not compete in sports — are increasingly being relegated to the rubbish bin. G.G.'s quest for everyone to recognize G.G. as a male for all purposes has already resulted in hormone therapy to counteract female secondary sexual characteristics. To prevail, this type of hormone therapy must continually battle G.G.'s genetically-expressed hormones for the rest of G.G's life. Undoing primary sexual characteristics will necessitate extremely complex surgeries. Even routine chemotherapy and surgery carry short-term and long-term risks. The Court's decision may encourage G.G. to continue the metamorphosis. Let us hope that G.G. engages in a thorough cost-benefit analysis before continuing and that G.G.'s decision ultimately maximizes happiness.

5. The Court remanded the case for proceedings consistent with its opinion. I expect additional erroneous rulings by this Court in this case and unrelated cases. I look forward to the Court's decision that the Constitutional right to "bear Arms" guarantees amputees the right to interspecies transplants and requires recognition of hirsute individuals as a protected class. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

I went to one of those big commercial parking lots near the airport a while back. You know the drill. You pull in and they direct you to a section. There are arrows and signs pointing the way. You get to where they're parking, and you get on the bus.

Everything went as it's supposed to. There were half a dozen of us on the bus when the driver got a call from the office. There was an unhappy customer in a distant section of the lot who wanted to get picked up. We went over to get him. When we got there the driver explained to the guy that he wouldn't have needed to call the office if he had followed the arrows and parked where he was supposed to.

The guy did not agree. In his mind the parking lot was entirely at fault. No one told him where to park. The arrows were completely unclear. There was no way he could be expected to follow such totally inadequate directions. And furthermore, the driver was an expletive deleted expletive deleted. I pointed out to the guy that the rest of us had managed to follow the arrows and get where we were supposed to be. He said I was an expletive deleted expletive deleted too.

I've been thinking about that guy ever since. It seems to me that if I pulled into a parking space at one of those lots and I didn't see a bus or any other customers, before too long it would occur to me that I was in the wrong place. I would look for the busses and go over to where they were. Or, if I called the office it would be to apologize and say, "Excuse me but I seem to have gotten confused. What section are you parking in today?"

But this guy didn't do that. He didn't think he had made a mistake. He was completely convinced he was blameless. Other people had made a mistake and inconvenienced him, and he was furious about it.

I have come to believe that this guy is incapable of forming the thought "I made a mistake." He just can't get his mind around the concept.

I mention him because I recognize this guy. I see him all the time in my practice. Sometimes he's on the Union side, and sometimes he's on the Employer side. Sometimes he's the Grievant, and sometimes he's the HR representative. But the personality type and the symptoms are the same. These are people who don't just believe they are right, they are incapable of conceiving the thought that they may be wrong.

I asked my wife the shrink about it. She explained the difference between Axis I and Axis II. These classification systems change, and I'm oversimplifying, but the gist is this: Axis I patients have mood disorders. They are anxious or depressed, and they are miserable. Axis II patients have personality disorders. They are not miserable; they make the people around them miserable. Narcissistic Personality Disorder is an Axis II condition that has been in the news a lot lately.

People with this kind of problem are difficult to deal with. They do not play nicely with others. They don't engage in the ordinary give and take of social interaction. They do not listen. And they take up an inordinate amount of everybody else's time, talent, resources, and psychic energy. They are exasperating.

So I was complaining about it to my wife. I said I see the same personality disorder over and over again. It isn't fair, I said. How much time is it appropriate for the rest of us to spend dealing with the problems of the small number of people with personality disorders?

She said, "Of course the people you deal with are difficult. That's why their cases get to you. If everybody was reasonable and rational both of us would be out of work."

I see the point. But still…. ■

MERC NEWS

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

• **Commission Decision Accessibility** – At the suggestion of persons on MERC's Advisory Committee, we have sought diligently to improve the ease with which Commission decisions may be searched. Constituents once again have the ability to conduct case searches by year and month by clicking on the "1998-present MERC Commission Decisions Issued" link on the "MERC Decisions" page at *www.michigan.gov/merc*.

Additionally, the search bar is fully operational on the "MERC Decisions" page and utilizes the new google search technology. Here, constituents are able to type in case numbers, party names, search terms, etc. to locate a specific case(s). Also, if an exact term is queried in "quotes," in addition to the documents that contain that phrase, a search box populates additional phrases or terms that may correlate to the topic being searched. We hope this feature will prove very useful for our constituents, especially those who may be unfamiliar with the work performed by MERC/BER.

MERC decisions are also now available through 2015 on the Governing Michigan web site, compliments of the Library of Michigan. We anticipate that MERC decisions issued in 2016 will be available on Governing Michigan in the first quarter of 2017. Thanks are due to Ms. Bernadette Bartlett, the Library's Documents Librarian, who has made this endeavor possible.

• **Reappointment** – On June 9, 2016, Governor Snyder announced that Commissioner Natalie Yaw was reappointed for another three year term, expiring on June 30, 2019. Currently, Ms. Yaw is a partner at Erskine Law, PC, in Rochester, where she focuses her practice on commercial litigation for corporate clients. Commissioner Yaw previously served as Vice President and Senior Counsel at Citizens Financial Group, Inc., and as an attorney at Dickinson Wright, PLLC, where she specialized in commercial and consumer lender liability litigation. She has a bachelor's degree from Rice University and a juris doctorate summa cum laude from Michigan State University College of Law.

• **Annual Report** – An Annual Report on the activities of the Michigan Employment Relations Commission (MERC) has a planned November 2016 publication date, following formal adoption by the Commission. The Annual Report will be posted on our agency's web site at *www.michigan.gov/merc*, and will provide a summary of MERC/BER activities conducted during the 2016 fiscal year. The MERC Annual Report was initiated at the request of MERC Chairperson Edward Callaghan during fiscal year 2013, making the 2016 Report the fourth annual edition.

The Annual Report provides a brief, yet comprehensive, summary of activities during the preceding fiscal year, including elections and mediation statistics, and a brief discussion of the subject matter of MERC Decisions issued throughout the year. BER is actively engaged in training and outreach activities, and the Annual Report highlights the nature and frequency of those important endeavors – all part of the agency's mission. The Report also provides updated biographies of MERC Commissioners and BER staff.

• **Performance Michigan** – Michigan's "Dashboards" were implemented by Governor Snyder to provide transparency in the assessment of the performance of all state governmental agencies. BER presently measures three metrics: (1) percentage of decisions issued within one year of record closure, (2) percentage of elections held within 65 days of filing of petition, and (3) percentage of contract disputes closed without the issuance of a 312 Award of Fact Finding Report. We welcome recommendations from constituents concerning metrics to be measured by BER that accurately and completely measure our agency's performance. ■

UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long

Disposition on the Merits Not Necessary for Fee Award

The Supreme Court found in favor of the employer in *CRST Van Expedited, Inc. v. EEOC*, 136 S.Ct. 1642 (2016) and upheld an award of nearly $4 million dollars in attorneys' fees. A female truck driver working for CRST filed a sexual harassment charge. During the investigation of that charge, the EEOC discovered that four other women had filed similar charges against CRST and that there was reasonable cause to find that CRST had engaged in unlawful sexual harassment towards a class of female employees and prospective employees. After attempts at conciliation failed, the EEOC brought suit against CRST on behalf of the original claimant and other similarly situated employees. During discovery, the EEOC identified 250 women who had allegedly been victims of sexual harassment.

In a series of motions, CRST succeeded in eliminating the claims of all but 67 allegedly aggrieved parties. As to those 67 women, the district court held that the EEOC had failed in its statutory obligations to investigate and attempt to conciliate these individual claims before filing the Complaint. Thus, the district court dismissed the remaining claims and invited CRST to apply for attorneys' fees. CRST's application for fees resulted in an award of $4 million. The EEOC appealed on the grounds that CRST was not a prevailing party because these claims had not been dismissed on their merits, but instead, on jurisdictional grounds. The Eighth Circuit Court of Appeals agreed with the EEOC and reversed and remanded. CRST successfully sought cert.

The Supreme Court reversed the decision of the Court of Appeals and upheld the award of fees, holding that "common sense undermines the notion that the defendant cannot 'prevail' unless the relevant disposition is on the merits." *Id*. at 1651 The Court noted that, while a disposition on the merits might be preferable, a defendant has "fulfilled its primary objective whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision. The defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason." *Id*. Finding no indication that Congress intended that a defendant be eligible for a fee award only upon a disposition on the merits, the Supreme Court vacated the Court of Appeals opinion and remanded.

Statute of Limitations in Constructive Discharge Claim Runs on Notice of Resignation

The issue in *Green v. Brennan*, 136 S.Ct. 1769 (2016) was when the statute of limitations begins to run in an employment discrimination case involving the plaintiff's alleged constructive discharge. Green was the postmaster for Englewood, Colorado. He sought a transfer to the postmaster position in Boulder, Colorado. Green was not selected for the position and subsequently claimed to the Postal Service EEO Counselor that it was because he is black. Green was thereafter placed on administrative leave, allegedly because he had intentionally delayed the mail. Those charges could not be proven, yet Green was ultimately offered a deal where he could return to work, but with a demotion to a position 300 miles away at a salary reduction of $40,000. Green turned down the offer and resigned. 41 days after his resignation, he contacted the EEO Counselor again, this time alleging retaliation and constructive discharge. As a federal employee, Green was required to initiate administrative proceedings within 45 days of the date of the matter alleged to be discriminatory. The government argued that the 45 days began to run when Green was offered the deal to return to work with a demotion; Green argued that it began to run when he resigned. The trial court and Tenth Circuit Court of Appeals agreed with the government, and Green successfully sought cert.

The Supreme Court found in Green's favor and reversed the Court of Appeals decision. The Court reasoned that the statute of limitations begins to run after a plaintiff has a "complete and present cause of action." *Id*. at 1776. Thus, because a constructive discharge claim has two distinct elements — the employer's allegedly discriminatory conduct causing the plaintiff to resign and the plaintiff's resignation, a plaintiff does not have a complete and present constructive discharge cause of action until he resigns. The Court also clarified that an employee is deemed to have resigned on the day he gives notice of his resignation, not his last day of work.

DOL Regulation Not Entitled to Deference

The Supreme Court refused to give deference to Department of Labor's overtime regulations in *EncinoMotorcars LLC v. Navarro*, 136 S.Ct. 2117 (2016). In that case, the plaintiffs were service advisors working for the defendant's automobile dealership; they were responsible for selling repair and maintenance services. The plaintiffs alleged that the defendant violated the Fair Labor Standards Act by failing to pay overtime. The defendant argued that the service advisors were covered under 29 U.S.C. §213(b)(10)(A), which exempts from the FLSA overtime provisions certain employees engaged in selling or servicing automobiles.

In 1970, the DOL promulgated a regulation specifically excluding service advisors from the §213 exemption. In 1978, the DOL issued an opinion letter, and in 1987 amended its Field Operations Handbook, changing its position in the regulation and clarifying that service advisors should be treated as exempt under §213. The DOL stated that it would revise the regulation to reflect this change in position. In 2008, the DOL issued a notice of proposed rulemaking with the intention to amend the regulation to state that service advisors were exempt. With little explanation, in 2011 the DOL completed the notice and comment period for the 2008 proposed rule and issued a final and imprecise rule reverting back to its original position that service advisors were non-exempt.

The district court agreed with the defendant that the 1978 opinion letter and 1987 Field Operations Handbook controlled and that the service advisors were exempt. The plaintiffs appealed the district court decision and the Ninth Circuit Court of Appeals reversed. The Court of Appeals held that the DOL's 2011 regulation was entitled to deference and controlled. The defendant sought cert.

The Supreme Court ruled that the 2011 regulation was not entitled to controlling weight. The Court found that the DOL had failed to provide a reasoned explanation for its change in position, and therefore the regulation should not carry the force of law. The Supreme Court held that while "a summary discussion may suffice in other circumstances . . . because of decades of industry reliance on the Department's prior policy — the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position." *Id*. at 2126. ■

RULE 26 AND THE ARISTOTELIAN MEAN

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Nothing too much. That is the Aristotelian Mean. It does not provide a precise blueprint for day-to-day living, but it helps.

There is wisdom in moderation. The difficult part is deciding whether more is appropriate, or enough is enough, or too much. Aristotle pointed out, for example, that courage is good, but too much leads to reckless foolishness and too little leads to pusillanimity. Harvard law professor Alan Dershowitz said something similar about *chutzpah* — some is admirable, but too much is obnoxious.

The wisdom of moderation has been endorsed throughout history in religious and philosophical texts, in aphorisms about gilding lilies, and in *Goldilocks and the Three Bears*. If you doubt that too much of a good thing can be bad, test the proposition at a Chinese buffet.

Federal litigators are the object of the latest call for moderation. It is in Federal Rule of Civil Procedure 26, the version that became effective last December.

Under Rule 26(b)(1), discovery of "any nonprivileged matter that is relevant to any party's claim or defense" must be "proportional to the needs of the case."

When a lawyer autographs discovery requests, responses, and objections, the lawyer "certifies" — to "the best of" the lawyer's "knowledge, information, and belief formed after reasonable inquiry" — that, among other things, the requests, responses, and objections are not "unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action." Rule 26(g).

In other words, the lawyer certifies that the discovery requests, responses, and objections are proportional or — as Goldilocks put it — just right.

What is just right? What is *unduly* burdensome and expensive? It depends. If the litigants can't agree, the judge will decide. Rule 26(b)(1) specifies six considerations for assessing proportionality:

> (1) "the importance of the issues at stake in the action"; (2) "the amount in controversy"; (3) "the parties' relative access to relevant information"; (4) "the parties' resources"; (5) "the importance of the discovery in resolving the issues"; and (6) "whether the burden or expense of the proposed discovery outweighs its likely benefit."

The judge may keep things proportional by limiting discovery "for good cause," protecting a party from "undue burden or expense." Rule 26(c). See also Rule 26(b)(2).

Proportionality is not a new concept in federal practice. The 1983 amendments to Rule 26 addressed, the committee notes say, "the problem of overdiscovery" and the need to discourage "disproportionate discovery" and "discovery overuse." And federal judges have always had — and exercised — the power to decide when enough is enough.

But the times they are a-changin' and proportionality looms large in the era of electronically stored information (ESI). See *e.g.*, Rules 26(f)(3)(C), 34(a)(1)(A), and 34(b)(2)(D) and (E). It seems that now little goes unrecorded and that all electronic records, like diamonds, are forever. They likely are stored in the cloud — whatever that is — rather than the basement. When everything is available, asking to discover *everything* may be disproportionate.

The impact of the new emphasis on proportionality will be better understood with time and experience. For now, you might apply the Aristotelian Mean. ■

MERC UPDATE

Erika P. Thorn
White Schneider PC

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

Reese Public Schools -and- Reese Professional Ed Ass'n, MEA/NEA, MERC Case No. UC14 K-019 (June 20, 2016)

The Reese Professional Education Association ("Association") and the Reese Public Schools ("Employer") were parties to a collective bargaining agreement that ran from August 2013 through August 2015. The recognition clause of the CBA recognized the Association as the exclusive bargaining representative for all professional instructional personnel, including personnel on tenure, probation, classroom teachers, guidance counselors, and librarians; but excluding supervisory and executive personnel and office and clerical employees.

In July 2014, the Employer posted a newly created position as a social worker/home-school liaison. The position was based on an annually federally funded grant for at-risk students, and the grant money received by the Employer paid directly to the social worker at $25 per hour. The social worker did not receive insurance or other benefits, and the position was not guaranteed to continue from one year to the next. Once the position was posted, the Association filed a unit clarification petition with MERC to clarify the appropriate placement of the social work position. In its Decision and Order, the Commission found that the recognition clause did not expressly include or exclude the position of social worker; thus, there was no evidence to establish that the position of social worker was historically excluded from the bargaining unit.

The Commission stated its long-standing precedent that when evaluating a unit clarification petition its objective is to create the largest single unit of all employees sharing a community of interest. See *Hotel Olds v State Labor Mediation Bd*, 333 Mich 382 (1952). MERC has included non teaching positions in bargaining units with teachers where the functions of the non teaching positions directly relate to the educational process. The inclusion of both teaching and non teaching professional staff in the same bargaining unit is proper because of the functionally integrated nature of the work and the efforts of both groups. See *Muskegon Hts Public Schools*, 1993 MERC Lab Op 419, 422; *Wayne-Westland Community School Dist*, 1976 MERC Lab Op 847. Employees in non teaching positions are required to have a professional education and background, and to exercise related skills in the performance of their duties. See *Battle Creek Public Schools*, 1990 MERC Lab Op 113; *Grand Haven Public Schools*, 1987 MERC Lab Op 1025. As long as the position is related to the educational process on a professional level, MERC will not require teacher certification for inclusion in the unit. *Washtenaw Intermediate School Dist*, 1993 MERC Lab Op 555.

Based on the above-cited factors, the Commission determined that the functions and duties of the social work position related directly to the educational process; that it required a professional education and background; and that the person in the position must exercise related skills in the performance of the duties required of it. The Commission concluded that the social work po-

sition shared a community of interest with the other members of the Association's bargaining unit and was not affected by the fact that the position was hourly and not salaried, or that the social worker received different benefits than other bargaining unit members.

MERC reiterated its position that "the existence of a dispute concerning the Employer's contractual obligations to such a position is of no relevance to the underlying issue of community of interest" (citing *Dearborn Public Schools*, 2002 MERC Lab Op 287; 15 MPER 33065; and *Port Huron Area School Dist*, 1996 MERC Lab Op 396. MERC), and determined that the fact that the social work position was funded by an annual federal grant that was not guaranteed to be continued would not prevent the Commission from placing such a position in the unit where a community of interest is apparent.

Mid-Michigan Community College -and- Mid-Michigan Community College Faculty Senate, Inc, MEA/NEA, Case Nos. C14 G-075 and UC 14 G-011 (March 3, 2016)

The Mid-Michigan Community College Faculty Senate, Inc., MEA/NEA ("Charging Party") filed an unfair labor practice charge against Mid-Michigan Community College ("Respondent") after it unilaterally removed two counselor positions from the bargaining unit. Initially, Charging Party alleged a failure to bargain over the unilateral removal, transfer of bargaining unit work to positions outside the unit, and direct dealing with the two bargaining unit members whose positions were being eliminated. Charging Party, in its post-hearing brief, withdrew the claim of direct dealing. An evidentiary hearing was held and the following facts established:

The Charging Party union represents all full-time counselors and professional and instructional personnel employed by the College. The College and union were parties to a collective bargaining agreement that expired on August 19, 2013, which included the following language in its recognition clause:

> The Board hereby recognizes the Faculty Senate as the sole and exclusive negotiating representative for all counselors and as the exclusive negotiating representative for all College professional instructional personnel under contract on a fulltime basis….

The parties then entered into a successor agreement that was set to expire in August 2017. This new contract's recognition clause remained unchanged. During the course of negotiations for the successor agreement, Respondent proposed removing two counselor positions from Charging Party's bargaining unit. Sometime later, Respondent submitted a second proposal, which called for an increase in the annual hour workload for the counselor positions and not filling the positions when they became vacant.

The Charging Party countered with a proposal that sought to keep the two employees who filled the counselor positions at the time until one or both of them left employment with the College, at which time the positions would not be filled. Respondent then countered with a proposal to convert the two counselor positions to new fulltime faculty positions. The parties entered mediation in early 2014, and shortly thereafter Respondent indicated that the two positions would be eliminated and would be offered to new, yettobecreated positions.

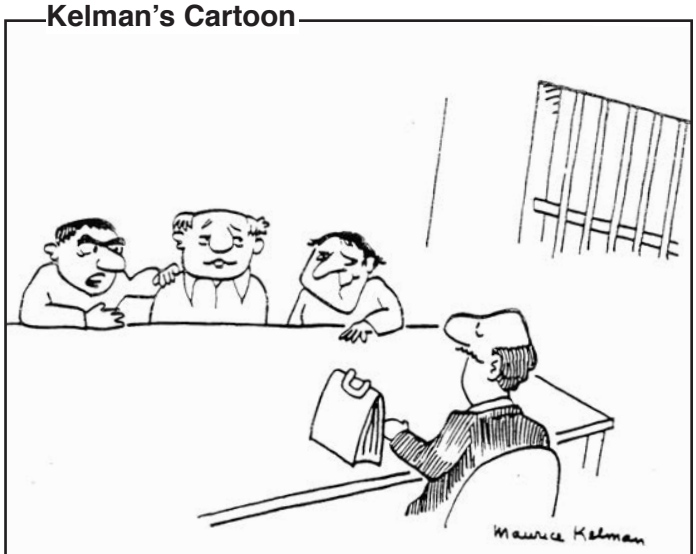
On February 17, 2014, Respondent met with the two employees to discuss the creation of two new coordinator positions that would not be part of Charging Party's bargaining unit. The two employees were informed that their positions would be eliminated whether or not they decided to take the newly created positions. In August 2014, the two employees began serving in the new positions.

After taking extensive testimony on the nature of the counselor positions and the nature of the newly created coordinator positions, the ALJ concluded that the changes made to the counselor positions did not destroy its community of interest with the union's bargaining unit. The ALJ, citing *City of Grand Rapids,* 19 MPER 69 (2016); *Ingham County*, 1993 MERC Lab Op 808, 812-813; and *Northern Michigan Univ*, 1989 MERC Lab Op 139, stated: "Commission law is clear that when a public employer seeks to remove an existing position from an established bargaining unit, the question is not whether the position now has a closer community of interest with another bargaining unit or group, but rather whether because of the changes in duties has the position lost its community of interest with the established unit."

The ALJ determined that Respondent has an obligation to bargain with Charging Party over the terms and conditions of employment of the coordinator positons, and that the unilateral removal of the positions from the bargaining unit without Charging Party's agreement or an order of the Commission resulted in the Respondent's breach of its bargaining obligation in violation of Section 10(1)(e) of PERA.

The ALJ further determined that because of Respondent's unlawful unilateral removal, no bargaining demand by Charging Party was required. The ALJ dismissed the unit clarification petition as moot, and recommended that the Commission order that the positions be restored to the bargaining unit; that Respondent make Charging Party whole for losses suffered by the unilateral removal; that Respondent make the two employees whole for any losses suffered as a result of the unilateral removal; and that Respondent cease and desist from refusing to bargain in good faith with Charging Party. No exceptions were filed, and on March 3, 2016 the Commission adopted the Recommended Order as its final Decision and Order. ■

Kelman's Cartoon



"Meet my reputed co-conspirator. Next to him is my purported accessory after the fact. And I'm the alleged perpetrator."

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- Stuart Israel writes about Rule 26 discovery proportionality. Barry Goldman writes about parking and personality proportionality.
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- Paul Monicatti surveys the use of joint sessions in mediation.
- 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 Ryan D. Bohannon, Regan K. Dahle, Scott R. Eldridge, Larry Gagnon, Barry Goldman, Elizabeth Hardy, Richard Hooker, Stuart M. Israel, Maurice Kelman, Paul F. Monicatti, D. Lynn Morison, Ashley M. Olszewski, Eric J. Pelton, John R. Runyan, Jr., Benjamin Schepis, Brian M. Schwartz, James Spalding, and Erika P. Thorn.