LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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UNEMPLOYMENT, COVID-19, AND THE ADA

Rachael Kohl
Director, Workers' Rights Legal Clinic
Michigan United

For nearly three million Michiganders who have applied for unemployment insurance ("UI") benefits over the pandemic, one thing has become clear: getting UI benefits is not a simple process. The UI system, though supposedly pro se, is cumbersome and bewildering. The Unemployment Insurance Agency ("UIA") issues contradictory decisions and when claimants have questions, the UIA is difficult to contact. Further, Michigan's unemployment laws are restrictive and outdated. As a result, people have been forced to wait weeks to get their benefits, if they receive any at all. These issues only scratch the surface of the deeply-rooted barriers in the UI system.

Since March 2020, I have helped more than 7,000 people navigate the UI system. Though the volume of inquiries has drastically increased since pre-pandemic times, the specific issues that claimants face today are the same issues that I have seen for years. In fact, the pandemic only further exacerbated known issues in the system and the law that created it. Because unemployment laws have not been updated much since their implementation in 1935, women, people of color, and those with disabilities have been excluded from unemployment benefits at a higher rate than white men. In 1935, the program was designed for white men, intentionally excluding people with disabilities and trades that employed primarily women and people of color.[1]

Our workforce has evolved. There has been a substantial increase in number of independent contractors and gig workers. Women now make up about 47% of those working. People with disabilities seek workplace accommodations to remain a part of the labor market. Despite the changes to labor's makeup, neither state nor federal unemployment laws have not seen any significant modernization regarding unemployment benefits since its implementation in 1935.

Given these antiquated laws, a majority of the workforce are not able to obtain traditional state unemployment benefits. Generally, only about 25% of unemployed workers in Michigan are entitled to state unemployment benefits, leaving about 75% of unemployed workers without any coverage during their bout of joblessness. To understand why the Michigan UI system is failing today, it is important to look at what happened to it over the past decade. As time has passed, jobless workers have found it more and more difficult to access benefits. Benefit recipiency – the percent of jobless workers receiving unemployment benefits – fell dramatically after the Great Recession after the Legislature passed "austerity measures" meant to purposefully prevent benefits from being paid out.

Moreover, the UIA implemented a problematic computer system called MiDAS, which was infamously known for wrongly alleging fraud against innocent claimants at a 93% error rate.

1.

Many lawsuits regarding this Michigan's faulty system have been filed, and most continue to be litigated. See *Bauserman v. Unemployment Insurance Agency,* 330 Mich. App. 545 (Mich. Ct. App. 2019) (claiming the UIA deprived people of property when it wrongly seized tax refunds and garnished wages without valid process against innocent Michiganders), *Cahoo v. SAS Analytics et. al,* 912 F.3d 887 (6th Cir. 2019) (due process violations because of the way the UIA's computer system was designed, built, and implemented to charge fraud to innocent claimants), and *Zynda v. Arwood,* 175 F. Supp. 3d 791 (E.D. Mich. 2016) (denying summary judgment to the state regarding the claimants' claims of constitutional and statutory violations due to the state's improper compute program). Moreover, this UIA has added to the problem by skipping important procedural and due process appellate steps required by the Legislature in the Michigan Employment Security Act, which the Michigan Supreme Court recently struck down as invalid agency actions. *Dep't of Licensing & Regulatory Affairs v. Lucente,* 944 N.W.2d 121 (Mich. 2020) (holding that the UIA cannot "have its cake and eat it, too" and holding redeterminations as invalid when the UIA skipped the determination stage of a claimant's administrative review).

With the pandemic causing loss of work seemingly overnight, unprecedented need for unemployment surged. Over the first few weeks of the pandemic, this country saw its worst negative change to employment in its entire history – meaning that more people became unemployed all at once during early 2020 than during the Great Recession and in the Great Depression. Yet, the country was able to stave off an actual recession. How? Because the federal government expanded unemployment benefits to fill the vast holes state unemployment systems like Michigan left open.

2.

On March 27, 2020, Congress passed and President Trump signed into law the federal Coronavirus, Aid, Relief, and Economic Security ("CARES") Act. This critical piece of legislation established the Pandemic Unemployment Assistance ("PUA") to render aid to workers as a last resort economic safety net. 15 U.S.C. § 9021 (2020). PUA was designed to provide unemployment benefits to those whose work situation was affected by COVID-19 and who were otherwise ineligible for regular state UI benefits.

(Continued on page 2)

CONTENTS

STATEMENT OF EDITORIAL POLICY

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

UNEMPLOYMENT, COVID-19, AND THE ADA

(Continued from page 1)

To qualify for PUA, a claimant must meet two requirements. First, they cannot be entitled to state benefits. Second, they must meet a specific COVID-related reason. Congress delineated those reasons (15 U.S.C. §§ 9021(a)(3)(A)(ii)(I)(aa)-(kk)):

a) being diagnosed with COVID or experiencing COVID-19 symptoms and seeking medical diagnosis;

b) having a member of an individual's household diagnosed with COVID-19;

c) providing care for a family member or household member who has been diagnosed with COVID-19;

d) childcare responsibilities that result when an individual's child is not able to attend school because the school is closed due to COVID-19;

e) the individual is unable to reach their place of employment because a COVID-19 related quarantine has been imposed;

f) the individual has been advised by a medical provider to self-quarantine and is unable to reach their place of employment;

g) the individual was scheduled to commence work but does not have a job or is unable to reach their job as a direct result of the COVID-19 pandemic;

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h) the individual has become the major breadwinner or major support for a household because the head of household died due to COVID-19;

i) the individual has had to quit his or her job as a direct result of COVID-19;

j) the individual's place of employment is closed as a direct result of the COVID-19 public health emergency; or

k) the individual meets any additional criteria established by the Secretary of Labor for unemployment assistance.

The Secretary of Labor shall provide PUA benefits "to any covered individual" for the weeks in which "the individual is not entitled to any other unemployment compensation." 15 U.S.C. § 9021(b). Such individuals must self-certify that they are "otherwise able to work and available for work within the meaning of applicable state law except the individual is unemployed, partially employed, or unable to work" due to one of several reasons related to the COVID-19 pandemic. See above for the reasons. 15 U.S.C. §§ 9021(a)(3)(A)(ii)(I)(aa)-(kk). Moreover, the text of the Act includes individuals seeking part-time workers as eligible for PUA benefits.

For the first time, the federal program added that a "covered individual" is also one who, in addition to having lost their job for one of the enumerated pandemic-related reasons, "is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law." 15 U.S.C. § 9021(a)(3)(A)(ii)(II) (emphasis added). Because of the CARES Act, most workers affected by the pandemic were likely going to be able to see benefit payments. This included, *for the first time,* self-employed workers, gig workers, and independent contractors. Moreover, the Act specifically delineates that workers with a limited work history who did not earn enough to qualify for state benefits would be covered, along with part-time workers.

3.

Before PUA, part-time workers generally could not receive benefits in Michigan due to the state's able and available for full-time work requirement. MCL 421.28. Michigan is one of the few states in the country that does not cover part-time workers. Unemployment benefits are funded through employers' payment of unemployment taxes on the first $9,000 of each employee's wages. Many part-time workers have two or more part-time jobs, which means their work has funded the system multiple times, but they will not be protected in Michigan if they lose their positions.

Michigan is one of the few states that do not include part-time workers in its statute. The majority of states either grant equal access to benefits to workers seeking part-time work or offer a limited benefit conditioned on disability status or having a history of part-time work. Given that Michigan has not updated its unemployment laws to match its workforce, or even state and federal anti-discrimination laws, Michigan's unemployment laws regarding ability may violate Title II of the Americans with Disabilities Act ("ADA"). This depends on whether "full-time" can be considered a nonessential eligibility requirement – especially considering that the federal statute does not require full time work. 42 USC 1213(2). This ADA claim becomes even stronger if the agency denies PUA benefits given that Congress intended to grant PUA access to all workers affected by the pandemic, and it specifically enumerated part-time workers. Full-time work is not an essential eligibility requirement for PUA.

4.

Currently pending before the Unemployment Insurance Appeals Commission is an exact case where the UIA denied PUA to a part-time worker whose place of employment closed because of the pandemic. *Holifield v. Unemployment Insurance Agency,* Case Numbers 262734W & 263102W. Ms. Holifield has a disability preventing her from being able to perform full-time work, but she was gainfully employed before the pandemic hit. The Commission's decision in this case will have a significant impact on part-time workers throughout Michigan who have faced economic hardship as a result of the pandemic. PUA is entirely federally funded, so neither UI taxes nor state budgets pay for the program. While other states have welcomed federal PUA dollars for part-time workers into their economies, the state of Michigan is leaving millions of federal dollars on the table by unnecessarily denying part-time workers access to the federal relief program. Finding for Ms. Holifield and other part-time workers puts Michigan in line with the rest of the country.

Attorney General Nessel filed an amicus brief with the Commission in support of granting PUA benefits to part-time workers like Ms. Holifield. That brief agreed that denying PUA to a claimant because of their inability to work full-time would violate the ADA. Under Title II of the Americans with Disabilities Act ("ADA"), "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The ADA defines disability, in part, as "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A). Working is an enumerated "major life activity." Id.

The UIA is a public entity for the purposes of the ADA. A public entity incudes any "state or local government body or any instrumentality thereof." 42 U.S.C. § 12131(1). The provision of benefits to claimants falls within Title II's definition of "services, programs, or activities." The Sixth Circuit has interpreted the ADA broadly, finding that this provision "encompass[es] virtually everything that a public entity does." *Babcock v. Michigan,* 812 F.3d 531, 540 (6th Cir. 2016). The ADA requires public entities to provide reasonable accommodations to individuals with disabilities to enable participation in an entity's programs. *Yaldo v. Wayne State Univ.,* 266 F.Supp.3d 988, 1010 (E.D. Mich. 2017).

The UIA's basis to deny workers from PUA who have a disability that prevents them from working full time stems from Michigan's law. The UIA claims that the CARES Act requires that the individual be able and available under state law. But recall that the first CARES Act requirement is that the claimant be ineligible for state benefits. This UIA's reading of the law creates an unnecessary conflict. Ms. Holifield's case is the first deciding this issue in Michigan, but Minnesota's Court of Appeals already ruled in the claimants' favor on this exact question. Before the Court was the question of whether a high school student could receive PUA given that the state's able and available rule would find her

(Continued on page 4)

UNEMPLOYMENT, COVID-19, AND THE ADA

(Continued from page 3)

ineligible. The agency originally denied the claimant, but the Minnesota Court of Appeals reversed. The high school student lost her part-time position due to the pandemic, so the Court of Appeals of Minnesota opined "If the very thing that makes the person eligible for PUA benefits is treated as a disqualification, no one would be eligible for PUA benefits." *In re Muse,* 956 N.W.2d 1, 6 (Minn. Ct. App. 2021).

Ms. Holifield makes no request for relief that would present a fundamental alteration of the PUA program. She is not asking for any changes to the program, she is simply asking that she not be denied benefits because of her disability. The legitimate purpose of the PUA program is to provide public benefits to workers who have lost employment for COVID-related reasons. In providing PUA benefits to Ms. Holifield and workers like her, the state is not being asked to pay more to administer the funds or to change the basis of the program at all. Indeed, these funds are already going to other states for the same types of workers. The CARES Act specifically names part-time workers as intended recipients of PUA benefits and distributing benefits to part-time workers with disabilities does not alter the essential nature of a program that has the express purpose of providing benefits to workers like Ms. Holifield.

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There is a clear gap between the Congressional intent animating the CARES Act's coverage of non-traditional (low-wage, part-time, and/or gig/contract workers) workers and the states' ability to administer this federal program via the existing state laws that all too often exclude these same workers. Systemic barriers are buried deep in these governmental systems.

PUA presents interesting questions about which workers are not covered when there is not a federal program available. These questions continue when the impact of the UI denial could violate anti-discrimination laws. The ADA is a vehicle for insuring that people with disabilities are not forced out of participating in the workforce. The same deep-seated prejudices that necessitated the ADA's enactment in the first place are still actively harming workers with disabilities when they are unemployed because of antiquated, restrictive laws. This failure may open states up to liability.

While the COVID-19 pandemic has highlighted that many areas of UI need reform, updating state unemployment insurance systems so they are compliant with Title II of the ADA shines brightly as a much-needed reform.

—END NOTE—

[1]Richard Rodems & H. Luke Shaefer, *Left Out: Policy Diffusion and the Exclusion of Black Workers from Unemployment Insurance,* 40 SOC. SCI. HIST. 385, 398 (2016); Paul K. Longmore & David Goldberger, *The League of the Physically Handicapped and the Great Depression: A Case Study in the New Disability History,* 87 J. of AM HIST. 888, 912 (2000); Cynthia L. Estlund, *The Ossification of American Labor Law,* 102 Colum. L. Rev. 1527, 1545 (2002). ■

"IMPROBABLE RESCUE"? SCOTUS PUNTS AS IT UPHOLDS ACA

Diane M. Soubly
Butzel Long

In a 7-2 decision in *California v. Texas* (consolidated for oral argument with *Texas v. California*), 141 S. Ct. 2104 (June 17, 2021), the U. S. Supreme Court reversed the decision of the Fifth Circuit Court of Appeals declaring Section 5000A(a) of the Affordable Care Act ("ACA") (a/k/a/ the "Individual Mandate") unconstitutional. The Court also remanded the matter to the Fifth Circuit with instructions to dismiss the case.[1]

Despite the glare of the media, the expenditure of ink in briefing, and the hopes of many that "the third time would be the charm" when the Court confronted "Obamacare," the Court chose to punt on procedural grounds. It held that the "state plaintiffs" (led by Texas) and the individual plaintiffs lacked standing to seek such a declaration.

The Court found that none of the state and individual plaintiffs, even those with what the Court called a "pocketbook injury," had proven any past or future concrete or particularized injury that the plaintiffs could "fairly trace" to the Individual Mandate or that the Court could remedy. In effect, the Court declined to issue an advisory opinion because Article III of the Federal Constitution prohibits it from doing so.

In dissent, Justice Alito (joined only by Justice Gorsuch) called the decision yet one more "installment" in what he dubbed "our epic [ACA] trilogy," in which the Act again faced a serious threat and the Court again "pulled off an improbable rescue."

Beyond the group of employee benefits practitioners attempting to counsel clients on compliance with ACA who can apprise their clients that ACA survives -- at least for now, labor and employment litigators should carefully review the standing analysis adopted by the Court.

The Posture of the Case on Unconstitutionality:

How ACA Arrived -- Again -- at the Court: Supreme Court watchers may remember that the first ACA case (*NFIB v. Sibelius,* 567 U.S. 518) reached the Court in 2012, well before the COVID pandemic led the Court to simulcast its oral arguments and to close its courtroom to parties, their counsel, and visitors.

As Chief Justice Roberts read the opinion containing the judgment of the Court from the bench, with only parts of the rationale for the judgment joined by the four "liberal" Justices, reporters left the courtroom to relay in "play-by-play" fashion to the American public that the Court had "found ACA unconstitutional." In reality, the Chief Justice had simply rejected the first two of three proposed constitutional sources of authority under which Congress could enact ACA: the Commerce Clause and the Necessary and Proper Clause.

Reporters were forced to recant cries of unconstitutionality when the Chief Justice finally announced from the bench that the

Court had blessed a third proposed constitutional source of authority for the Act: the power of the government to levy taxes and to spend.

However, taking their cue from that decision, ACA opponents in Congress at last garnered enough votes in 2017 to reduce the Act's penalty for failing to obtain health care coverage (the "ACA Penalty") to zero. Their theory? No tax, no authority for the Individual Mandate or for ACA itself, so that the entire Act must fall. However, when Congress reduced the penalty to zero in 2017, it actually left intact the Individual Mandate passed by the 2010 Congress.

A Brief Recap for Labor and Employment Lawyers on the Individual Mandate: The ACA Individual Mandate required, beginning in 2019, that individuals obtain health care coverage unless the Act exempted them from doing so (e.g., for reasons of religious belief). Other ACA provisions set forth the statute's requirements for health care coverage, both in terms of essential health care requirements and affordability.

Individuals could obtain minimum essential coverage through ACA-compliant insured or self-insured employer-sponsored programs or through ACA Marketplace Plans. The ACA Penalty provision then required taxpayers to prove that they had done so; and the IRS blessed forms to be submitted, either proving exemptions from the Act or proving ACA-compliant coverage. Originally, to begin in 2019, Congress set a nominal penalty of less than the cost to an individual of health care coverage. In later years, the ACA Penalty would increase substantially.

The Posture of the Case Below: In 2018 and thereafter, Texas and its state allies and the individual plaintiffs sought to have ACA declared unconstitutional, arguing that the Individual Mandate had become unenforceable without the ACA Penalty. Other states, led by California, contended that reducing the ACA Penalty to zero did not render the Individual Mandate or the entire act unconstitutional, and that Congress clearly did not intend all of ACA to fall because it had left the Individual Mandate and "shared responsibility" provisions untouched in 2017.

Before a district court in Texas known (and perhaps forum-shopped) for its hostility to ACA and before the Fifth Circuit, the state and individual plaintiffs successfully argued that reducing the ACA Penalty to zero for individuals required to obtain ACA-compliant health care coverage rendered the Individual Mandate unconstitutional. After the appointment of Attorney General William Barr to head the Department of Justice, the federal government changed its position and joined plaintiffs in contending that all of ACA must fall.

The Fifth Circuit affirmed the district court's partial final judgment finding the Individual Mandate unconstitutional in light of the reduction of the ACA Penalty to zero.

Before the Supreme Court: Led by its then Attorney General (and now Secretary of Health and Human Services) Xavier Becerra, California and its state allies petitioned the Court for review after the Fifth Circuit's affirmance (*California v. Texas,* Case No. 19-840, docketed on January 3, 2020). Texas and its state allies then also petitioned the Court for review (*Texas v. California,* Case No. 19-1019, docketed on February 20, 2020).

On March 2, 2020, the Court granted both petitions and consolidated the cases for briefing and oral argument.

Many entities submitted amicus briefs supporting both sides, both at the petition stage and at the merits stage. Of note among those amicus briefs at the merits stage, Native American organizations reminded the Court that Native Americans, who are exempt from the Individual Mandate, nonetheless benefit from ACA Marketplace plans. Moreover, during the 2020 COVID-19 pandemic, Native American tribal lands became some of the nation's worst "hot spots" as tribes lacked resources to provide adequate health care services or sufficient vaccines for their peoples.

Also of note, four constitutional law scholars, two of whom had opposed ACA and two of whom had supported ACA before the Court over the last decade, joined forces in an amicus brief to argue that the 2017 Congress clearly did not intend to declare the entire Individual Mandate provision or the entire act unenforceable, because that Congress had left the Individual Mandate intact and rendered only the ACA Penalty unenforceable. Such conduct, they argued, supported no more than severability of the Individual Mandate if the Court found the mandate constitutionally repugnant.

After President Biden took the oath of office in January of 2021, the Biden administration entered the fray. By letter on February 10, 2021, the federal government again reversed course and notified the Court that it now supported the constitutionality of ACA and the severability of the Individual Mandate upon a finding of the provision's unconstitutionality.

In the midst of the global pandemic, the Court faced whether to terminate the ACA-compliant health care of millions of employed and unemployed individuals.

The Decision on Standing:

The majority opinion: The Court reversed the Fifth Circuit decision finding ACA unconstitutional on standing grounds alone. The majority opinion by Justice Breyer carefully stated that the Court "does not reach these questions of the Act's validity" because Texas and the other plaintiffs – now "federal respondents" in the lead case -- lacked the standing necessary to raise those issues.

The state plaintiffs (led by Texas) had complained before the Court that ACA caused them injury through increased costs in the running of state-operated insurance programs, as well as increased administrative expenses necessitated by compliance with ACA's minimum value and essential coverage requirements. The individual plaintiffs had complained that ACA forced them to obtain health care coverage that they did not want.

The Court rejected as insufficient the injuries asserted by the individual plaintiffs and the state plaintiffs. Assuming "pocketbook injury" for the individual plaintiffs, the Court reasoned that, under the Federal Constitution's "live case or controversy" requirement, plaintiffs must trace their alleged pocketbook injury to the very provision that they challenged as unenforceable and therefore unconstitutional, in this case to the Individual Mandate provision itself.

(Continued on page 6)

"IMPROBABLE RESCUE"? SCOTUS PUNTS AS IT UPHOLDS ACA

(Continued from page 5)

As the Court noted, however, the plaintiffs challenged the provision by relying solely on cases with penalties still in effect. With the ACA Penalty set at zero and thus rendered unenforceable, the individual plaintiffs had not shown any kind of governmental action or conduct that had caused or would cause them the injury that they attributed to the Individual Mandate. Justice Breyer pointed to the Court's precedents requiring plaintiffs to show injury from actual or threatened enforcement of the statutory section at issue. In the Court's view, the individual plaintiffs faced only a voluntary choice (here, your author would paraphrase Hamlet, to buy coverage or not to buy coverage), but no injury or damage if they chose not to buy coverage. Whom, Justice Breyer questioned, could they enjoin? The Secretaries of HHS or Treasury? Neither could enforce a zero penalty.

Similarly, the Court concluded that the states pointed only to injuries not fairly traceable to the Individual Mandate. Instead, the states had asserted increased costs in the running of state-operated insurance programs, as well as increased administrative expenses necessitated by compliance with ACA's minimum essential coverage requirement. The Court noted that ACA imposed these requirements in provisions other than the Individual Mandate provision.

Thus, the Court held that no plaintiff had standing to seek a declaration of the Act's unconstitutionality.

The majority opinion also declined to reach a novel theory of standing offered by the individual plaintiffs but never argued below. It also noted that the two dissenters (Justices Gorsuch and Alito) discussed a novel theory of standing for the state plaintiffs, again never advanced below.

In the absence of any plaintiff with standing, the Court felt that it had no choice but to reverse and remand.

The separate Thomas concurrence and the Alito dissent: After reviewing the Court's prior ACA cases (*NFIB v. Sibelius and Burwell v. Hobby Lobby Stores,* 573 U.S. 682 (2015), Justice Thomas simply noted that "times have changed" and concluded with the majority that plaintiffs had not demonstrated harm that the Court could remedy. Although he also characterized the dissent's "standing-by-inseverability" argument as a "merits-like exercise," he also suggested how future litigators might develop such an argument.

Joined only by Justice Gorsuch, Justice Alito's dissent criticized the majority opinion as a distortion of the Court's standing jurisprudence, but then cited several cases from earlier eras when the Court incorporated a merits exercise into a standing analysis when the dissent extensively discussed two examples of traceability and redressibility.

In support of its standing analysis, the dissent described a previously rarely discussed standing analysis never raised below, i.e., "standing-by-inseverability." Under that analysis, the dissent would have held that plaintiffs had standing to challenge ACA because the Individual Mandate and other provisions "inextricably linked" to the Individual Mandate could not survive with a zero penalty. The dissent also cobbled together the Roberts "lone-wolf" opinion on the Commerce Clause joined by no other justice, and the dissent in *NFIB v. Sibelius* to find a "majority" vote of 5 Justices who rejected the Individual Mandate under the Commerce Clause.

Having found standing, the dissent reached the merits and would have found that the reduction of the ACA Penalty to zero vitiated the constitutional source of authority for the mandate, and that the related "inextricably linked" provisions also fell as inseverable and unenforceable against the federal respondents.

Punting in Controversial Cases:

The Court has punted before in controversial cases. In *Perry v. Brown,* for example, the Court also found that plaintiffs lacked standing to bring their legal appeal and sidestepped the merits of the marriage equality question for another day. There, the Ninth Circuit Court of Appeals had enjoined California from enforcing Proposition 8 ("Prop 8") language permitting marriage only between one man and one woman, grafted onto the state constitution by popular vote. The appellate court stayed its injunction pending Supreme Court review.

Of interest to labor and employment litigators, *unlike* the decision in *California v. Texas,* the Supreme Court did *not* remand to the Ninth Circuit *with instructions to dismiss the case.* That remand left the Ninth Circuit injunction against enforcing the Prop 8 language intact. Wedding bells chimed. HBO produced an award-winning documentary (*The Case Against 8*) with David Boies and Ted Olson (former adversaries from the Bush/Gore election controversy) in lead roles, along with four same-sex couples with compelling stories. Then California Attorney General (Kamala Harris) married one of those couples on camera.

After a rapid shift in the nation's perspective, the Court affirmed marriage equality on the merits on *Obergefell v. Hodges,* 516 U.S. 644 (2015).

Impact During the Pandemic:

Punting in the midst of a pandemic may not be the worst result.

Just two days before the Supreme Court's decision, *Bloomberg News* reported that, according to the U.S. Department of Health and Human Services (HHS), more than 1.2 million individuals had already signed up for ACA Marketplace Plans during the special enrollment period extended by the Biden Administration. HHS also reported that 1 million new and returning consumers will pay monthly premium costs under those plans of $10 or less through premium tax credits under the American Rescue Plan.

The 7-2 decision saved millions of individuals from losing affordable, comprehensive health care coverage in the midst of the resurging COVID pandemic and uncertainty surrounding vaccine rollouts, vaccine hesitancy, and new strains of the coronavirus.

—END NOTE—

[1]Eleven days later, in what might be termed a "penny whistle trill at midnight" or an afterthought, the Court dismissed the petition for certiorari in *House of Representatives v. Texas* from the same Fifth Circuit decision, 2021 WL 2637839 (June 28, 2021). ■

BEWARE THE RISE OF LEGAL *IPSE DIXITS*

Stuart M. Israel

Legal *ipse dixits* are on the rise. *Caveat litigator.*

1.

An *ipse dixit,* various dictionaries explain, is "an unsupported statement that rests solely on the authority of the individual who makes it," an "assertion made but not proved," a "dogmatic and unproven statement," and an "assertion by one whose sole authority is the fact that he himself said it."

An *ipse dixit* may be based on power or on the self-regard of its author, justified or not.

An example of the former is the declaration of Louis XIV: *"L'etat, c'est moi."* Another example is the common parental response to a child's protest, as in:

Child "Why do I have to wear this stupid bike helmet!?"

Parent "Because I say so, that's why!"

An example of the latter is Dr. Anthony Fauci's retort to his critics: "Attacks on me, quite frankly, are attacks on science." In French, I think, that would be *"Le science, certainment, c'est moi."*

Ipse dixits used by potentates, parents, and politicians are one thing. Legal *ipse dixits* are another.

2.

Black's Law Dictionary (11th ed. 2011) reports that the phrase *ipse dixit* "is commonly used in court decisions analyzing the admissibility of expert testimony." A court, *Black's* continues, "may reject expert-opinion evidence that is connected to existing data only by the expert's 'ipse dixit.'"

Under FRE 702 and 703, admissible expert opinion must be based on "sufficient facts or data" and "reliable principles and methods," "reliably applied" to the "facts of the case." *Ipse dixits,* even from highly-credentialed individuals, are not sufficient to satisfy the evidence rules.

As Judge Richard Posner put it in *Rosen v. Ciba-Geigy,* 78 F.3d 316, 318 (7th Cir. 1996), a judge "asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist."

Ipse dixits from aspiring expert witnesses are one thing. *Ipse dixits* from advocates are another.

3.

It seems that advocates are increasingly using *ipse dixits,* often instead of references to things like *stare decisis,* statutory language, legal reasoning, and what Fed.R.Civ.P. 11(b)(2) refers to as "nonfrivolous argument for extending, modifying, or reversing existing law or establishing new law."

This trend seems to be prevalent among teams of highly-credentialed BigLaw litigators who are uber-confident that their conclusions—which favor their clients—*must* be correct "as a matter of law." In the (translated) words of Luigi Pirandello, "It is so if you think so!"

Whatever the etiology of this trend, the use of legal *ipse dixits* is on the rise.

4.

Here is an example from my lived experience.

An employer retained a team of BigLaw management lawyers to sue my union-client to try to nullify a labor arbitration award.

The award addressed "final" reprimands imposed on workers charged with using offensive "shop talk" and "barracks language" in the workplace. Applying the contractual "just cause" standard to the unique facts, considering "past practice" and management's "due process" deficiencies, the arbitrator moderated the discipline to "first" reprimands.

The management lawyers were highly-credentialed and pleasant, but unswervingly devoted to their clients' high dudgeon about the moderation of the "final" reprimands to "first" reprimands.

The award should be nullified, the management lawyers asserted in court, because the award "flies in the face of the significant public policy concerns and goals embodied in and furthered by Title VII."

Federal courts may nullify arbitration awards that "fly in the face" of public policies declared by Congress. But federal courts may not nullify awards based on one side's *ipse dixit* about "concerns" and "goals" supposedly implicit—but not stated—in a federal statute.

See, e.g., Eastern Assoc. Coal Corp. v. UMWA Dist. 174, 531 U.S. 57, 58, 60, 65-68 (2000), which holds that the "public policy" invoked by a party challenging an arbitration award must be "explicit," "well defined," "dominant," and based on "positive law" and "legal precedents"—not merely on "general considerations of supposed public interest" posited by the challenger.

All's well that ends well, and my case ended well for the union. But the end came only after many months of *ipse-dixit*-driven, time-consuming, expensive litigation, including mandated mediation filings and a magistrate-conducted mediation and Rule 56 proceedings involving cross motions, three briefs per side, and a district-judge-conducted hearing. There also were strained labor relations.

5.

I have more *ipse-dixit*-driven litigation pending, in a retirement healthcare class action in which highly-credentialed BigLaw defense lawyers insist that their interpretation of ERISA's remedy language is definitive "as a matter of law."

The defense interpretation would bar the retirees' remedy-related discovery and limit the district court's authority—and responsibility--to award the retirees the healthcare "benefits due" and "other appropriate equitable relief" needed to "protect" the retirees' "interests" and "redress" and "adequately remedy" defendants' already-adjudicated ERISA violations.

The quoted words mostly come from 29 U.S.C. Sections 1001(a) and (b) and 1132(a)(1)(B) and (a)(3) and *Varity Corp. v. Howe,* 516 U.S. 489, 512 (1996).

If you think "highly fact-specific" questions about what relief is needed and "appropriate" to "adequately remedy" ERISA violations may be answered by one side's *ipse dixit* pronouncements, you

(Continued on page 8)

BEWARE THE RISE OF LEGAL *IPSE DIXITS*

(Continued from page 7)

might want to review the multiple opinions in *Rochow v. Life Ins. Co. of North America,* 780 F.3d 364 (6th Cir. 2015) (*en banc*) and read Section 39, *Restatement (Third) of Restitution and Unjust Enrichment* (American Law Institute 2011).

6.

I connect the rise in legal *ipse dixits* in part to the uber-self-confidence increasingly common among highly-credentialed BigLaw litigators—particularly those high on the letterhead, accustomed to deference, and those low on the letterhead, fresh from academic success, assigned to draft confident pleadings and briefs—who seem to share a taste for hyperbole and the operating principle *"La loi, c'est moi."*

Of course, *ipse dixit* use is part of the human condition, and quite prevalent among juris doctors. Take my word for it. So, when assessing proffered expert-opinion evidence and reviewing the other side's confident pronouncements about "the law," *caveat litigator.* ■

BOARD BANS BALLOT SOLICITATION

John G. Adam

Fessler & Bowman, Inc., 341 NLRB 932, 934 (2004) ruled that a party's collection of mail ballots constitutes "objectionable conduct."

I argued—unsuccessfully—in *Fessler* that the Board should ban solicitations even if no voters turned over their ballots. The four-member Board split, declining to adopt my no BS rule. 341 NLRB at 934. See "My Fight Against Ballot Harvesting" (Fall 2020).

Citing *Fessler, Professional Transportation, Inc.* 370 NLRB No. 132 (2021), ruled that the ballot solicitation is objectionable and the election would be set aside if the evidence showed that ballot solicitation affected a determinative number of votes. Solicitation **(1)** "casts doubt on the integrity of the election and the secrecy of employees' ballots" and **(2)** "suggests to employees that the soliciting party is officially involved in running the election." This rule applies retroactively. Op. 3-5.

In *Professional* the union won by more than ten votes. As only two ballots were solicited by the union, the election was not set aside. Op. 5-6. Member Emanuel dissented in part. He would adopt a *per se* rule that whenever a party solicits ballots the election is set aside. Op. 5, n. 19

While *Fessler* and *Professional* both involve union solicitation, this rule "applies equally to other parties to an election, including employers." Op. 4, n.15. Remember, no BS! ■

SCABBY THE RAT, THE NLRA, AND THE FIRST AMENDMENT

Benjamin L. King
McKnight, Canzano, Smith, Radtke & Brault, P.C.

Scabby is a large, cartoon inflatable rat. He has red eyes, large teeth, and a scabby belly. Such attention-getting inflatable rats are sometimes used by unions to protest against "rat" contractors. The Board explains that "various meanings have been assigned to unions' use of a rat caricature or the word "rat." Rat can "refer to some sort of labor dispute between a union and an employer or as "a contractor that does not pay all of its employees prevailing wages" or benefits. *IUOE,* 2019 WL 6838679, at *2 (ALJD).

Judge Richard Posner wrote that large-inflated "rubber rats" are "widely used by labor unions to dramatize their struggles with employers" and "protected by the First Amendment." "The rats are the traditional union picketers' signs writ large." *Laborers' Local 330 v. Town of Grand Chute,* 834 F.3d 745, 752 (7th Cir. 2016).

Scabby

1.

The Board in July 2021 rejected an effort by Trump-appointed General Counsel Peter Robb to ban the rat.

The Board reaffirmed that a union's display of an inflated Scabby rat and banners at the neutral employer's work site are lawful and do not violate the secondary boycott provision of Section 8(b)(4) of the National Labor Relations Act. *IUOE Local 150 (Lippert Components, Inc.),* 371 NLRB No. 8 (2021).

In a 3-1 decision, the Board affirmed *Carpenters Local 1506 (Eliason & Knuth of Arizona),* 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15 (Brandon Regional Medical Center),* 356 NLRB 1290 (2011). These cases held that the display of inflatables near a neutral employer's premises does not "threaten, coerce, or restrain" with the object of forcing or requiring the neutral employer "to cease doing business" with the primary employer. Charmain Lauren McFerran and Members John Ring and Marvin Kaplan issued concurring opinions. Member William Emanual issued a dissent.

Lippert Components address the union's labor dispute with MacAllister Machinery which leased heavy machinery and equipment to Lippert. Lippert attended a trade show during which union agents posted Scabby (about 12 feet tall) and two banners near the trade show's entrances. One banner approximately 96 in. long and 45 in. high read, "OSHA found safety violations against MacAllister, Inc." The other banner, approximately the same size read, "Shame on Lippert Components, Inc., for harboring rat contractors."

Chairman McFerran concurred, explaining that under the "constitutional avoidance doctrine," the potential infringement of a union's First Amendment rights precludes the Board from finding that the banners and Scabby in these circumstances violate Section 8(b)(4)(ii)(B). Slip Op. 2. This doctrine, per *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction*

Trades Council, 485 U.S. 568 (1988), requires the Board to avoid interpreting the NLRA in a way that raises serious constitutional concerns.

While *DeBartolo* did not concern inflatable rats, Members Ring and Kaplan wrote that constitutional avoidance "cannot persuasively be limited to handbilling" (Op. 5):

> [T]he union's display of an inflatable rat and banner [does] not violate Section 8(b)(4(ii)(B). Interpreting that statutory provision would raise serious First Amendment issues. The display of banners and inflatable rat was clearly expressive activity, conveying the Union's message that MacAllister had committed OSHA violations and was a "rat contractor," that Lippert should be ashamed to do business with it, and, implicitly, that MacAllister's alleged conduct should be opposed by abstaining from doing business with Lippert.

2.

Lippert Components fits squarely with well-established precedent, such as *NLRB v. Fruit & Vegetable Packers,* 377 U.S. 58 (1964), which held that Section 8(b)(4) did not prohibit peaceful secondary picketing at neutral business establishments. There, picketers asked the public not to buy a struck product. The Court based its decision in part on its concern "that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." *Id.* at 63. See also, *NLRB v. Catholic Bishop of Chicago,* 444 U.S. 490 (1979) (the Board cannot exercise jurisdiction over nonsecular schools because such coverage would raise serious questions under the First Amendment).

The courts and the Board have frequently invoked the constitutional avoidance doctrine in cases where expressive union conduct is challenged by Section 8(b)(4)(ii)(B). *520 South Michigan Avenue Associates, Ltd. v. UNITE HERE,* 760 F.3d 708, 723 (7th Cir. 2014) ("the Supreme Court has cautioned us to be especially careful not to label expressive union conduct as coercive if such an interpretation could interfere or limit free speech"); *Carpenters Local 1827 (United Parcel Service, Inc.),* 357 NLRB 415, 416 (2011) ("our duty [is] to avoid construing the Act, if possible, to avoid raising serious constitutional questions"); *Eliason & Knuth,* 355 NLRB at 807 (bannering does not violate NLRA "is supported, if not mandated, by the constitutional concerns that animated" *DeBartolo*). These decisions leave no doubt that the law required the Board in *Lippert Components* to apply the constitutional avoidance doctrine.

Members Ring and Kaplan note that certain picketing activity and "secondary activity" that "seeks to achieve its objective through intimidation . . . may be found unlawful without posing serious questions of the validity of Section 8(b)(4) under the First Amendment." *Lippert Components,* Op. 5, quoting *DeBartolo* (internal quotation omitted).

3.

Member Emanuel dissenting, states that Scabby, "replete with red eyes, fangs, and claws." is so disturbing and intimidating that he is "coercive even if viewed as non-picketing conduct." That is because the "size of the symbolic display combined with its location and threatening or frightening features could render it coercive within the meaning of Section 8(b)(4)(ii)." Member Emanuel asserts that Scabby would not be subject to the constitutional avoidance doctrine because the use of Scabby is "predominated by coercion and intimidation." Op. 10.

4.

Member Emanual, however, does not show that the inflatable rat is intimidating or coercive. Indeed, Scabby is not any "creepier" than the Charlie Brown inflatable used in the Macy's Thanksgiving Day Parade.

Member Emanual does not address that Scabby is protected First Amendment speech. But the First Amendment protects banners and inflatable displays. *Tucker v. City of Fairfield,* 398 F.3d 457, 462 (6th Cir. 2005) ("a rat balloon to publicize a labor protest is constitutionally protected expression within the parameters of the First Amendment, especially given the symbol's close nexus to the Union's message"). To hold that displaying Scabby violates the NLRA would raise serious questions about the constitutionality of Section 8(b)(4)(ii)(B).

The First Amendment states that "Congress shall make no law…abridging the freedom of speech." The display of signs and banners to convey written messages of public concern constitutes speech protected by the First Amendment. See *U.S. v. Grace,* 461 U.S. 171, 176 (1983) ("peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment.") and *Carlson v. California,* 310 U.S. 106, 112-13 (1940) ("The carrying of signs and banners…is a natural and appropriate means of conveying information on matters of public concern.").

The constitutionality of displaying Scabby cannot be nullified by describing the "rat" as threatening. Speech "cannot be restricted simply because it is upsetting or arouses contempt." *Snyder v. Phelps,* 562 U.S. 443, 458 (2011) ("Thank God for 9/11" signs protected).

In sum, the rat as a symbol of protest in labor disputes will continue to be used. *Lippert Components* teaches that Scabby and Section 8(b)(4) and the First Amendment can continue to coexist harmoniously. ■

WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for *Lawnotes*. But the muse is elusive. And you just can't find the perfect topic. You make the excuse that it's the press of other business but in your heart you know it's just writer's block. We can help. On request, we will help you with ideas for article topics, no strings attached, free consultation. Also, we will give you our expert assessment of your ideas, at no charge. No idea is too ridiculous to get assessed. You have been unpublished too long. Contact *Lawnotes* editor John Adam at jgabrieladam@gmail.com.

FEDERAL LITIGATION AND LABOR ARBITRATION

Nate Kilbert
Assistant General Counsel
United Steelworkers

Emily M. Maglio
Leonard Carder, LLP

Federal law favors resolution of grievances arising over the application or interpretation of a collective bargaining agreement through the contractual grievance procedure. 29 U.S.C. § 173(d). The Supreme Court affirmed this statutory preference favoring arbitration and deference to labor arbitrators in the *Steelworkers Trilogy: United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960). See *United Paperworkers v. Misco,* 484 U.S. 29, 37 (1987).

The following is an overview of common litigation issues in private sector labor arbitration.

I. JURISDICTION

A. Statutory Basis

Labor Management Relations Act, Section 301, 29 U.S.C. § 185

(1) Section 301(a) creates a federal cause of action for "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce[.]"

(2) Section 301(c) provides that "district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

Section 301 empowers the courts to develop a body of federal common law for the enforcement of CBAs. See *Lewis v. Benedict Coal Corp.,* 361 U.S. 459, 470 (1960).

B. LMRA Section 301 Causes of Action Relating to Arbitration

(1) Petition to Compel Arbitration: A union or employer may move to compel arbitration of a dispute pursuant to the arbitration procedure in a collective bargaining agreement. This may be accompanied by a request for injunctive relief to prevent the actions of the other party from frustrating the arbitral process.

(2) Petition to Confirm and Enforce Arbitration Award: A union or an employer may file a petition to confirm and enforce an arbitration award in order to make an arbitration award enforceable in court. Typically, the moving party will file a motion to confirm and enforce the award along with supporting declarations shortly after filing the petition and not engage in discovery. Often a petition to confirm and enforce is filed in response to a petition to vacate.

(3) Petition to Vacate Arbitration Award: A union or an employer may also file a petition to vacate an arbitration award on narrow grounds discussed below. Like the petition to confirm and enforce, typically, the moving party will file a motion to vacate the award along with supporting declarations shortly after filing the petition and not engage in discovery.

II. STATUTES OF LIMITATIONS

No federal statute of limitations applies to § 301 actions. The Supreme Court has instructed lower courts to "'borrow' the most suitable statute or rule of timeliness from some other source." *DelCostello v. Int'l Bhd. of Teamsters,* 462 U.S. 151, 158, (1983 (adopting 6-month statute of limitations from §10(b) of the National Labor Relations Act (NLRA) for suits alleging breach of the duty of fair representation in connection with employer breach of a CBA.

A. Actions to Compel Arbitration

The statute of limitations begins to run with an unequivocal, express refusal to arbitrate. There need not have been a formal demand for arbitration. *Int'l Bhd. of Teamsters Local Union No. 661 v. Zenith Logistics, Inc.,* 550 F.3d 589, 592-593 (6th Cir.2008).

For actions to compel arbitration, almost all circuits have adopted the NLRA's 6-month statute of limitations on filings of unfair labor practices contained in §10(b) of the Act. *E.g., McCreedy v. Local Union No. 971, UAW,* 809 F.2d 1232, 1237 (6th Cir. 1987).

B. Petitions to Confirm and Enforce and to Vacate Arbitration Awards

The timeliness of a Section 301 suit "is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. Hoosier Cardinal Corp.,* 383 U.S. 696, 704-05 (1966). Depending on the nature of the claim, federal courts tend to apply the statute of limitations from one of two state analogues: the state's arbitration act or the state's breach of contract claim. These statutes of limitations can be very short, especially when drawn from the state's arbitration act. *See Chauffeurs, Teamsters, Warehousemen & Helpers, Loc. Union No. 135 v. Jefferson Trucking Co.,* 628 F.2d 1023, 1026–27 (7th Cir. 1980) cert. denied, 449 U.S. 1125 (1981) (applying Indiana's 90-day statute of limitations). The federal courts of appeals have issued decisions identifying the state analogue for most, if not all states. The authors advise attorneys to familiarize themselves with the statutes of limitations applicable in the states in which they practice.

Many circuits apply the statute of limitations not just to the filing of a Section 301 petition, but also to bar affirmative defenses that could "could have [been] raised in a timely petition to vacate the award." *Bhd. of Teamsters & Auto Truck Drivers Loc. No. 70 of Alameda Cty. v. Celotex Corp.,* 708 F.2d 488, 490 (9th Cir. 1983), *citing Sheet Metal Workers International Association, Local 252 v. Standard Sheet Metal, Inc.,* 699 F.2d 481, 483 (9th Cir.1983); *Jefferson Trucking Co.,* 628 F.2d at 1025–27; *Serv. Employees Int'l Union, Local No. 36 v. Office Ctr. Servs., Inc.,* 670 F.2d 404, 412 (3d Cir. 1982).

III. COMPELLING ARBITRATION

The fundamental question for the court is whether the parties have agreed to submit a particular dispute to arbitration. *AT&T Techs., Inc. v. Communications Workers,* 475 U.S. 643, 649

(1986). The court cannot inquire into the merits of the grievance. *AT&T Techs.,* 475 U.S. at 649-50; *American Mfg. Co.,* 363 U.S. at 567-568.

A. Presumption of Arbitrability

There is a strong presumption in favor of arbitration when a CBA has a broad arbitration provision. *AT&T Techs.,* 475 U.S. at 650. "An order to arbitrate … should not be denied unless it may be it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," and "[d]oubts should be resolved in favor of coverage." *Warrior & Gulf Navigation Co.,* 363 U.S. at 582-538; *see also Granite Rock Co. v. Int'l Bhd. of Teamsters,* 561 U.S. 287, 301 (2010); *AT&T Techs.,* 475 U.S. at 650 ("This presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements, furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining.").

The presumption in favor of arbitrability applies only to validly formed and enforceable arbitration agreements. *Granite Rock Co.,* 561 U.S. at 301.

Most courts, including the Sixth Circuit, hold that presumption of arbitrability applies whenever there is an arbitration provision but that it is particularly applicable when the arbitration clause is "broad." *See Wash. Mailers Union No. 29 v. Wash. Post Co.,* 233 F.3d 587, 592 n.4 (D.C. Cir. 2000); *United Steelworkers v. Mead Corp.,* 21 F.3d 128, 132 (6th Cir. 1994).

The presumption of arbitrability may be rebutted by an express provision excluding a particular grievance from arbitration or by "the most forceful evidence of a purpose to exclude the claim from arbitration." *AT&T Techs.,* 475 U.S. at 650.

Intent to exclude disputes from arbitration, despite broad arbitration language, has been found where:

- Disability benefit plan incorporated into the CBA stated that the plan administrator has the final decision regarding interpretation and application of the plan. *Local Union No. 4-449, Oil Workers Union v. Amoco Chem. Corp.,* 589 F.2d 162, 164 (5th Cir. 1979) *(per curiam)*;
- Pension plan incorporated into the CBA and stated that the plan appeals committee would have the exclusive ability to interpret and apply the plan. *Teamsters Local Union No. 783 v. Anheuser-Busch, Inc.,* 626 F.3d 256, 262 (6th Cir. 2010);
- CBA limited arbitration to "good faith" claims that a written provision of the CBA was violated and the Court interpreted the CBA to unambiguously permit the Company to subcontract in the way the Union alleged to be a violation. *Paper Workers Int'l Union, Local 4-12 v. Exxon Mobil Corp.,* 657 F.3d 272, 278 (5th Cir. 2011).

B. Procedural v. Substantive Issues of Arbitrability

Parties may have disputes over whether procedural prerequisites to arbitration have been satisfied, for example, timeliness, notice, etc. Such questions of "procedural arbitrability" are allocated to arbitrators. *See, e.g., John Wiley & Sons v. Livingston,* 376 U.S. 543, 557 (1964) ("Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."); *Int'l Union of Operating Engineers, Local 150 v. Flair Builders, Inc.,* 406 U.S. 487, 491 (1972) (holding that issue of laches must "be referred to the arbitrator for decision"); *Shaw's Supermarkets, Inc. v. United Food & Commercial Workers Union, Local 791,* 321 F.3d 251, 255 (1st Cir. 2003) (question of bifurcation of proceedings for arbitrator); *Nursing Home & Hosp. Union No. 434 v. Sky Vue Terrace, Inc.,* 759 F.2d 1094, 1097 (3d Cir. 1985) (timeliness is question for arbitrator).

Procedural disputes are distinct from the question of "substantive arbitrability," whether there is an agreement to arbitrate that applies to the instant dispute, which are ordinarily for courts to decide. *Granite Rock Co.,* 561 U.S. at 297. Questions of substantive arbitrability include whether a CBA was in effect at the time the dispute arose and whether the parties' agreement covers the dispute in question. *Granite Rock Co.,* 561 U.S. at 297.

The parties may agree that the arbitrator will resolve the question of whether the parties agreed to arbitrate a particular dispute, but such an agreement must be clear and unmistakable. *AT&T Techs.,* 475 U.S. at 649. In such a case, even questions of substantive arbitrability will be resolved by the arbitrator.

C. Grievances arising after CBA expiration

Post-expiration grievances are generally not arbitrable, as the agreement to submit disputes to arbitration expires with the rest of the CBA. *See Litton Fin'l Printing v. NLRB,* 501 U.S. 190, 205 (1991) ("The object of an arbitration clause is to implement a contract, not transcend it."). Parties are thus "released . . . from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied." *Id.,* at 206.

A post-expiration grievance can be arbitrable under the expired CBA only where:

[1] it involves facts and occurrences that arose before expiration,

[2] where an action taken after expiration infringes a right that accrued or vested under the agreement, or

[3] where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

501 U.S. at 205.

Certain rights are often found to be vested without specific textual provisions showing an intention to vest. These are often rights that are worked toward or accumulated over time. *See Nolde Bros., Inc. v. Local No. 358, Bakery Workers Union,* 430 U.S. 243 (1977) (holding entitlement to severance pay based on years of service was arbitrable after CBA expired); *Cincinnati Typographical Union No. 3 v. Gannett Satellite Info. Net., Inc.,* 17 F.3d 906, 911 (6th Cir. 1994) (noting vacation time is often vested but protection against layoff is not); *Int'l Bhd. of Teamsters, Local Union 1199 v. Pepsi-Cola Gen'l Bottlers, Inc.,* 958 F.2d 1331, 1334 (6th Cir. 1992) (requirement that discharge be for just cause not arbitrable after expiration).

Retiree medical benefits were previously presumed to be vested in the Sixth Circuit. *See Int'l Union, United Auto. Workers v. Yard-Man, Inc.,* 716 F.2d 1476, 1481-1483 (6th Cir. 1983). But in *M&G Polymers USA, LLC v. Tackett,* 574 U.S. 427, 441-442 (2015), the Supreme Court held that the ordinary termination language of a CBA will generally serve to terminate retirees' rights to post-retirement medical coverage.

(Continued on page 12)

FEDERAL LITIGATION AND LABOR ARBITRATION

(Continued from page 11)

IV. Reverse *Boys Market* Injunctions to Preserve Status Quo

Notwithstanding the general prohibition on injunctions in the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.,* in *Boys Markets, Inc. v. Retail Clerks Union, Local 770,* 398 U.S. 235 (1970), the Supreme Court held that a district court may enjoin a strike in breach of a no-strike obligation under a CBA that contains provision for arbitration of the dispute over which the strike was called. 398 U.S. at 254-255.

Under this precedent, many circuits have permitted unions to secure injunctions to require the employer to maintain the status quo pending arbitration when they can show that this is necessary to prevent a situation in which no arbitral award could "return the parties substantially to the status quo ante." *Lever Bros. Co. v. Int'l Chem'l Workers Union, Local 217,* 554 F.2d 115, 123 (4th Cir. 1976); *see also Sky Vue,* 759 F.2d at 1098. These are sometimes called "reverse *Boys Market*" injunctions. *Lodge 91 Int'l Ass'n of Machinists v. United Techs. Corp.,* 230 F.3d 569, 581 (2d Cir. 2000).

In order for an injunction to restore or maintain the status quo pending arbitration to issue, (1) the dispute must be arbitrable; and (2) the traditional requirements for equitable relief must be satisfied, including irreparable injury, a balance of hardships, and, to an appropriate degree, probability of success on the merits. *See Sky Vue,* 759 F.2d at 1098 (granting injunction against dissipation of employer assets necessary to satisfy potential arbitral award); *Workers Int'l Union v. Consol'd Alum. Corp.,* 696 F.2d 437, 442-445 (6th Cir. 1982) (rejecting union's argument that possibility that laid off employees may be subject to repossessions, foreclosures, and credit injury constituted sufficient irreparable harm); *Machinists v. Panoramic Corp.,* 668 F.2d 276, 286 (7th Cir. 1981) (awarding injunctive relief in a threatened sale of assets).

V. SUBSTANTIVE LAW FOR JUDICIAL REVIEW

A. Grounds to Vacate or Decline to Enforce an Arbitration Award

The substantive law applied under Section 301 is "federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, 456-57 (1957). Federal courts play "a limited role when asked to review the decision of an arbitrator." *Misco,* 484 U.S. at 36. They may not "reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Id.* Arbitration awards are legitimate "[a]s long as the arbitrator's award 'draws its essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial justice.'" *See also, Southwest Reg. Council of Carpenters v. Drywall Dynamic, Inc.,* 823 F.3d 524, 530 (9th Cir. 2016) (four grounds for vacating award under § 301: "(1) when the award does not draw its essence from the collective bargaining agreement and the arbitrator is dispensing his own brand of industrial justice; (2) where the arbitrator exceeds the boundaries of the issues submitted to him; (3) when the award is contrary to public policy; or (4) when the award is procured by fraud.").

B. Public Policy

The standard to vacate or deny enforcement due to public policy is hard to meet. The public policy must be "explicit," "well defined," "dominant," and "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co. v. Rubber Workers,* 461 U.S. 757, 766 (1983).

1. Illegality & NLRA Section 8(e)

A frequently litigated public policy ground is whether the arbitration award violates NLRA Section 8(e), 29 U.S.C. § 158(e). The "hot-cargo provision" "forbids contracts between a union and an employer whereby the employer agrees to cease doing business with or to cease handling the products of another employer." *See Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 78 (1982). *Kaiser Steel* held that federal courts have "a duty to determine whether a contract violates federal law before enforcing it," and concluded that, "§ 8(e) renders hot cargo clauses void at their inception and at all times unenforceable by federal courts." *Id.* at 83-84. "[W]here a § 8(e) defense is raised by a party which § 8(e) was designed to protect, and where the defense is not directed to a collateral matter but to the portion of the contract for which enforcement is sought, a court must entertain the defense." *Id.* at 86. This standard applies with equal force in petitions to confirm and enforce or vacate arbitration awards to prohibit enforcement of the application of a CBA provision that violates Section 8(e). *See also Teamsters Loc. Union 682 v. KCI Const. Co.,* 384 F.3d 532, 537 (8th Cir. 2004).

2. Preemption & NLRA Section 10(k)

Another ground is whether the award conflicts with an NLRA Section 10(k), 29 U.S.C. § 160(k), award where the Board resolves a jurisdictional dispute between two groups of employees by assigning the disputed work to one group. Work assignment arbitration awards are also not enforceable when they are preempted by a Section 10(k) work assignment award. To preempt an arbitration award, the work assigned to one union in arbitration work must be the same work at the same location assigned in the Section 10(k) proceeding—similar contractual theories at different locations or for different employers are not preempted. *See Sea-Land Service, Inc. v. Int'l Longshore & Warehouse Union, Local 13 et al.,* 939 F.2d 866, 872-73 (9th Cir. 1991), *citing Int'l Longshore & Warehouse Union, Local 32 v. Pac. Marit. Ass'n,* 773 F.2d 1012, 1016 (9th Cir. 1985); *J.F. White Contracting Co. v. Loc. 103 Int'l Bhd. of Elec. Workers,* 890 F.2d 528 (1st Cir. 1989); *but see Carey v. Westinghouse Elec. Corp.,* 375 U.S. 261, 266 (1964) ("Since § 10(k) not only tolerates but actively encourages voluntary settlements of work assignment controversies between unions, we conclude that grievance procedures pursued to arbitration further the policies of the Act."); *Sheet Metal Workers Int'l Ass'n Local 27 v. E.P. Donnelly, Inc.,* 737 F.3d 879, 891 n.16 (3d Cir. 2013) (pursuit of work assignment grievance lawful prior to issuance of adverse Section 10(k) award); *Longshoremen ILWU Local 7 (Georgia-Pac.),* 291 NLRB 89 (1988), *aff'd sub nom.,* 892 F.2d 130 (D.C. Cir. 1989) (same).

As the law may vary by circuit, learn the standard of review and statute of limitations that apply in the circuit where you are litigating. ■

MERC ELECTION RULINGS

Ashley Rahrig, ***Department Analyst***
Bureau of Employment Relations

The Commission issued representation rulings on contract bar, ratification bar, and administrative determinations.

Contract Bar to Election: ***City of Farmington Hills,*** Case No. 20-K-1702-RC, issued June 8, 2021. The Employer and Incumbent Union were parties to a CBA covering the period of July 1, 2017 through June 30, 2022. A renegotiated agreement between the parties was reached on July 28, 2020 and mutually ratified in August 2020. On November 4, 2020, a rival Union filed a Petition for a Representation Election and argued that the contract ratified in August 2020 was a premature extension of the initial 5-year agreement and could not bar the newly filed petition. The Commission disagreed finding that the August 2020 ratified agreement did not constitute a premature extension under Section 14(1) of PERA. The Commission reasoned that the Petitioner (and others) had an opportunity to file during the open window period and after the expiration of the first 3 years of the initial 5-year agreement. The fact that the Incumbent Union renegotiated and ratified a subsequent agreement after expiration of the 3-year protected period of that initial contract did not meet the definition of a "premature extension" under PERA, and therefore, the Commission dismissed the rival Union's representation petition.

TA Ratification Bar to Election: ***Wayne County,*** Case 20-L-1803-RC, issued June 8, 2021. The Commission majority found that a 30-day election bar existed when the Employer and Incumbent Union reached a TA on contract negotiations on the same day that a rival Union filed a Petition for Representation Election involving that same unit. The Commission majority held that in light of the revamped processes used during the virtual bargaining setting caused by COVID-19, the Parties' TA was complete and sufficient to trigger the 30-day grace period consistent with PERA and MERC's General Rules. The Commission also found that the TA was fully ratified and adopted by the parties prior to the expiration of that 30-day grace period. Consequently, the Commission majority dismissed the petition as barred under Section 14 of PERA. Conversely, the dissenting Commissioner argued that any "agreement" reached on the same day as the petition's filing was incomplete and did not trigger the 30-day grace period. The Dissent reasoned that any agreement reached prior to the filing of the petition was not a complete written TA or executed by the authorized representatives of the parties, as required by longstanding Commission precedent. The Dissent also concluded that the alleged TA was not ratified by the Employer within the 30-day "grace" period.

Administrative Determination on R Petitions: ***Regents of the University of Michigan,*** 21-C-0630-RC, issued July 13, 2021 and August 10, 2021. The Commission unanimously directed an election on a representation petition following the administrative determination reached by the Bureau Director. The administrative determinations related to three major issues—(i) the validity of the show of interest, (ii) possible confusion stemming from the similar names of the competing unions and (ii) whether a pending ULP should "block" further processing of representation petition.

In short, (UMPNC Independent) had filed a R petition seeking to represent an existing bargaining unit represented by a different Incumbent Union (UMPNC Incumbent). After failing to reach an agreement to conduct an election, the matter was referred for hearing before an ALJ.

Before the ALJ were three key issues--the sufficiency of the show of interest used to support the petition, alleged confusion regarding the use of the "UMPNC" name by both union organizations and whether a pending ULP filed by the UMPNC Incumbent should "block" the representation petition. After several efforts to settle these disputes, the matter was returned to MERC on the administrative issues to be determined by the Bureau Director.

The Bureau Director concluded that the ULP should not delay the processing of the petition, and that the "show of interest" was sufficient to support the petition. The Bureau Director also reasoned that any potential confusion related to the dual use of the UMPNC name would likely be resolved with the election. The matter was returned to the ALJ for review of any other issues that would preclude moving forward with the petition. After concluding that there was no need for an evidentiary hearing on the petition, the Commission issued a decision directing an election in the matter between UMPNC Independent and UMPNC Incumbent. The next day, the UMPNC Incumbent filed a reconsideration motion and requested the Commission stay its election order. Although the requests sought to challenge the Commission's reliance on the Bureau Director's administrative determinations, MERC denied both requests as they merely restated issues already addressed in the prior order. ■

FRANK MURPHY (1890-1949)

Mark H. Cousens

Reading the biography of Michigan's William Francis ("Frank") Murphy makes one feel that one has accomplished very little. In his short life of 59 years, Murphy served as a U.S. attorney, judge of the Detroit Recorder's court (where he presided over the Ossian Sweet trial), Mayor of the City of Detroit, Governor General of the Philippines, Governor of Michigan, Attorney General of the United States, and Justice of the Supreme Court (the last UM graduate to serve on the Court) where he was a staunch advocate for human rights. In *Korematsu v. United States,* 323 U.S. 214, 233 (1944), Justice Murphy issued an extraordinary dissent opposing the majority opinion which authorized the incarceration of Japanese-Americans during WWII.

No short article could hope to capture Murphy's extraordinary life. His story is the object of a three-volume biography, more than 1200 pages, written by the late UM Professor Sidney Fine (1920-2009) and the subject of a 2021 book by Gregg Zipes, *Justice and Faith: The Frank Murphy Story.* See "A Reader's Guide to Frank Murphy" on page 15.

But as *Lawnotes* is for labor and employment lawyers, I focus on two events occurring in 1937 which are important parts of Michigan labor history in which then Governor Murphy supported the interests of labor.

1. Flint Sit-Down Strike

Frank Murphy testifies about sit-down strike

In December, 1936, the two-year old UAW occupied two key parts plants operated by General Motors located in Flint. Then employing tens of thousands of workers, the Flint plants were crucial to the operation of GM providing parts for the corporation's entire line of vehicles. The seizure of the plants was designed to force GM to recognize the UAW which had ardently refused to acknowledge the UAW. The strikers settled into the plants and were supplied by a "sit in" community which provided food and medical care.

The strike was castigated by the press and numerous elected officials. First one then another injunction was granted requiring the strikers to vacate the plants. The orders were ignored. The question was what Governor Murphy would do in the face of these orders.

Local police made several attempts to enter the plants to evict the strikers. They were met by a cascade of auto parts, bricks and bottles in what became known as the "Battle of the Bulls." Strikers stood off the police but further violence appeared likely. Governor Murphy, fearing loss of life, directed the National Guard to enter the city. However, it was clear that the Guard was not present to assist GM or remove the strikers. Murphy viewed the strike as an exercise in worker's lawful rights and assigned the Guard the task of keeping the peace. They were present to keep the police from further assaults on the strikers and to prevent the strikers from harming the police.

Such government neutrality in labor relations was a stunning departure from the customary role government assigned itself. Organized labor had once been referred to as" "criminal syndicalism" *(see People v. Ruthenberg)* by the Michigan Supreme Court. Now, the Governor began a substantial effort to mediate between the corporation and the UAW. It worked. On February 11, 1937 the strike ended when GM signed a one-page agreement recognizing the UAW.

The sit-down strike had achieved its goal and then some. It marked the beginning of substantial growth for labor and the UAW which saw its membership expand from 30,000 to 500,000 members in the next year. Governor Murphy's decision to view strikers as engaging in a legitimate effort to achieve recognition had an immediate impact which continues to impact labor-management relations nearly a century later.

Professor St. Antoine, "Justice Frank Murphy and American Labor Law," 100 *Mich. L. Rev.* 1900, 1902 (2002), writes of the sit-down (footnotes omitted):

> The governorship made Murphy a major national figure. The most dramatic event was the great sit-down strike at General Motors ("GM") in 1936-37. Workers at several Flint plants, seeking to organize on behalf of the United Automobile Workers ("UAW"), occupied the buildings and refused to leave. Murphy regarded the action as an illegal trespass and he called out the National Guard to maintain order. But the Governor was opposed to bloodshed and refused to use the Guard or State Police to eject the strikers forcibly. Instead, Murphy personally intervened as mediator between GM and the UAW. He proved adept in the role, and the strike was eventually settled, with GM recognizing the UAW as the bargaining representative for its members. A close observer declared the result "the high point in Frank Murphy's entire career," and Time talked about "Murphy for President in 1940."

2. Teacher Tenure

Substantially less well known than the sit-down strike is the fight by classroom educators for job security. Widespread public education was less than a century old in 1937. Teachers were viewed as ordinary civil servants subject to replacement at will. Teaching jobs were seen as political patronage and changes in school board membership commonly resulted in wholesale replacement of teaching staff. A study by the University of Michigan undertaken in the 1920's showed huge turnover in teachers.

The National Education Association, not then a labor organization, had urged the adoption of teacher tenure legislation. And the newly formed Michigan Federation of Teachers organized around support for a statute. Both organizations urged Governor Murphy to endorse a statute.

Bills had been introduced in the 1935 legislature but went nowhere. But the 1936 election made substantial changes to the makeup of the Michigan Senate and House. Shortly after he took office, Murphy appointed a fifteen-member commission to study the question of teacher tenure. The Commission included five representatives each of the MEA, MFT and "Federation of Teacher's Clubs." The group developed a consensus proposal. But the Legislature still balked at the proposal. Governor Murphy called

a special session of the body and pressed hard for adoption of a statute. The tactic succeeded. The law was adopted and gave Michigan teachers a measure of job security for the first time.

———————

These actions taken Governor Murphy made a difference in the lives of thousands of people and boosted organized labor. His legacy lives on today.

As a Justice, he was also ahead of the times. "Racism is far too virulent today," was written by Justice Murphy in his concurring opinion in *Steele v. Louisville & N.R. Co.,* 323 U.S. 192, 209, 65 S. Ct. 226, 235, 89 L. Ed. 173 (1944). Hard to believe, but this was the first time the word "racism" was used in a Supreme Court opinion.

In 1950, future Justice Thurgood Marshall wrote in "Mr. Justice Murphy and Civil Rights," 48 *Mich. L. Rev.* 745, 745 (1950):

> In the field of civil rights, Mr. Justice Murphy was a zealot. To him, the primacy of civil rights and human equality in our law and their entitlement to every possible protection in each case, regardless of competing considerations, was a fighting faith.

The life of Frank Murphy is more than his achievements. What is remarkable is the continuing impact of his accomplishments more than eight decades later. ■

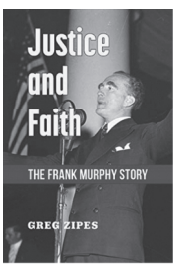
A READER'S GUIDE TO FRANK MURPHY

John G. Adam

1919–1922: U.S. Attorney, Eastern District of Michigan
1923–1930: Recorder's Court Judge
1930–1933: Mayor of Detroit
1933–1935: Governor-General of the Philippine Islands
1935–1936: High Commissioner to the Philippines
1937–1939: Governor of Michigan
1939–1940: Attorney General of the United States
1940–1949: Supreme Court Justice

Sidney Fine's trilogy:

Frank Murphy: The Detroit Years (1975)
Frank Murphy: The New Deal Years (1979)
Frank Murphy. The Washington Years (1984)



Gregg Zipes, *Justice and Faith: The Frank Murphy Story* (2021)

Theodore J. St. Antoine, "Justice Frank Murphy and American labor law," 100 *Mich. L. Rev.* 1900 (2002)

Thurgood Marshall, "Mr. Justice Murphy and Civil Rights," 48 *Mich. L. Rev.* 745 (1950)

LAWYER REFERRAL FEES AND OTHER NEWS

Ashleigh E. Draft and Bill Whalen
Varnum LLP

Referral Fees in Michigan

The Michigan Rules of Professional Conduct generally allow attorneys who are not in the same firm to split attorney fees. This typically occurs when one attorney makes a referral to the other. In such a case, under MRPC 1.5(e), the referring attorney must have an attorney-client relationship with the individual she refers.

The Michigan Supreme Court clarified the burden of proof necessary to establish whether such a relationship exists in *Law Offices of Jeffrey Sherbow, PC v. Fieger & Fieger, PC,* 2021 WL 2371254 (6/9/2021), *rehg denied,* 961 N.W.2d 490 (2021). The Supreme Court remanded for a new trial on the basis that the Fieger law firm—which opposed the fee sharing---must present evidence that an attorney-client relationship, for the purposes of the referral, was not established either directly or indirectly. Justice Viviano, writing for the unanimous court, held that the referring attorney must "participate in the matter as a lawyer" and that participation must be more than the bare involvement in the fee agreement. In other words, "some direct or indirect consultation between the parties" is necessary. On remand, the firm opposing the referral fee must now prove that no such attorney-client relationship existed.

Federal Pre-Emption in Labor Disputes

The Sixth Circuit held that a demolition company could not revive a lawsuit based on state-law claims against a labor union because its claims were pre-empted by federal labor law. The Sixth Circuit relied on Section 301 of the Labor Management Relations Act in which it determined that Congress intended that "doctrines of federal labor law should uniformly prevail over inconsistent local rules." In other words, Section 301 broadly preempts state-law claims that implicate any terms of a collective bargaining agreement, unless those claims can be resolved without interpreting agreement. The Sixth Circuit concluded that where any allegations "plainly" require a court to interpret the agreement, or are "inextricably intertwined" with the agreement, federal labor law preempts those claims. *Adamo Demolition Co. v. Int'l Union of Operating Engineers Local 150,* 3 F.4th 866 (6th Cir. 2021).

New Chief Judge at Sixth Circuit

Judge Jeffrey S. Sutton on May 1, 2021 assumed the position of Chief Judge of the Sixth Circuit. He is the eighteenth judge of the court to serve in this capacity. Chief Judge Sutton succeeded Judge R. Guy Cole, Jr., who had previously served as chief since 2014.

If you want to learn more about the Sixth Circuit judges, read Judge Sutton's 2018 book, *51 Imperfect Solutions: States and the Making of American Constitutional Law* and Judge Raymond Ketheledge's 2017 book, *Lead Yourself First* (co-authored with Michael S. Erwin). ■

ARE COLLEGE ATHLETES *NOW* EMPLOYEES?

Robert A. McCormick, ***Professor Emeritus***
Michigan State University College of Law

The world of college sports is undergoing seismic, and long overdue, reform. For decades, the NCAA prohibited college athletes from earning compensation for their work, even as all other participants in the college sports enterprise—coaches, athletic administrators, conference commissioners, and television networks—reaped billions of dollars from the revenue generated by their labor.[1] That is beginning to change.

A.

In my Winter 2007 *Lawnotes* article, "Are College Athletes Employees?," I argued that NCAA athletes in the revenue generating sports (football and men's basketball) are, in fact, employees of their private educational institutions under the NLRA and are, therefore, entitled to the rights conferred by that Act.[2] This thesis was based on a more extensive 2006 law review article by Professor Amy Christian McCormick and me: "The Myth of the Student-Athlete: The College Athlete as Employee," 81 *Wash. L. Rev.* 71-157 (2006).

Our position, of course, was contrary to the decades-long NCAA position that such young men are "student-athletes," not employees, and that college sports are "amateur." But times are changing.

B.

Fast forward to 2014. Football players at Northwestern University, represented by John Adam, petitioned the National Labor Relations Board for an election to determine whether a majority of those players wished to be represented for purposes of collective bargaining by the College Athletes Players Association. After an evidentiary hearing, Regional Director Peter Sung Ohr ruled that "[b]ased on the entire record in this case, I find that the Employer's [scholarship] football players . . . fall squarely within the Act's broad definition of 'employee'" and so directed an election. *Northwestern University,* Case 13-RC-121359; 2014 WL 1246914 (2014).

On appeal, the NLRB "punted" (pun intended): "we conclude, without deciding whether the scholarship players are employees under Section 2(3), that it would not effectuate the policies of the Act to assert jurisdiction in this case" thus, effectively ending the players' bid to organize. *Northwestern University,* 362 NLRB 1350, 1355 (2015).

The issue of employee status thus remained unresolved while several antitrust actions against the NCAA were lodged challenging the Association's numerous rules restricting the ability of college athletes to enjoy rights enjoyed by all other Americans. *See, e.g., O'Bannon v. NCAA,* 802 F.3d 1049 (9th Cir. 2015).

C.

In June 2021, fifteen years after our law review article was published, and for the first time in its 115-year history, the NCAA, under pressure from some state legislatures, agreed to allow these particular students, like any other student, to earn compensation by permitting them to profit from their names, images and likenesses.

That same month, the Supreme Court issued its unanimous decision in *NCAA v. Alston,* 141 S.Ct. 2141 (2021), holding the NCAA and its 1,200 college and university members in breach of the Sherman Act for limiting even educationally related benefits like computers, post-eligibility internships, academic tutoring, and graduate school scholarships for their athletes. More changes are coming as the NCAA's business model—based on the concept of unpaid labor by their "student-athletes"—is under increasing scrutiny.

Alston lays to rest the NCAA's decades-long position that major college sports are wholly amateur and outside the reach of the Sherman Act.[3] The relevance of the *Alston* decision to the question of employee-athlete status, however, is found not in the majority's antitrust analysis, but in Justice Kavanaugh's concurring opinion:

> . . . the NCAA's business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes.[4]

Importantly, to address the numerous policy issues that could emerge from a legal determination that the NCAA's business model offends antitrust principles—such as how paying athletes in some sports could affect athletes in non-revenue-generating sports, and how such payments could comply with Title IX – Justice Kavanaugh suggested:

> . . . colleges and student athletes *could potentially engage in collective bargaining . . . to provide student athletes a fairer share of the revenues that they generate for their colleges,* akin to how professional football and basketball players have negotiated for a share of league revenues.[5]

While Justice Kavanaugh's concurrence recognized the "important traditions that have become part of the fabric of America—game days in Tuscaloosa and South Bend" and "the packed gyms in Storrs and Durham," he nevertheless concluded that

> . . . those traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their *workers* a fair market rate on the theory that their product is defined by not paying their *workers* a fair market rate.[6]

This language plainly invites the next challenge to the NCAA's nearly 70-year-old reliance on the "student-athlete" label to avoid the conclusion that the players are, in fact, employees of their universities. Thus, the question of employee status will certainly arise again, and likely soon.

D.

But how will it emerge? Perhaps other athletes, like the Northwestern players, will seek union representation, or perhaps they will engage in concerted activity, like the University of Missouri football players did in 2015 when they threatened to strike over the university president's handling of racial incidents on campus.[7] On the other hand, the issue could come alive through the filing of unfair labor practice charges before the NLRB in the case of a private institution, or a state agency, like MERC, should the issue arise at a state university. In that regard, I've long believed that several NCAA and university rules and practices violate Section 7 of the NLRA and parallel state law sections.

Or, perhaps, a young athlete will be severely injured, as happens regularly—especially in football—and file for workers' compensation under state law. Naturally, the threshold question in such a filing would be whether the athlete was an employee. In

my view, it would be poetic justice were the question to arise this way, because it was just such a case—*University of Denver v. Nemeth,* 257 P.2d 423 (Colo. 1953)—that led the NCAA to coin the term "student-athlete" in the first place.

As I described in my earlier *Lawnotes* article, in 1953 the Colorado Supreme Court sustained a determination that Ernest Nemeth, a University of Denver football player, was an "employee" within the meaning of the Colorado workers' compensation statute and that the university was obligated to provide workers' compensation for his football injuries. Stunned by this decision, the NCAA invented the term "student-athlete." As then-NCAA Executive Director Walter Byers later wrote:

> "[T]he threat was the dreaded notion that NCAA athletes could be identified as *employees* by state industrial commissions and the courts" and so "[to address that threat, w]e crafted the term *student-athlete* and soon it was imbedded in all NCAA rules and interpretations as a mandated substitute for such words as players and athletes."[8]

One way or another, the thesis that major college football and men's basketball players are actually employees of their universities—not merely "student-athletes"—is plainly ripe for resolution, either by way of representation, unfair labor practice, or workers' compensation proceedings. And when that happens, a fair-minded judiciary will find the conclusion inescapable that these young men, as Justice Kavanaugh described them, are *workers* in an enormously lucrative business enterprise and entitled to the rights that employee status confers.

—END NOTES—

[1] For example, the NCAA's broadcast contract for the "March Madness" basketball tournament generates $1.1 billion annually while its contract to televise the College Football Playoff reaps an additional $470 million each year. The NCAA president, Mark Emmert, earns nearly $4 million; college conference commissioners earn $2 to $5 million; and annual salaries for some top football coaches exceed $10 million.

[2] The same result is true for public institutions under parallel state statutes like Michigan's Public Employee Relations Act (PERA).

[3] In support of its "amateurism" defense, the NCAA cited language from the Court's 1984 decision in *NCAA v. Board of Regents of Univ. of Oklahoma,* 468 U.S. 85, that "the NCAA plays a critical role in the maintenance of amateurism in college sports." *Id.* at 120. In *Alston,* the Court noted that college sports had become vastly more commercialized than it had been in 1984 and characterized that quoted language as "stray comments" inapposite to the case at hand.

[4] *NCAA v. Alston,* 594 U.S. Nos. 20-512 and 20-520, slip op. at 4 (Justice Kavanaugh, concurring) (June 21, 2021).

[5] *Id.* at 5 (Justice Kavanaugh, concurring) (emphasis added).

[6] *Id.* (emphasis added).

[7] The university president resigned two days later.

[8] Walter Byers with Charles Hammer, Unsportsmanlike Conduct: Exploiting College Athletes 69-70 (1995) (emphasis in original). ■

Student "athletes could potentially engage in collective bargaining."

"The NCAA is not above the law."

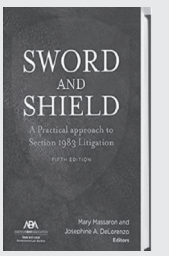
Justice Kavanaugh's concurrence, *NCAA v. Alston,* 141 S. Ct. 2141, 2168-69 (2021)

ROADMAP FOR SECTION 1983 LITIGATION

The new fifth edition of the American Bar Association book on civil rights law has been released: *Sword and Shield: A Practical Approach to Section 1983 Litigation* examines civil rights laws and 42 U.S.C. §1983. Since 1998, *Sword and Shield* has provided a comprehensive review of the fundamentals of Section 1983 litigation.

42 U.S.C. §1983, civil action for deprivation of rights, allows lawsuits to be brought by people alleging that their rights protected by the U.S. Constitution or federal statutes have been violated by state or local governments, or the agents of those governments.

"Having kept practitioners in mind, this new edition was reorganized to provide easier access to the information needed when handling civil rights claims," said Mary Massaron, who, along with Josephine A. DeLorenzo, both appellate attorneys at Plunkett Cooney, served as co-editors of *Sword and Shield.* Massaron has edited each of the past editions and explained that the treatise "provides the readers with an analysis of practical considerations and a roadmap for handling litigation under Section 1983."



The 500 plus page book begins with a comprehensive overview of the fundamental principles of § 1983 litigation, including discussions on jurisdiction, elements of a claim, and defenses. The book then presents separate chapters that focus on the special considerations for the plaintiffs and defendants in a § 1983 action.

Remaining chapters address specific constitutional amendments, violations of which typically serve as the basis for most § 1983 lawsuits, such as the Fourth Amendment, one of the most frequently litigated amendments. The book also includes a chapter on the Second Amendment, which is a relatively new area of § 1983 litigation.

John G. Adam

SUPREME COURT ENDS 2020-2021 "PANDEMIC" TERM

Regan K. Dahle
Butzel Long, PC

1. Claimants Entitled to Judicial Review of Retirement Board Reopening Decisions

Manfredo Salinas, the plaintiff in *Salinas v. United States Railroad Retirement Board,* 141 S. Ct. 691 (2021), was a former railroad employee who applied to the U.S. Railroad Retirement Board (the "Board") for disability benefits under the Railroad Retirement Act of 1974 (the "RRA"). The Board has a four-part process for administrative review of benefit applications. First, the appropriate division of the Board makes its determination on the application. If the applicant is dissatisfied with that determination, they can petition the Board's Reconsideration Section. If the Reconsideration Section upholds the denial of benefits, the applicant may appeal to the Board's Bureau of Hearings and Appeals (the "Bureau"). If the appeal is unsuccessful, the applicant may appeal to the Board itself. An applicant has 60 days to proceed to each next step in the review process. If that 60-day period lapses without action by the claimant, the determination becomes final, although the applicant may request that the Board reopen the decision. The Board's decision to reopen an application is discretionary, however, it follows certain criteria in making that decision. One of the criterion is whether "[w]ithin four years of the date of the notice of such decision . . . there is new and material evidence." 20 C.F.R. § 261.2(b)

Salinas unsuccessfully applied for benefits in 2006. He successfully reapplied in 2013, but nevertheless, sought reconsideration of the amount and start date of his benefits. The Board denied reconsideration. Salinas timely appealed to the Bureau and included in his appeal an argument that the Board should reopen its 2006 decision because it had not considered medical records in existence at the time. The Bureau refused Salinas' request. Salinas appealed the Bureau's decision to the Board, but the Board affirmed. Salinas timely filed a petition for judicial review with the Fifth Circuit Court of Appeals. The Court of Appeals dismissed Salinas' petition for lack of jurisdiction, joining with "the majority of Circuits in holding that federal courts cannot review the Board's refusal to reopen a prior benefits determination." *Id.* at 696. Salinas successfully sought cert. The issue before the Supreme Court was whether the Board's refusal to reopen its decision denying Salinas' 2006 application was subject to judicial review.

The Supreme Court reversed the Fifth Circuit. The Court explained that judicial review under the RRA is subject to the same limitations and legal provisions as is judicial review under the Railroad Unemployment Insurance Act (the "RUIA"), 45 U.S.C. § 231g. Under the RUIA, "[a]ny claimant . . . aggrieved by a final decision under subsection (c) of this section, may ... obtain a review of any final decision of the Board." *Id.* at 696. Referring to a similar provision in the Administrative Procedures Act, the Court defined "final decision" as one that "both (1) mark[s] the consummation of the agency's decisionmaking process and (2) is one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 697. The Court held that the Board's refusal to reopen the 2006 denial of Salinas' benefits was a "final decision."

The Board argued, in part, that the judicial review section of the RUIA did not apply here, because that section refers only to judicial review of claims brought under the RUIA. The Court rejected the Board's argument finding that nothing in the statute suggested that the legislature intended that limitation. In addition, the Court recognized that, to the extent there is ambiguity in the statute, it must be resolved in Salinas' favor under the "strong presumption favoring judicial review of administrative action." *Id.* at 698. And while the Court did hold that the Board's decision was subject to judicial review, it also held that the Board's decision would not be disturbed absent a showing of abuse of discretion. *Id.* at 701.

2. Court Finds for College Athletes in NCAA Antitrust Case

In 2014, the NCAA amended its bylaws and gave the "Power Five" -- the top-five revenue-generating conferences in the NCAA -- the autonomy to control, among other things, the value of athletic scholarships. The Power Five determined that athletic scholarships would be capped at the cost of student attendance at their educational institution ("COA"). Nevertheless, student athletes remained eligible for a variety of other things of value above the COA; for example, they could still receive: cash stipends to be used at their discretion; athletic achievement awards, which could come in the form of VISA gift cards; and disbursements from the NCAA's Student Assistance and Academic Enhancement Funds. The plaintiffs in *National Collegiate Athletic Assoc. v. Alston,* 141 S. Ct. 2141 (2021) were current and former collegiate basketball and football players who allege that the NCAA's rules limiting compensation for student-athletes is an unlawful restraint of trade in violation of the Sherman Act.

The plaintiffs filed suit in the United States District Court for the Northern District of California, effectively seeking to "dismantle the NCAA's entire compensation framework." *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.,* 958 F.3d 1239, 1247 (9th Cir.), *cert. granted sub nom. Nat'l Collegiate Athletic Ass'n v. Alston,* 141 S. Ct. 1231, 208 L. Ed. 2d 504 (2020), and *cert. granted sub nom. Am. Athletic Conf. v. Alston,* 141 S. Ct. 972, 208 L. Ed. 2d 504 (2020). After a bench trial, the district court held that "NCAA limits on education-related benefits are unreasonable restraints of trade," but "declined to hold that NCAA limits on compensation unrelated to education likewise violate section 1 [of the Sherman Act]." *Id.* at 1248. The Court issued an injunction establishing a Less Restrictive Alternative ("LRA") to the NCAA's restraint that was consistent with its holding. Both sides appealed.

The Ninth Circuit Court of Appeals affirmed the trial court decision. The Court agreed with the district court's analysis using the three-part "rule of reason" framework set forth in a 2019 U.S. Supreme Court case involving the NFL. First, the Court held that the student-athletes met their burden of showing that the NCAA rules produced significant anticompetitive effects; they did this by demonstrating that they "are forced to accept, to the extent they want to attend college and play sports at an elite level after high school, whatever compensation is offered to them by [Division I] schools, regardless of whether any such compensation is an accurate reflection of the competitive value of their athletic services." 958 F.3d at 1256-57. Next, regarding the second prong of the rule of reason framework, the Court held that the NCAA failed to come forward with evidence of the restraint's

procompetitive effects. While the Court agreed that not providing student-athletes with unlimited payments *unrelated to education* is what qualifies them as amateurs and widens the distinction between professional and collegiate sports, it did not agree that compensation limits that restrict certain education-related benefits served a pro competitive purpose. Finally, the Court found that the student-athletes met their burden under the third step of the rule of reason framework by proving that the trial court's LRA was "virtually as effective in serving the procompetitive purpose of the NCAA's current rules, and without significantly increased cost." 958 F.3d at 1260. The Court refused to find, however, that the district court's LRA should have enjoined the NCAA's restrictions on student-athlete compensation related to education.

The NCAA appealed the Court of Appeals' decision that the NCAA's limits on education-related benefits violated the Sherman Act. The NCAA claimed that the district court erred in applying the rule of reason analysis instead of a deferential review, because it is, essentially, a joint venture where "collaboration among its members is necessary if they are to offer consumers the benefit of intercollegiate athletic competition." 141 S.Ct. at 2155. While the Court acknowledged that the NCAA could be considered a joint venture, it rejected the argument that it was entitled to deferential review of its rules, especially considering that the "NCAA *accepts* that its members collective enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact do) harm competition." *Id.* at 2156. The Court also rejected the NCAA's argument that a Supreme Court case involving league rules restricting schools' rights to televise games supported its "deferential review" argument. The Supreme Court found that the language in that case upon which the NCAA relied was simply "an aside" that should not be applied to a fact intensive analysis of the changing marketplace of collegiate sports. *Id.* at 2158. The Supreme Court also rejected the NCAA's argument that the rule of reason analysis should not apply here because the NCAA and its member schools are not "commercial enterprises," but instead, seek "to maintain amateurism in college sports as part of serving the societally important non-commercial objective of higher education." *Id.* at 2158 (citations omitted).

In the end, the Court affirmed the Court of Appeals' decision enjoining the NCAA's rules limiting student-athlete education-related benefits. The Court recognized that some people will not be satisfied with its decision and acknowledged that "[t]he national debate about amateurism in college sports is important." *Id.* at 2166. In the end, however, the Court noted that its job as an appellate body is not to resolve that debate, but instead, to "simply review the district court judgment through the appropriate lens of antitrust law." *Id.*

3. ACA Withstands a Constitutional Challenge

In *California v. Texas,* 141 S.Ct. 2104 (2021), several states sued the Secretary of Health and Human Services and Commissioner of Internal Revenue challenging the constitutionality of the minimum essential coverage provisions of the Affordable Care Act ("ACA"). The states (later joined by the United States) claimed that they were harmed by the increased costs associated with state-operated insurance programs and increased administrative expenses incurred in complying with those programs. Two individual plaintiffs joined the suit, alleging that they were harmed by the ACA, as it forced them to purchase health insurance. 16 states and the District of Columbia intervened to defend the constitutionality of the ACA.

Without reaching the issue of constitutionality, the Supreme Court found that neither the state nor the individual plaintiffs had standing to bring suit. The Court noted that "a plaintiff has standing only if he can allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." 141 S.Ct. at 2113. As to the individual plaintiffs, while the Court assumed that the cost of purchasing healthcare could satisfy the personal injury component of standing, the fact that the ACA provided no means of enforcing the mandate meant that there was no causal connection between that injury and any Government action. *Id.* at 2114. As to the individual states, the Court held that they "have failed to show that the challenged minimum essential coverage provision, without any prospect of penalty, will harm them by leading more individuals to enroll in these programs." *Id.* at 2117 Moreover, concerning the alleged additional administrative costs associated with implementing the challenged ACA provision, the Court held that those costs were mandated by provisions of the ACA not being challenged in the suit and, therefore, did not provide a basis for finding the minimum essential coverage provisions unconstitutional. The Supreme Court remanded the case back to the Fifth Circuit Court of Appeals with instructions to dismiss.

4. Improper Use of Digital Information

In *Van Buren v. United States,* 141 S. Ct. 1648 (2021), the Supreme Court resolved a split in the federal circuits regarding the interpretation of the Computer Fraud and Abuse Act ("CFAA"). The CFAA "subjects to criminal liability anyone who 'intentionally accesses a computer without authorization or exceeds authorized access,' and thereby obtains computer information." *Id.* The issue before the Court was whether a person authorized to access certain digital information violates the CFAA if they access that information for an improper purpose.

The case involved a police sergeant, Nathan Van Buren, who, in exchange for money, used a law enforcement database to which he had authorized access to find information about a certain license plate number. Van Buren's conduct violated the police department's policy against accessing database information for purposes not associated with law enforcement. Van Buren was subsequently convicted of violating the CFAA and later appealed the conviction to the Eleventh Circuit Court of Appeals, arguing that "the 'exceeds authorized access' clause [in the CFAA] applies only to those who obtain information to which their computer access does not extend, not to those who misuse access that they otherwise have." *Id*. at 1653. The Court of Appeals upheld the conviction, holding that Van Buren violated the CFAA by accessing the law enforcement database for an improper purpose. Van Buren successfully sought certiorari "to resolve the split in authority regarding the scope of liability under the CFAA's 'exceeds authorized access' clause." *Id.* at 1654.

The CFAA defines "exceeds authorized access" as "to access a computer with authorization and to use such access to obtain . . . information in the computer that the accesser is not entitled so to obtain." 18 U.S.C. § 1030(e)(6) The Supreme Court held that Van Buren was "entitled" to access the license plate information from the database, having been given authorization by the police department that employed him. *Id.* at 1654. The issue was, then, did the phrase "so obtain" prohibit an individual from obtaining information they were authorized to have, but then using it for an

(Continued on page 20)

SUPREME COURT ENDS 2020-2021 "PANDEMIC" TERM

(Continued from page 19)

improper purpose. The Court held that it did not and that to read otherwise would subject "millions of otherwise law-abiding citizens" to criminal liability for sending a personal email on an employer's computer if the employer had a computer-use policy prohibiting personal use of its email system. *Id.* at 1660. The Court held that, instead, a proper reading of the CFAA's "exceeds authorized access" clause is that it imposes liability on an individual who "accesses a computer with authorization but then obtains information located in particular areas of the computer--such as files, folders, or databases--that are off limits to him." *Id.* at 1662.

5. Farmers Get a Victory against Workers' Unions

The plaintiffs in *Cedar Pointe Nursery v. Hassid,* 141 S.Ct. 2063 (2021), were a group of agricultural employers who challenged a California Agricultural Labor Relations Act regulation granting "the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support."Cal. Code Regs., tit. 8, § 20900(e). The regulation specifically provided that organizers could "take access to an agricultural employer's property for up to four 30-day periods in one calendar year, allowing two organizers per work crew (with additional organizers allowed if the work crew exceeded 45 employees) to access the property for one hour before work, one hour during the lunch break, and one hour after work." *Id.* at 2069.

The plaintiffs alleged that the regulation violated their constitutional rights because it "constituted a *per se* physical taking" of their land, in that it would not "allow the public to access their property in a permanent and continuous manner for whatever reason." *Id.* at 2070. The district court disagreed with the plaintiffs and upheld the regulation. The plaintiffs appealed to the Ninth Circuit Court of Appeals which affirmed the district court. The plaintiffs sought certiorari on the issue of whether the regulation violated the Takings Clause of the Fifth Amendment of the U.S. Constitution.

The Court found the regulation unconstitutional. It began its analysis by noting that "protection of property rights is necessary to preserve freedom and empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Id.* at 2071 (citations omitted) Indeed, "[w]hen the government physically acquires property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation." *Id.* Similarly, where government regulations restrict a property owner's ability to use their land, if the restrictions are too severe, it will amount to an unlawful taking. As in this case, where the regulation granted union organizers the right to enter and occupy the plaintiffs' land for three hours each day, 120 days each year, it appropriated the right of the plaintiffs to exclude others from their property, something the Court has referred to as appropriating an easement; and for this easement, the plaintiffs were owed just compensation--something the regulation did not provide. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Let's talk about Sha'Carri Richardson. She was the gold-medal favorite in the women's 100 meters who got suspended for smoking weed and was not allowed to compete in the Tokyo Olympics.

No one who reads this column will be surprised to learn I think the rule that resulted in Richardson's suspension is nonsense. I agree with my wife that Richardson should get an *extra* medal for being able to perform at her level and smoke weed too. The rule is silly, and the outcome is absurd. Weed is not a performance-enhancing drug, unless the performance in question is sitting on the couch eating Screaming Yellow Zonkers. I don't think anyone could reasonably disagree.

What may surprise some readers is this: If I were hearing the Richardson case as a labor arbitrator, I would uphold the suspension, cruel and stupid as it certainly is. My job is to apply the contract terms to the facts of the case. If the CBA calls for suspension for a positive test for marijuana, and the Grievant tested positive in a properly conducted test, I uphold the suspension.

How, my wife wonders, can that be right?

Let me respond with a quote from William Patrick Murphy. Murphy was a Constitutional Law professor at Ole Miss when *Brown v Board of Education* was decided by the Supreme Court. He supported the decision and said so in class and in print. The powers that be in Mississippi hounded him out of his job. He went to Missouri where he subsequently supported the right of students to demonstrate against the Vietnam War, and the powers that be in Missouri hounded him out of that job. Murphy would later serve as president of the National Academy of Arbitrators. One of my colleagues in the Academy said he never knew anyone with more moral courage.

Here is a paragraph from a talk Murphy gave in 1990 looking back on his career:

"I particularly remember a hearing in Southeast Virginia where the union had been organized almost single-handedly by a prematurely aged pint-size lady who, judged by her grammar, never finished grammar school. She was called Miss Union, and she literally exuded leadership. She was discharged, under a broad no-strike provision, for having participated in an illegal strike. She had tried to get the wildcat strikers to go back to work, and when they wouldn't she joined them. I will never forget her statement to the company attorney on cross-examination: 'They was my people, and I was gonna be there with them.' I never upheld a discharge with more regret."

It's easy to support the Rule of Law when you agree with the result. What's difficult is to support it when the result is so regrettable. But an arbitrator who refused to uphold the discharge in Miss Union's case would stand on the same legal ground as the Citizens' Council types who refused to desegregate Mississippi schools following the ruling in *Brown*.

Under a system of collective bargaining, workers vote for a bargaining representative who negotiates a contract. The job of a labor arbitrator is to apply the terms of that contract, not to apply "his own brand of industrial justice" or "general considerations of fairness and equity." It is to apply the terms of the contract. That's not just Supreme Court jurisprudence, it's the bedrock principle underlying the rule of law. It doesn't matter whether I think the policy the parties agreed to is stupid or cruel or both. If the parties agreed to it and put it in the contact, the conversation is over. That's what rule of law *means.* ■

GIVING A REASON FOR TERMINATION: *JACKSON V. GENESEE COUNTY ROAD COMMISSION*

Carey A. DeWitt and Blake C. Padget
Butzel Long

Jackson v. Genesee County Road Commission, 999 F.3d 333 (6th Cir., 2021) (Siler, Cole, and Gibbons, J.), raises an important question: Is it unwise for an employer to provide no reason for an employee's termination?

In *Jackson,* the Sixth Circuit considered plaintiff's Title VII and Elliott-Larsen Civil Rights Act retaliation claims, which U. S. District Judge Bernard Friedman had dismissed under Rule 56. The Sixth Circuit reversed, finding that the temporal proximity between the employee's protected activity and the termination along with the other facts in the case could create a question of fact, barring summary judgment under the burden shifting standard applied since *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

Judge Gibbon's opinion does not directly criticize the Genesee County Road Commission for failing to provide the employee with a reason for termination. Nonetheless, the tone of the decision was that the failure to provide a reason at termination—other than at-will status—did not add to the credibility of the employer's later stated reason for the termination, "communication style." 933 F.3d at 341. This raises the question of whether an employer is well advised to provide an employee with no reason for their termination.

Courts have routinely held that giving the wrong reason for termination or a reason that is at least subject to serious attack can make it much more difficult for an employer defending an employment discrimination action. *See, e.g., Hrapkiewicz v. Wayne State University Board of Governors,* 2017 WL 947604, *6 (Michigan Court of Appeals, 2017) (employer's "inconsistent explanations also served as circumstantial evidence from which a rational trier of fact could reasonably infer that the snow day incident and other cited concerns were a mere pretext for unlawful age discrimination."); *Fox v. Certainteed Corp.,* 198 F.3d 245, *10 (6th Cir. 1999) ("evidence tending to demonstrate the falsity and inconsistency of the employer's explanations for the plaintiff's discharge may raise an inference of pretext and thus of retaliation."); *Walker v. Johnson,* 798 F.3d 1085, 1092 (D.C. Cir. 2015) (same); and *Cullen v. Select Med. Corp.,* 779 F. App'x 929, 932 (3d Cir. 2019) (same). These cases would suggest that an employer may be better off providing no reason for an employee's termination, certainly in comparison to a false, shifting, or inconsistent reason. By not providing a reason for the termination, an employer could at least arguably avoid any negative inference caused by *inconsistent* explanations.

At the same time, however, the *Jackson* decision suggests there is little benefit to not providing a reason for termination other than stating the employee is "at-will," when the real reason is available. Not providing any reason for an employee's termination does not prevent litigation. (the *Jackson* decision is proof of that). In *Jackson,* of course, because of this lawsuit, the employer ultimately had to produce a reason for termination. Perhaps if the employer had provided a (solid) reason for termination when the employee was terminated, it could have avoided the lawsuit all together. Not informing an employee why they are being terminated may invite the assumption that the employer does not have a good reason for termination. It may not be a big leap for the employee to assume the employer did not want to provide a reason for termination because the real reason was unlawful discrimination and retaliation, which employees may fear or believe in any event. It is notable in this regard that in *Jackson,* the employee's charge with the EEOC noted that she was not given a reason for her discharge. The employee certainly appears to have believed that the absence of a stated reason for termination was relevant to her allegations of discrimination and retaliation. Simply put, not providing any reason for termination may invite litigation rather than prevent it.

Given the relative risks, it is most often wisest to offer a reason for termination. Many factfinders and courts may instinctively prefer to see the employee offered a reason for the termination. More fundamentally, if the employer has a good reason for terminating an employee, especially a high-level employee such as the plaintiff in *Jackson,* there is little benefit to declining to provide that reason at termination. An employer should gather and analyze the underlying facts, prepare the reasoning for termination carefully, and offer the underlying reason as the basis for termination at the termination meeting and in the termination letter. Doing this thinking prior to termination also more likely ensures that the employer has a solid stated reason for terminating the employee. And, of course, performing this careful review in advance helps to ensure that the reason for termination will remain consistent if explored in litigation. Thus, a factfinder or court would be less likely to be surprised or offended, and a successful defense or even summary judgment may be more likely.

In short, *Jackson v. Genesee County Road Commission* may show us that offering no reason for termination can become a problem later. Moreover, such an approach will not prevent the employee from suing over the termination or the employer needing to provide a reason for termination eventually. If there is a good reason supported by evidence for the termination, which there presumably is for any lawful termination, it may often be best to come out with it, instead of providing no explanation or relying on the employee's "at-will" status at termination. ■

SIXTH CIRCUIT ADDRESSES TITLE VII AND TRANSGENDER ISSUES

Ashley Higginson and Ahmad Chehab
Miller, Canfield, Paddock and Stone, P.L.C.

I. PROTECTED ACTIVITY UNDER TITLE VII INCLUDES ACTIVITIES WITHIN AN EMPLOYEE'S JOB DUTIES

In *Jackson v. Genesee Cnty. Road Comm'n,* 999 F.3d 333 (6th Cir. 2021) (Gibbons, Siler and Cole), the Sixth Circuit reversed a district court's grant of summary judgment in favor of the employer, and held that an HR Director engaged in protected activity by investigating racial discrimination complaints and ensuring that the company's vendor contracts complied with equal employment opportunity regulations. The appeals court held that performance of one's job duties can qualify as protected activity under Title VII.

Plaintiff was hired as HR Director for Defendant Genesee County Road Commission ("GCRC") in March 2016. Several discrimination complaints from various employees remained under review when Plaintiff was hired. The first set of complaints involved the director of equipment and facilities. Several African American employees complained about the director's behavior towards them. Plaintiff investigated each claim, and recommended to management that the director be terminated.

In addition to handling employee complaints, Plaintiff was the Equal Employment Opportunity ("EEO") Officer and approved the Equal Employment Opportunity Plans ("EEOPs") submitted by vendors and contractors who worked with GCRC. When Plaintiff took over the management of the EEOPs, she became concerned that the director of engineering and the director of construction were colluding under the table with potential bidders, contractors, and suppliers before they submitted all the required documentation for contract consideration with the road commission. Plaintiff decided to edit the EEOP submission instructions to require that all entries and questions regarding the EEO Plan Policy and Process be directed solely to her. Complaints regarding Plaintiff's communication and domineering style started coming in, from vendors and employees. In October 2016, Plaintiff was terminated—no reason was provided other than that she was an at-will employee.

Plaintiff filed suit alleging three claims—(1) retaliation under Title VII, (2) retaliation under Michigan's Elliott-Larsen Civil Rights Act, and (3), a claim for wrongful termination in violation of public policy under Michigan law. The district court dismissed all claims. In reversing the district court, the Sixth Circuit held that Plaintiff's investigation of employee complaints and her conduct within her role as EEO Officer constituted protected activity. Viewed as a whole, a reasonable juror could view Plaintiff's actions as opposition to or steps taken to ensure there was no discrimination in hiring both within GCRC and among its vendors, and such conduct constituted protected activity under Title VII. In so ruling, the Sixth Circuit rejected the district court's restriction that the opposition clause does not extend to an employee's regular job duties.

II. TRANSGENDER EMPLOYEE NOT SUBJECT TO HOSTILE WORK ENVIRONMENT

In *Jane Doe v. City of Detroit,* 3 F.4th 294 (6th Cir. 2021) (Gibbons, Kethledge, and Murphy), Plaintiff, a transgender employee, began publicly presenting as a woman while working for the City.

During Plaintiff's transition, an unknown employee defaced her nameplate by inserting the word "Mr." Plaintiff informed her supervisor who immediately removed the nameplate and had it cleaned and replaced. Plaintiff also notified Human Resources but did not received a response. Two days later, Plaintiff received a gift bag on her desk that contained a phallic toy and a note with biblical language and insults about her transition. Plaintiff reported the concern to Human Resources and was told to leave work early. The City gathered employees to investigate the incident.

Plaintiff filed a formal complaint and asked that a lock be placed on her door and a camera in her room. The City interviewed employees, asked them to produced handwriting samples, and informed employees of its zero tolerance policies, but was unable to identify the harasser. Plaintiff felt the investigation was insufficient and that the City was trying to keep the conduct a secret by failing to involve the authorities. The City recommended a lock be installed on Doe's door, but it was not installed.

Five months later, Plaintiff received another note in her office mailbox, with a death threat and again filed a complaint and additionally filed a police report. The City contacted the police who stated the matter should be internally reviewed. At this time, the City placed a lock on Plaintiff's door. Two weeks later, Plaintiff was threatened with another note and filed another internal complaint – indicating she thought the perpetrator was a colleague who appeared increasingly hostile to her, but admitting there was no evidence against him. A lock and camera were installed on Plaintiff's door, but the City was unable to make a substantiated finding. The matter was transferred to the police who also did not make a finding. No further incidents occurred.

Later, Plaintiff learned of disparaging remarks made by the colleague she opined was the perpetrator, reported the remarks, and the colleague received a three day unpaid suspension and was moved to a different floor. Plaintiff also felt that her supervisor's treatment had changed, including raising attendance issues and complaining about Plaintiff shutting her door at work. Plaintiff filed a new complaint and when her supervisor learned of the report (even though Plaintiff thought it was confidential) the supervisor stated she was disappointed in Plaintiff and started nitpicking her work, denying vacation time, and insinuating poor performance. Ultimately, the supervisor left the City and Plaintiff applied for and did not receive her supervisor's job. She alleged her new supervisor also stripped her of key staff, accused her of stealing, and gave her poor performance reviews.

Plaintiff filed a lawsuit alleging that the City subjected her to a hostile work environment and retaliated against her. The district court dismissed, granting the City summary judgment. The Sixth Circuit affirmed, holding that where harassment is committed by a coworker, rather than a supervisor, the employer is liable only "if it knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action." To find liability, the employer must be indifferent and unreasonable in light of the circumstances. The Court held the steps the City took in response to the nameplate, giftbag, and threats were reasonable, even if no perpetrator was ultimately identified.

The Court also held that Plaintiff's retaliation claims failed as the only adverse action she identified was a failure to receive a promotion. Plaintiff failed to identify anything other than a subjective belief that she was denied a promotion because of her complaints. "Speculation is insufficient to survive summary judgment." ■

MERC ADDRESSES DISCRIMINATION AND DFR

John A. Maise
White Schneider PC

City of Detroit (Fire Department) -and- Detroit Fire Fighters Association, Local 344, Case No. 19-G-1452-CE & 19-H-1646-CE (May 11, 2021)

On May 11, 2021, the Commission entered an order affirming an order recommended by the Administrative Law Judge upholding a determination that the City of Detroit (the City) had committed an unfair labor practice by prohibiting President Michael Nevin from "riding a fire-fighting rig" in retaliation for his engagement in protected activity.

"Riding the rigs" is a practice engaged in by union executive board members working in the field as active fire-fighters in order to maintain the qualifications and proficiencies required of all City of Detroit fire fighters. This was a common practice in the Fire Department, and the Department was always receptive to union officer's requests to "go out to the field." It was established that during President Nevin's term, a large number of Unfair Labor Practices and MIOSHA complaints were filed against the City, and President Nevin was unpopular with the Fire Chief. President Nevin requested to "ride the rigs", however that request was denied. This was out of the ordinary because until Nevin's request, it had never been an issue for union officials to ride the rigs. The Fire Chief admitted at the hearing that he had previously given Union Vice President Harp permission to ride a rig, that he had told Harper that he could do so at any time, and even that the practice was a "good thing." In fact, until President Nevin's request, there had never been an issue regarding union officer's requests to ride.

The motivation for the disparate treatment was further established through discussions President Nevin had with the Chief and other management personnel. These included statements to the effect of Nevin "was the guy assigning all these [ULP charges and MIOSHA complaints] and giving the Department a lot of grief, and that as a result, Nevin was going to enjoy some grief as well."

Section 10(1)(a) PERA makes it unlawful for a public employer to interfere with, restrain or coerce public employees in the exercise of rights guaranteed to public employees. Section 10(1)(c) PERA makes it unlawful for a public employer to discriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor union. This requires a showing that there was union or other protected activity, that the employer had knowledge of that activity, that anti-union animus was a motivating cause of the alleged discriminatory action.

The Commission upheld the ALJ's findings that the Chief's actions in denying Nevin the opportunity to "ride the rigs" was a violation of both 10(1)(a) and 10(a)(c). In large part, this finding was based on the ALJ's determination that "Nevin seemed to testify in an honest and truthful manner regarding the events giving rise to this dispute, including interaction with Chief Distelrath and others within the Department." This credibility assessment was critical in determining that there was an intentional retaliation for protected activity, as opposed to the City's defense that it was merely interpreting the contract language and that nothing prohibited the City from denying President Nevin's requests.

As the Commission notes, even if a public employer is not prohibited from taking an action by contract, that action may still violate PERA where there is an unlawful motivation. Discretion cannot be used for discriminatory purposes.

City of Detroit (Department of Transportation) -and- Amalgamated Transit Union, Local 26 -and- Frank Lacey Case No. 19-K-2181-CE & 19-K-2182-CU (June 8, 2021)

On June 8, 2021, the Commission affirmed a recommended order from the Administrative Law Judge dismissing an Unfair Labor Practice charge filed against the City of Detroit and a duty of fair representation charge filed against the Amalgamated Transit Union. Frank Lacey alleged that the City had violated a revenue sharing provision, and alleged that the union failed to file his grievance against the employer, retaliated against him for prior unfair labor practice charges, and for interfering with his election campaign for Union Vice President. With respect to the charge against the employer, the Union had previously filed a class action grievance requesting identical relief for the entire union. As such, the Commission found that Lacey lacked standing to pursue his charge against the employer and found no DFR due to the pending class action ULP.

Lacey also alleged that the Union retaliated because of his earlier ULP charges against the Union, and that the Union had interfered with his election campaign to become Vice President. While the Commission did not find any DFR violation of, Lacey did identify some questionable statements made by Union representatives.

Lacey was ultimately unsuccessful in his bid for Vice President, and filed a challenge with the Union alleging that executive board members were paid while the voting was ongoing, that Executive Board Member Schetrone Collier and Vice President Glenn Tolbert told members of the bargaining unit that they should not vote for Lacey because he had "sued" the union, that Collier and Tolbert defaced or removed Lacey's campaign posters, and that at least one member of the bargaining unit had voted twice.

At an executive board meeting to discuss this challenge, Collier stated that he had not voted for Lacey because he had "cost the Union $10,000." In response to this statement, Collier was told to be quiet by Tolbert and at Tolbert's recommendation, the executive board decided to place the matter before the ATU International for review to ensure impartiality to the challenges.

With respect to the statements made by Collier, which on their face appear to show retaliation for the prior labor charges, any negative inferences were overcome by the actions taken by Vice President Tolbert to silence the inappropriate speech and to refer the matter to impartial review before ATU International. As such, the ALJ held that Lacey had failed to prove that the Union had retaliated or discriminated against him for his prior protected activity.

This case demonstrates the importance of taking steps internally to ensure that a union is protected from the actions of individual members, especially when dealing with individuals who have previously filed Duty of Fair Representation charges against the Union. What allowed the union to prevail in this case was swift action taken by its vice president to show that it would not consider inappropriate matters in its consideration of the challenges, and the referral to the International for impartiality. These actions effectively isolated the Union from the statements made by an executive board member. ■

Labor and Employment Law Section
State Bar of Michigan
The Michael Franck Building
306 Townsend Street
Lansing, Michigan 48933

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INSIDE *LAWNOTES*

- Rachael Kohl reports how the pandemic has exposed gaps in Michigan's unemployment law.
- Nate Kilbert and Emily Maglio review arbitration issues in federal court.
- Ben King discusses the NLRB's recent ruling reaffirming labor's right to protest using "Scabby the Rat."
- Diane Soubly and Regan Dahle review the Supreme Court.
- Mark Cousens summarizes Michigan's Frank Murphy—Supreme Court Justice, U.S. Attorney General, Governor, Mayor, and more.
- Ashley Rahrig and John Maise address MERC rulings.
- Professor Bob McCormick discusses how college athletes' legal rights are growing.
- Stuart Israel warns us of the increase in legal *ipse dixits.*
- Labor and employment decisions and developments from the U.S. Supreme Court, the Sixth Circuit, the Michigan Supreme Court, MERC, and more.
- Authors John G. Adam, Ahmad Chehab, Mark H. Cousens, Regan K. Dahle, Carey A. DeWitt. Ashleigh E. Draft, Barry Goldman, Ashley Higginson, Stuart M. Israel, Nate Kilbert, Benjamin L. King, Rachael Kohl, John A. Maise, Robert A. McCormick, Emily M. Maglio, Blake C. Padget, Ashley Rahrig, Diane M. Soulby, and Bill Whalen.