Labor and Employment Law Section • State Bar of Michigan

LABOR AND EMPLOYMENT LAWNOTES

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REPORT FROM THE CHAIR

Being a labor lawyer is a lot of fun. Much of that fun derives from working with many interesting and talented attorneys (about half of whom can be accused, in the parlance of the '90's, of being "ideologically challenged"). Despite these differences, I continue to be amazed at how much we have in common and how willing our members are to set these differences aside. An example is the recent position taken by the Section's Council in opposing Congressional funding cuts for the National Labor Relations Board. The virtual unanimity of the Council in opposing those cuts was heartening and truly remarkable given the stridency which seemingly dominated the debate on this important issue in Washington. At the same time, the result is easily understood if you consider the personal integrity and professionalism which so characterizes the vast majority of your fellow Section members.

In my experience it is those qualities which distinguish labor lawyers from many of our colleagues in the bar and it is for that very reason that being part of the Section is also fun. I hope that many of you will be able to gain the same satisfaction from participating in the Section's activities as I have during the last several years. Opportunities for participation abound. For those of you who are interested I will briefly describe several.

The most visible way to participate is by becoming involved as either a participant or presenter at the Annual Meeting, the Mid-Winter Meeting, or the ICLE Spring Meeting. If you are interested in presenting at one of these sessions feel free to send a short note with your recommended topic to me or any of the other officers and I will get it into the hands of the program committee for that meeting. Another opportunity is to be on the panel of judges for the annual Student Writing Competition. The competition will be headed this year by Roger McClow who would like to hear from you. Yet another opportunity is to become active in the recently formed Region 7 Practice and Procedure Committee which has been organized by NLRB Regional Director Bill Schaub and still has a few openings (once again drop me a short note if you are interested). Finally, we are always interested in contributors to *LABOR AND EMPLOYMENT LAWNOTES* and Stu Israel, who has graciously assumed the editorship, is the person to contact.

I am certain that with your participation and assistance we can continue to provide an open forum for debating current issues, excellent continuing legal education and an outstanding environment in which to enjoy the collegiality of our membership.

Best regards,
Paul Kara
Chairperson

HEURTEBISE AND THE ARBITRATION OF CIVIL RIGHTS CLAIMS

At the Section's well-attended September 20 program, part of the State Bar's 60th Annual Meeting in Lansing, interest was high in the panel discussion of the implications of *Heurtebise v Reliable Business Computers, Inc.*, 207 Mich App 308 (1994), applic. lv. to app. pending.

The panelists, including the defendant's attorney, Patricia Bordman, civil rights attorney Shel Stark, Michigan Education Association counsel Mary Job, and arbitrator Bob McCormick, expressed divergent views as to when arbitration of civil rights claims is appropriate.

We continue the discussion here. We begin with the *Heurtebise* opinion, issued per curiam by Court of Appeals Judges Janet T. Neff and Gary R. McDonald, along with VanBuren County Circuit Judge Meyer Warshawsky sitting by assignment. We then present the observations of arbitrator Mark Glazer, Shel Stark, Mary Job and EEOC Regional Attorney Adele Rapport. Finally, we present the "Due Process Protocol" for mediation and arbitration of civil rights claims and other employment-related disputes adopted by the American Bar Association Labor and Employment Law Section and other prominent organizations.

The Editors

The *Heurtebise* Opinion:

Before: NEFF, P.J., and MCDONALD and M. WARSHAWSKY, J.J.

PER CURIAM. Defendant appeals by leave granted from an April 16, 1992, order denying its motion to dismiss or compel arbitration in this action filed by plaintiff pursuant to the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, alleging discriminatory treatment in her discharge from her employment with defendant. We reverse.

Plaintiff was hired by defendant in May 1989, at which time she received a copy of defendant's employee handbook. The handbook stated employment with defendant could be terminated at any time with or without cause. The handbook also provided a mechanism by which an employee whose employment was terminated could seek internal review of the decision. The handbook stated an employee who followed the internal review procedure and was dissatisfied with the result could seek arbitration of the dispute. The handbook stated "any dispute, matter or controversy involving claims of monetary damages and/or employment related matters . . . including, but not limited to, any and all claims relating to termination of employment" would be arbitrated pursuant to the rules

(Continued on page 2)

INDEX

STATEMENT OF EDITORIAL POLICY

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

Stuart M. Israel, Editor
Paul E. Glendon, Editor Emeritus

COUNCIL DIRECTORY

HEURTEBISE AND THE ARBITRATION OF CIVIL RIGHTS CLAIMS —

Continued from page 1

of the American Arbitration Association. Plaintiff signed a document acknowledging receipt of the handbook and agreeing to conform to the procedures, rules, and regulations set forth therein.

Following her termination from employment, plaintiff filed the instant action in circuit court. Defendant filed a motion to dismiss or, in the alternative, to compel arbitration. Defendant argued pursuant to the procedure outlined in the employee handbook, plaintiff was required to arbitrate the dispute. The trial court denied defendant's motion, apparently finding the provision in the handbook requiring arbitration to be ambiguous and contrary to public policy. We disagree.

The provision requiring arbitration is not ambiguous. The clause plainly states that claims for money damages must be submitted to arbitration. Likewise, there is no valid question that plaintiff's claims for discriminatory termination fall within the scope of the arbitration clause. The claims are indisputably "employment related."

The trial court appears to have denied defendant's motion in part because it found there was no "meeting of the minds" between plaintiff and defendant with regard to the arbitration clause. The record does not support such a finding. Before beginning employment, plaintiff signed an acknowledgment form that stated that she agreed to conform to the various procedures, rules, and regulations of the company as set forth in the handbook. Moreover, even were the record devoid of plaintiff's express acceptance of the handbook's provisions, it is well established under Michigan law that mutual assent to a term of employment is not required. *In re Certified Question*, 432 Mich 438; 443 NW2d 112 (1989); *Carlson v Hutzel Corp of Michigan*, 183 Mich App 508; 455 NW2d 335 (1990); *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980).

Plaintiff's argument that the handbook specifically states that it does not create an enforceable contract is misguided. The provision plaintiff relies on addresses the at-will nature of plaintiff's employment, not the handbook in its entirety.

Finally, we find no "public policy" prohibition against the enforcement of a valid arbitration agreement that provides for meaningful arbitration in matters involving civil rights questions. See *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20; 111 S Ct 1647; 114 L Ed 26 (1991). To the contrary, arbitration has long been a favorable method of dispute resolution. *Detroit v A W Kutsche & Co*, 309 Mich 700; 16 NW2d 128 (1944). Thus, arbitration clauses are to be liberally construed with any doubts to be resolved in favor of arbitration. *Chippewa Valley Schools v Hills*, 62 Mich App 116; 233 NW2d 208 (1975). Contrary to plaintiff's suggestion, arbitration of plaintiff's claims will not result in the loss of her rights under the Civil Rights Act, but, instead, merely constitutes enforcement of an agreement to have those rights

(Continued on page 3)

determined in a different forum. Arbitration does not impair the remedies afforded under the statute.

The trial court erred in denying defendant's motion to compel arbitration.[1] Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

NOTE

1. Defendant's failure to address on appeal the issue whether the trial court erred in denying defendant's motion to dismiss waives review of the issue. We note, however, that matters of procedural arbitrability (i.e. compliance with the procedural requirements of the arbitration clause or grievance procedure) are for the arbitrator to decide, *Bennett v Shearson, Lehman-American Express, Inc*, 168 Mich App 80; 423 NW2d 911 (1987).

THE NEW FORMS OF EMPLOYMENT ARBITRATION: UNDERSTANDING THE EXPECTATIONS OF ADVOCATES AND ARBITRATORS

Mark J. Glazer, Arbitrator and Attorney

Until recently the arbitration of employment disputes meant labor arbitration where there was a company or a public employer on one side and a union on the other, with arbitration and the role of the arbitrator being defined by a collective bargaining agreement. Arbitration practices and procedures were well known by the participants, insofar as there was a lengthy history of labor arbitration, and there was much written on the subject. Moreover, the attorneys and arbitrators often knew each other and the format of the hearings was often assumed, rather than planned.

With the advent of alternative dispute resolution in the 90's, however, traditional labor arbitration is no longer the only form of employment arbitration: new forms of arbitration, where the advocates and neutrals do not necessarily either have a consensus on the format or a familiarity with the participants is emerging.

THE LEGAL PREDICATE

In *Carlson v Hutzel Corp.*, 183 Mich App 508; 455 NW2d 335 (1990) a panel of the Court of Appeals held that an employer could unilaterally change a written policy statement for non-union employees to provide for binding arbitration, without first obtaining the consent of the employees. This followed from *Toussaint v Blue Cross Blue Shield*, 408 Mich 579; 292 NW2d 880 (1980) where the Court said that an employer could provide for binding arbitration on the issues of cause for termination and damages.

At the federal level the Supreme Court in *Gilmer v Interstate/Johnson Lane Corp.*, 500 U.S. 20; 111 S. Ct. 1647 (1991) enforced an arbitration clause in the brokerage industry requiring the arbitration of statutory claims, such as those arising under the Age Discrimination In Employment Act. In *Heurtebise v Reliable Computers*, 207 Mich App 308 (1994) the Court allowed employer-promulgated arbitration as a remedy for an employee's claim under Michigan's Elliot-Larsen Civil Rights Act. Leave to appeal in the Supreme Court has been requested.

Michigan courts have required arbitration procedures to be fair in order to be enforceable. In *Renny v Port Huron Hospital*, 427 Mich 415; 398 NW2d 327 (1986) the Court set certain minimum standards for a valid arbitration hearing.

WHAT ARE THE NEW FORMS OF EMPLOYMENT ARBITRATION?

Employer-Promulgated Wrongful Termination Arbitration

The format that is closest to traditional labor arbitration is employer-promulgated arbitration in wrongful termination cases.

Rather than being an at will employee, the employee is offered the opportunity to arbitrate a termination. Reinstatement may or may not be an option, depending upon the arbitration rules which are solely the employer's. An arbitrator is selected through an agency, or indirectly by the parties. The arbitrator's fees are either fully or to a large extent paid by the employer, although some plans may provide for the fees to be split as they generally are in the arbitration of union disputes. The company is usually represented by an attorney; the employee may have a lawyer. The hearing progresses like a traditional labor arbitration, and the arbitrator writes a binding written award.

Litigation-Substitute Arbitrations

The attorneys to a wrongful termination lawsuit, sex harassment lawsuit, or any area of employment law may agree to have their case heard by an arbitrator instead of a jury or a judge.This clearly saves considerable litigation expense. Arbitrators are generally paid by the day for the hearing, with additional days paid for the preparation of the award. The arbitrator is selected by the attorneys either directly or through an agency. Often there is also a plaintiff and a defense arbitrator in addition to the neutral. The attorneys mutually establish the procedures for the hearing, usually without the input of the neutral arbitrator. The format of the hearing may parallel litigation, with significant discovery and numerous days of hearing. However, the parties may want to follow a traditional arbitration format which often takes only a day, or even an expedited one, where the attorneys alone make a presentation.

The neutral arbitrator may or may not be asked to write a written decision. The rules of evidence may be relaxed as they are in traditional arbitration, or the neutral may be asked to apply the state or federal rules. The neutral will have to understand and apply current law on employment relations. The decision of the arbitration panel will be binding, although the attorneys may have an over-under agreement.

Professional labor arbitrators should be very comfortable with this type of arbitration, particularly those with a litigation background. Experienced arbitrators have dealt with hundreds of termination cases, and they have a special expertise that is easily transferrable to employment litigation.

CIVIL RIGHTS ARBITRATION

As previously noted, in *Heurtebise* a panel of the Court of Appeals held that employer-promulgated arbitration of state civil rights claims was enforceable.

This is uncharted territory. Recently, Masco Corporation issued an employer-promulgated arbitration plan through the American Arbitration Association which includes the arbitration of civil rights claims.

Expectations and Concerns In Employer-Promulgated Arbitration

Although the process parallels traditional collective bargaining arbitration, lawyers, particularly on the plaintiff's side, may be new to arbitration. The plaintiff's attorney may be concerned that the arbitrator has regular business with the defense counsel in traditional arbitrations. Having come from a litigation background, plaintiff's counsel may be uncomfortable with the informality of an arbitration proceeding, particularly with the lesser amount of discovery. This may also be true of defense counsel with a litigation background.

The defense attorney may further be uncomfortable with the lack of an opportunity to have the case dismissed with a pretrial motion, and may be concerned about a large judgment from an unfamiliar arbitrator. Plaintiff's counsel may be concerned that arbitrators will be more conservative than juries.

Some arbitrators will not hear these cases because they are perceived as being anti-union. Arbitrators are also concerned about the fairness of employer-paid arbitrations, and the uncertainty of being paid when the employee participates. Arbitrators also worry about the probity of the selection procedure, and the behavior of advocates who are unfamiliar with the arbitration process.

Expectations and Concerns in Litigation-Substitute Arbitration

The arbitrator will want to write an award; the attorneys may not expect one. The arbitrator is used to sitting alone; the attorneys may want their own arbitrators in addition to the neutral. The parties may want either a formalized hearing following the rules of evidence, or an extremely informal one. The arbitrator may not be comfortable with a format that he or she isn't used to. The attorneys may assume that the arbitrator is familiar with the full range of employment law; infact, the arbitrator may wish to be educated by the parties on the particular area of the law at issue.

Expectations and Concerns in Post-*Heurtebise* Arbitrations

Heurtebise is anathema to plaintiff's attorneys, who hope for its reversal in the Supreme Court. Defense counsel still face the loss of any opportunity for a summary disposition motion. Arbitrators would be comfortable hearing civil rights cases, insofar as they already hear related issues in collective bargaining arbitrations.

MEETING THE EXPECTATIONS OF ATTORNEYS AND ARBITRATORS

Both Chrysler and Masco have recently issued arbitration plans for their salaried employees. They both express the same reasons for this action: management is determined to cut the cost of employment litigation and arbitration is seen as a means of accomplishing that goal. The major plaintiff's firms take as few as one in a hundred cases, with many of them being for white collar employees, who have damages which can support litigation. Consequently, arbitration (*Heurtebise* aside) offers plaintiff's counsel the opportunity to reach many more clients.

Arbitration can be an effective low cost alternative to litigation. However, to succeed it must meet the expectations of parties, and most importantly, it must be fair. To achieve these goals:

- Litigation attorneys should learn about arbitration; arbitrators should become current on employment laws.
- Litigation attorneys and arbitrators should try to meet each other in a professional setting to overcome the distrust that arises from unfamiliarity. Attorneys should understand that an arbitrator's acceptability will ultimately be determined by his or her competence and integrity, and not the relationship with one side or the other.
- The arbitrator must be selected and compensated in an equitable manner.
- Arbitrators should be flexible in meeting the needs of the parties in terms of the format of the arbitration hearing; the attorneys should recognize that arbitrators are trained and expect to write a decision.
- Because the parties are new to the process, there should be a dialogue at a professional level in order to achieve an effective and equitable proceeding.

Whether the new forms of employment arbitration will be an important means of dispute resolution is unclear. Certainly there is apprehension when attorneys are presented with something different. It should be remembered, however, that employment arbitration in its traditional form has existed for many years, with arbitrators deciding cases ranging from written reprimands to multi-million dollar plant closings — this hasn't caused a serious complaint from either management or labor, and there is no reason to expect that professional labor arbitrators would have difficulty making good decisions in the format of the new employment arbitration. The impetus for expanded arbitration comes from the need to lower litigation costs; ultimately, however, the success of the process will be determined by the willingness of attorneys to try something different that may very well benefit all sides.

MANDATORY ADR AND THE *HEURTEBISE* PROBLEM: THE LAW IS BROKE AND NEEDS TO BE FIXED

Sheldon J. Stark
Stark and Gordon

Let's get one thing straight from the start: I *support* voluntary alternative dispute resolution procedures. I have used voluntary ADR. I have offered to use voluntary ADR. I have sat as an arbitrator, a mediator and a facilitator, as a plaintiff panelist, as a neutral, and as a single arbitrator in ADR proceedings. What I am opposed to is mandatory employer-imposed arbitration, which to mind, is repellent and offensive, especially in civil rights and employment discrimination cases.

There is no dispute that civil rights and employment discrimination cases are about justice. The parties are themselves seeking justice through the courts which are financed with taxpayer money. The courts are intended and designed to be an impartial forum within which justice is dispensed. The victim seeks to overcome invidious discrimination, so corrosive to our national character and to the fabric of our society. The employer, on the other hand, seeks to vindicate its actions and prove that it was not guilty of prejudice or illegal motivation. Each is after justice in his own way. Congress and the courts have long characterized the resolution of these kinds of cases as our "highest national priority."

As these cases are developed through the Civil Rights Commission, the Equal Employment Opportunity Commission and the courts, whether or not there is a trial, justice is dispensed. First, there is micro-justice to the parties. For the victim the wrong is righted, or the wrongdoers forced to answer for their actions. He or she is compensated, reinstated or issued an apology in a righteous case, and justice is done. For the employer, there is either exoneration or punishment, self-imposed or imposed by the decision-maker. This is "micro" justice at its best. For society there is "macro" justice. The development of these laws are important to us as a people. It is no accident, for example, that the Americans with Disabilities Act, which authorizes complaints to the Equal Employment Opportunity Commission, and, eventually public jury trials in the Federal Courts, has been characterized as the "Emancipation Proclamation for the Disabled." It frees people from a form of oppression, as do the other civil rights laws. As a people we have decided that we want to develop a process for ending discrimination against women, minorities, the disabled, older workers, ethnic minorities and the like. That goal and ideal is one of the characteristics of this country that makes us all proud to be Americans.

ADR and arbitration are not about justice. Instead, they are procedures for settling disputes. There is a big difference between dispensing justice and settling disputes.

Some people may want ADR for their cases. If it is voluntary, that's fine. I support it, and most of the people I know do, as well. For the majority of my clients, however, the goal is justice. These clients want to tell their stories, out loud and publicly, not privately in the offices of one of the attorneys or an arbitrator. My clients want to put a stop to racial injustice, age discrimination, sexual harassment and the like. That means jury trials — public jury trials. My clients want their cases to become part of the great build-up of precedents we call the Common Law. These individuals do not want a quiet confidential settlement of their matter. As Oliver Wendell Holmes noted, "the life of the law is experience and not logic." Society has grown and developed from the slow, steady build-up of precedent and case law. It has grown from experience. Privacy and the elimination of written decisions explaining a result will bring a halt to that development. That consequence is dead wrong for individuals and dead wrong for society.

It is surprising to me that mandatory ADR is being pushed by people who consider themselves to be political conservatives. From their point of view, mandatory ADR imposed by an employer should be seen for the radical public-policy horror that it is. We have State and Federal laws on how civil rights cases should be handled. The civil rights laws are, as noted, among our most revered. Enforcement of our civil rights laws raises our society out of the muck of racial and ethnic violence. These laws and their vigorous enforcement distinguish us at bottom from actions taken in fractured societies such as those in the Balkans and the Caucasus where private means are utilized to settle ethnic and religious bias claims and disputes. There, the term "loser pays" has a whole different ring. Nonetheless, the *Heurtebise* principle takes all the lawmaking power and unilaterally turns it over to private corporations to write the laws for their employees. Suddenly, it will be the Ross Perot and Michael Milken types who will legislate the rules concerning proper forum, proper procedures, appropriate statute of limitation, appropriate decision-maker, extent of discovery and, no doubt, remedy. Do conservatives not care that *Heurtebise* is a wholesale delegation of legislative authority to private parties?

Moreover, anyone with experience in arbitration knows how inadequate it is in a number of important particulars. Absent an agreement, there are no discovery depositions. Effective handling of employment discrimination cases means putting the decision makers under oath and cross-examining them about their biases, prejudices, and reasons for making decisions prior to trial. Arbitration is also very ineffective at enforcing the discovery of key records and documents prior to actually appearing before an arbitrator at hearing. Often times, the victim's counsel cannot figure out what documents to ask for until a witness has testified. In addition, the cost of arbitration can deter a victim from pursuing righteous claims.

We also know that discrimination is very hard to prove. We often prove it through the discovery of the defendant's witnesses. That is substantially more difficult without discovery. Proof of discrimination also requires a decision-maker with an open mind. The O.J. Simpson verdict is an example of the importance that predisposition in a fact-finder can have on the decision-making process. For jurors, there is likely to be only one experience in the role. Arbitrators, with all respect, may be thinking about who's going to select them in

the next case if they decide the case before them in a certain way. An arbitrator may also carry his or her own predispositions. That in turn could lead to "arbitrator-shopping" by the parties, giving management, which will have greater experience with a given arbitrator, a significant advantage.

ADR, of course, pushes jury trials off the board. Jury trials are an essential component of our system of justice. As DeTocqueville said in his seminal book, *Democracy In America*, the American jury has had a great influence on national character:

> Juries are wonderfully effective in shaping a nation's judgment and increasing its natural lights. That, in my view, is its greatest advantage. It should be regarded as a free school which is always open and in which each juror learns his rights . . . and is given practical lessons in the law, lessons which the advocate's efforts, the judge's advice, and also the very passions of the litigants bring within his mental grasp. I think that the main reason for the practical intelligence and political good sense of the Americans is their long experience with juries in civil cases.
>
> I do not know whether a jury is useful to the litigants, but I am sure it is very good for those who have to decide the case. I regard it as one of the most effective means of popular education at society's disposal.

Juries should be part of the civil rights and employment discrimination process. Juries are able to decide these cases correctly. They are part and parcel of the civil justice system and, they bring practical wisdom and good sense to the process.

It has been said that nothing is decided finally until it is decided right. *Heurtebise* is wrong; it has "broken" the law; it needs to be fixed. For those of us who care about the civil justice system, it is hoped the Supreme Court will grant leave.

HEURTEBISE v RELIABLE COMPUTERS — A UNION AND ARBITRATION ADVOCATE'S PERSPECTIVE

Mary Hannorah Job,* *Staff Attorney
Michigan Education Association

In October 1994, the Michigan Court of Appeals decided *Heurtebise v Reliable Computers*, 207 Mich App 308 (1994), in which it held lawful an employer policy which required the arbitration of any and all diputes between the employee and his or her employer. In so doing, the Court essentially held that, as a matter of law, an employee may, *as a condition of employment*, be compelled to arbitrate even those claims which arise out of statute and have a statutorily conferred judicial remedy.

Leaving aside the question of whether imposing such a condition of employment is an appropriate means of preserving an employee's rights which are conferred on him or her by the laws of this state, there remains the issue of whether the Court's decision in *Heurtebise*, and the rationale on which it based its decision, is consistent with the body of case law and legal theory underpinning arbitration as a remedy for employment-related disputes. I believe this question must be answered in the negative. Indeed, the Court's reasoning in *Heurtebise* for allowing the unilateral imposition of arbitration as a means of resolving even statutorily-granted rights with judicial means of enforcement is both intellectually dishonest and legally deficient.

The rationale in *Heurtebise* relies on the principles of judicial deference to and the finality of contractual arbitration clauses, particularly those arbitration clauses found in collectively bargained agreements. At the same time, however, the Court ignored and virtually repudiated the bilateral nature of arbitration as it developed in the organized labor sector. In discussing whether plaintiff's acknowledgment of an employee handbook containing the mandate of arbitration was an act of mutual agreement, the Court noted that "even were the record devoid of plaintiff's express acceptance of the handbook's provisions, it is well established under Michigan law that mutual assent to a term of employment is not required [citations deleted]." *Heurtebise* at p 311.

While such a statement may be true for the working conditions to which an at-will employee is traditionally subject, it is far from true in assessing the merits of arbitration as a dispute resolution process in traditional management labor relations. Indeed, the case law which established collectively-bargained arbitration as a "favored method of dispute resolution," (*Heurtebise*, at 311) makes it clear that the integrity of the arbitration process as a means of dispute resolution is firmly grounded in the principles of mutuality. Every decision from the *Steelworkers Trilogy* (*United Steelworkers v American Manufacturing Co*, 363 US 564 (1960); *United Steelworkers of America v Warrior and Gulf Navigation Company*, 363 US 574 (1960); *United Steelworkers of America v Enterprise Wheel and Car Corporation*, 363 US 593 (1960)) to more recent case law in Michigan on the enforceability of arbitration awards and the judicial deference given to such awards have either expressly rested on this premise of mutuality or clearly assumed its existence. In *Warrior Gulf and Navigation*, Justice Douglas, writing for the majority, emphasized the mutual nature of the process of arbitration and expressly noted that "no party is required to submit to arbitration any dispute to which he has not so agreed to submit. . . ." *Id.* at page 582.

Nor is arbitration an axiomatic part of an agreement to provide services under specified conditions. It is a contract within a contract. Concurring in *American Manufacturing Co, supra* at 570, Justice Brennan emphasized that "the arbitration promise is itself a contract. The parties are free to make that promise as broad or as narrow as they wish, for there is no compulsion in law requiring them to include any such promises in their agreement."

This theme was reiterated by the Michigan Supreme Court in 1986 in *Port Huron Area School District v Port Huron Education Association*, 426 Mich 143, (1986). Judicial deference flows from the "consensual authority" given to the arbitrator by the parties. The authority will, by its nature, vary with the particular contract. However, once assured that the subject falls within the sphere agreed to by the parties, the arbitrator reigns supreme, largely because in Justice Douglas' words, the arbitrator is:

> chosen because of the *parties'* confidence in his knowledge of the common law of the shop and in *their* trust in his personal judgment to bring to bear considerations which are not expressed in the contract as a criteria for judgment. (emphasis added).

Arbitration is not a public tribunal, but a "part of a system of self-government *created by* and confined to the *parties*." Sulman, *Reason, Contract and Law in Labor Relations* 8 Harv. L.Rev. 999, 1016 (1955), (emphasis added). Where, however, the parties fail to mutually agree on arbitration as a means of resolving a particular dispute, or where the arbitrator is subsequently found to have exceeded the scope of that mutually agreed upon jurisdiction, judicial deference is withheld. *Port Huron, supra* at 151-52. Indeed, this heavy reliance on mutuality and the contractual nature of arbitration is a major reason why collectively bargained arbitration as a means of dispute resolution does not survive the expiration of a collective bargaining agreement, unless there is clear evidence within the contract or by separate agreement to the contrary. See, *Gibraltar School District v Gibraltar MESPA*, 443 Mich 326 (1993); *Litton v NLRB*, 501 US 190, (1991); *Ottawa County v Jaklinski*, 423 Mich 1 (1985).

When reading these and other cases dealing with arbitration, it is difficult to avoid the conclusion that the strength and the integrity of arbitration as a means of dispute resolution has taditionally rested on three basic assumptions:

1. The parties who are bound by the decision mutually agreed to this method of dispute resolution after arm's length bargaining in which each side had the opportunity and the ability to weigh the advantages and disadvantages of the process.
2. The scope of the process, including such vital issues as the identity of the arbitrator, what issues he or she can decide, and the nature and amount of relief to be awarded, is a function of that mutually-derived contract and subject to the same bargaining process and principles of mutuality.
3. The document, or governing principles from which the arbitrator derives his or her decision and which will apply to the dispute at hand is itself finite and bilaterally derived. Because of the contractual nature of the rights being litigated by the parties in an arbitration, both parties have substantial parity in their knowledge of the factors and relevant background involved in the dispute. In any event, the arbitrator is to resolve disputes regarding the scope of the parties' agreement and the agreement's application to a specific set of facts, not to adjudicate their inherent rights as citizens with all of the attendant public policy implications.

Arbitration is therefore most viable when the parties who are bound to the decision of an arbitrator have equal ownership in the source and principles on which the decision rests, the process of decisionmaking, and the end product. Cases like *Heurtebise*, which separate arbitration from the principles of mutuality which have given it its vitality and strength for over 50 years, do the process no service. Under these circumstances, it will be viewed as a weapon in management's arsenal to be used or discarded at its convenience rather than a bona-fide method of dispute resolution. If the Michigan judiciary wishes to continue to rely on arbitration as a method of dispute resolution, it should soundly reject the reasoning in *Heurtebise*.

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND ADR

Adele Rapport

Regional Attorney U.S. EEOC

In April 1995, the EEOC adopted several significant changes in its policies affecting charge processing, litigation authorization and Alternative Dispute Resolution. In subsequent months, the Commission made clear that it will accept complaints of discrimination notwithstanding the existence of a signed arbitration agreement. As Commissioner Paul Steven Miller advised the Press: "We caution all that internal resolution programs cannot supplement remedies afforded by the civil rights laws. Alleged victims of employment discrimination should be able to file charges with the EEOC, regardless of the outcome of any employer sponsored ADR program."

The Commission's official policy on ADR was published on July 17, 1995. In that policy statement the Commission states its firm commitment to using ADR to resolve disputes in its own activities. We believe that, in appropriate circumstances, ADR can provide faster, cheaper, less contentious and more productive results in resolving employment disputes.

District offices are in the process of submitting proposals for ADR programs which will be funded in the near future (assuming the Commission receives appropriate funding from Congress). Importantly, the Commission lists certain fundamental principles which govern its endorsement of ADR. These fundamental principles include a requirement that the ADR program further the Commission's mission, and that it be fair. In describing the fairness requirement the Commission states that the ADR program must be voluntary, neutral, confidential, and enforceable. The program must also be flexible and must contain training and evaluation components.

The voluntary element is key. In its policy, the Commission expressed an overall concern in this regard by stating: "The Commission believes that parties must knowingly, willingly and voluntarily enter into an ADR proceeding." The Commission's views that any ADR program must be voluntary are also evidenced by its litigation posture. In fact, the Houston District Office recently obtained a preliminary injunction against an employer which tried to enforce an involuntary ADR program on unwilling employees in an effort to prevent them from utilizing the Commission to vindicate their Title VII rights.

In *EEOC v River Oaks Imaging and Diagnostic*, 95-CV-H-95-755 (S.D. Tex 1995), the defendant terminated two employees who refused to sign the company's mandatory arbitration policy. The EEOC alleged that the company implemented the arbitration policy after it received ten allegations of sex discrimination.

The Court enjoined the defendant from retaliating against employees who file EEOC charges or oppose the ADR policy. It also barred the company from implementing a policy that required employees to pay the costs of ADR or interfered with their rights to proceed with EEOC claims and/or suits.

The Commission's Office of Legal Counsel is currently drafting an ADR policy which will specifically address the issue of involuntary ADR programs in the private sector. Likewise, the Detroit District Office is investigating several cases where potential policy violations have arisen in view of involuntary ADR programs, among other issues (e.g., fee shifting, venue shifting and time limitations for proceeding on claims).

[Ms. Rapport's views are her own and do not necessarily reflect those of the Commission. Commission policy on ADR is found in its published policy statements.]

ABA AND OTHER PROFESSIONAL ORGANIZATIONS ENDORSE "DUE PROCESS PROTOCOL" FOR MEDIATION AND ARBITRATION OF STATUTORY EMPLOYMENT RIGHTS DISPUTES

The Labor and Employment Law Section of the American Bar Association and other prominent professional organizations recently have endorsed a "Protocol" on issues of due process in the mediation and arbitration of employment disputes involving statutory rights.

An ABA-convened task force began meeting in September 1994, reached unanimous agreement on the Protocol's contents in May 1995, and forwarded it to organizations represented among its membership in May 1995. The task force was created in response to concerns raised in the profession and the media about employer-created arbitration systems (including articles in *The Wall Street Journal* in early 1994 describing unfairness in the disposition of discrimination claims in such systems under the Security Industries Arbitration Agreement), the Report of the Commission on Future Worker Management Relations chaired by John Dunlop, and discussions with the then-president of the National Academy of Arbitrators, Arnold M. Zack.

According to Zack, the Academy extensively debated what role it should take, if any, in new forms of employment dispute resolution beyond its traditional emphasis on union-management arbitration. From that debate there emerged concern that lack of due process standards in these new forums could cause loss of faith in traditional union-management arbitration, as well as a desire to insure that the high due process standards developed in fifty years of union-management arbitration be applied to the resolution of employment disputes, especially those involving statutory rights, in the non-organized sector.

Zack met with the ABA Labor and Employment Law Section to discus those concerns in August 1994. ABA Section leaders responded with creation of the task force and invitations to the American Arbitration Association, American Civil Liberties Union, Federal Mediation and Conciliation Service, National Employment Lawyers Association, and Society of Professionals in Dispute Resolution to appoint representatives to it, along with Zack and five ABA Section members. All five organizations responded, and the Protocol was signed by all twelve members of the task force, including one of our own members, Carl E. VerBeek of Grand Rapids, in his capacity as management Co-Chair of the Arbitration Committee of the ABA Labor and Employment Law Section.

So far four of the seven participating organizations have formally endorsed the Protocol: the ABA Labor and Employment Law Section soon after it was issued; the Academy at its annual meeting later in May; the American Arbitration Association this past summer; and the National Employment Lawyers Association on September 29, 1995.

Given the increased focus on employer-promulgated arbitration systems in Michigan post-*Heurtebise*, we present the full text of the Protocol not as dispositive of all issues and concerns reflected elsewhere in this newsletter, but as at least a starting point for addressing some of them. We also invite you to share your thoughts and observations on this subject in letters to the editor.

The Editors

"A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP"

The following protocol is offered by the undersigned individuals, members of the Task Force on Alternative Dispute Resolution in Employment, as a means of providing due process in the resolution by mediation and binding arbitration

of employment disputes involving statutory rights. The signatories were designated by their respective organizations, but the protocol reflects their personal views and should not be construed as representing the policy of the designating organizations.

GENESIS

This Task Force was created by individuals from diverse organizations involved in labor and employment law to examine questions of due process arising out of the use of mediation and arbitration for resolving employment disputes. In this protocol we confine ourselves to statutory disputes.

The members of the Task Force felt that mediation and arbitration of statutory disputes conducted under proper due process safeguards should be encouraged in order to provide expeditious, accessible, inexpensive and fair private enforcement of statutory employment disputes for the 100,000,000 members of the workforce who might not otherwise have ready, effective access to administrative or judicial relief. They also hope that such a system will serve to reduce the delays which now arise out of the huge backlog of cases pending before administrative agencies and courts and that it will help forestall an even greater number of such cases.

A. Pre- or Post-Dispute Arbitration

The Task Force recognizes the dilemma inherent in the timing of an agreement to mediate and/or arbitrate statutory disputes. It did not achieve consensus on this difficult issue. The views in this spectrum are set forth randomly, as follows:

- Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but any agreement to mediate and/or arbitrate disputes should be informed, voluntary, and not a condition of initial or continued employment.
- Employers should have the right to insist on an agreement to mediate and/or arbitrate statutory disputes as a condition of initial or continued employment. Postponing such an agreement until a dispute actually arises, when there will likely exist a stronger pre-disposition to litigate, will result in very few agreements to mediate and/or arbitrate, thus negating the likelihood of effectively utilizing alternative dispute resolution and overcoming the problems of administrative and judicial delays which now plague the system.
- Employees should not be permitted to waive their right to judicial relief of statutory claims arising out of the employment relationship for any reason.
- Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but the decision to mediate and/or arbitrate individual cases should not e made until after the dispute arises.

The Task Force takes no position on the timing of agreements to mediate and/or arbitrate statutory employment disputes, though it agrees that such agreements be knowingly made. The focus of this protocol is on standards of exemplary due process.

B. Right of Representation

1. Choice of Representative

Employees considering the use of or, in fact, utilizing mediation and/or arbitration procedures should have the right to be represented by a spokesperson of their own choosing. The mediation and arbitration procedure should so specify and should include reference to institutions which might offer assistance, such as bar associations, legal service associations, civil rights organizations, trade unions, etc.

2. Fees for Representation

The amount and method of payment for representation should be determined between the claimant and the representative. We recommend, however, a number of existing systems which provide employer reimbursement of at least a portion of the employee's attorney fees, especially for lower paid employees. The arbitrator should have the authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law or in the interests of justice.

3. Access to Information

One of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery. Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims. The employees' representative should also have reasonable pre-hearing and hearing access to all such information and documentation.

Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available. We also recommend that prior to selection of an arbitrator, each side should be provided with the names, addresses and phone numbers of the representatives of the parties in that arbitrator's six most recent cases to aid them in selection.

C. Mediator and Arbitrator Qualification

1. Roster Membership

Mediators and arbitrators selected for such cases should have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment. The roster of available mediators and arbitrators should be established on a non-discriminatory basis, diverse by gender, ethnicity, background, experience, etc. to satisfy the parties that their interest and objectives will be respected and fully considered.

Our recommendation is for selection of impartial arbitrators and mediators. We recognize the right of employers and employees to jointly select as mediator and/or arbitrator one in whom both parties have requisite trust, even though not possessing the qualifications here recommended, as most promising to bring finality and to withstand judicial scrutiny. The existing cadre of labor and employment mediators and arbitrators, some lawyers, some not, although skilled in conducting hearings and familiar with the employment milieu

is unlikely, without special training, to consistently possess knowledge of the statutory environment in which these disputes arise and of the characteristics of the non-union workplace.

There is a manifest need for mediators and arbitrators with expertise in statutory requirements in the employment field who may, without special training, lack experience in the employment area and in the conduct of arbitration hearings and mediation sessions. Reexamination of rostering eligibility by designating agencies, such as the American Arbitration Association, may permit the expedited inclusion in the pool of this most valuable source of expertise.

The roster of arbitrators and mediators should contain representatives with all such skills in order to met the diverse needs of this caseload.

Regardless of their prior experience, mediators and arbitrators on the roster must be independent of bias toward either party. They should reject cases if they believe the procedure lacks requisite due process.

2. Training

The creation of a roster containing the foregoing qualifications dictates the development of a training program to educate existing and potential labor and employment mediators and arbitrators as to the statutes, including substantive, procedural and remedial issues to be confronted and to train experts in the statutes as to employer procedures governing the employment relationship as well as due process and fairness in the conduct and control of arbitration hearings and mediation sessions.

Training in the statutory issues should be provided by the government agencies, bar associations, academic institutions, etc., administered perhaps by the designating agency, such as the AAA, at various locations throughout the country. Such training should be updated periodically and be required of all mediators and arbitrators. Training in the conduct of mediation and arbitration could be provided by a mentoring program with experienced panelists.

Successful completion of such training would be reflected in the resume or panel cards of the arbitrators supplied to the parties for their selection process.

3. Panel Selection

Upon request of the parties, the designating agency should utilize a list procedure such as that of the AAA or select a panel composed of an odd number of mediators and arbitrators from its roster or pool. The panel cards for such individuals should be submitted to the parties for their perusal prior to alternate striking of the names on the list, resulting in the designation of the remaining mediator and/or arbitrator.

The selection process could empower the designating agency to appoint a mediator and/or arbitrator if the striking procedure is unacceptable or unsuccessful. As noted above, subject to the consent of the parties, the designating agency should provide the names of the parties and their representatives in recent cases decided by the listed arbitrators.

4. Conflicts of Interest

The mediator and arbitrator for a case has a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest. The designated mediator and/or arbitrator should be required to sign an oath provided by the designating agency, if any, affirming the absence of such present or preexisting ties.

5. Authority of the Arbitrator

The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating agency, including the authority to determine the time and place of the hearing, permit reasonable discovery, issue subpoenas, decide arbitrability issues, preserve order and privacy in the hearings, rule on evidentiary matters, determine the close of the hearing and procedures for post-hearing submissions, and issue an award resolving the submitted dispute.

The arbitrator should be empowered to award whatever relief would be available in court under the law. The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

6. Compensation of the Mediator and Arbitrator

Impartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator. In cases where the economic condition of a party does not permit equal sharing, the parties should make mutually acceptable arrangements to achieve that goal if at all possible. In the absence of such agreement, the arbitrator should determine allocation of fees. The designating agency, by negotiating the parties' share of costs and collecting such fees, might be able to reduce the bias potential of disparate contributions by forwarding payment to the mediator and/or arbitrator without disclosing the parties share therein.

D. Scope of Review

The arbitrator's award should be final and binding and the scope of review should be limited.

A PREMIUM ON IGNORANCE, STUPIDITY AND PERJURY?

Stuart M. Israel

Miller, Cohen, Martens, Ice and Geary, P.C.

The O.J. Simpson verdict and other newsworthy cases have heightened criticism of trial by jury, that venerable institution guaranteed in the Sixth and Seventh Amendments.[1]

A legacy of English common law, trial by jury has been revered as a foundation of American democracy, a safeguard against elitism, a bulwark against abuse of authority, and the fairest, most effective method of achieving justice ever created by government. It is said that the collective wisdom of twelve (or five of six) citizens, good and true, will, almost always, do the right thing.

Critics, however, question our assumptions about jury wisdom, hold that our reverence for the institution is unwarranted, parochial and outmoded, and make unfavorable comparisons between our peer jury system and European civil law systems that employ panels of professional and trained lay jurists. One critic observed: "The American jury system confronts us with a powerful contradiction: We love the idea of the jury but hate the way it works."[2]

Skepticism about the American jury is no new phenomenon. In *Roughing It*, published in 1872, Mark Twain called trial by jury in nineteenth century America "the most ingenious and infallible agency for *defeating* justice that human wisdom could contrive."[3] The emphasis is Twain's.

Twain described "one of those sorrowful farces, in Virginia, which we call a jury trial." The defendant was a "noted desperado" who killed "a good citizen" in "the most wanton and cold blooded way." Twain wrote about pretrial publicity and jury selection.

> Of course the papers were full of [news about the killing], and all men capable of reading, read about it. And of course all men not deaf and dumb and idiotic, talked about it. A jury-list was made out, and Mr. B.L., prominent banker and a valued citizen was questioned precisely as he would have been questioned in any court in America:
>
> "Have you heard of this homicide?"
> "Yes."
> "Have you held conversations upon the subject?"
> "Yes."
> "Have you formed or expressed opinions about it?"
> "Yes."
> "Have you read the newspaper accounts of it?"
> "Yes."
> "We do not want you."
>
> A minister, intelligent, esteemed, and greatly respected; a merchant of high character and known probity; a mining superintendent of intelligence and unblemished reputation; a quartz mill owner of excellent standing, were all questioned in the same way, and all set aside. Each said the public talk and the newspaper reports had not so biased his mind but that sworn testimony would overthrow his previously formed opinions and enable him to render a verdict without prejudice and in accordance with the facts. But of course such men could not be trusted with the case. Ignoramuses alone could mete out unsullied justice.
>
> When the peremptory challenges were all exhausted, a jury of twelve men was impaneled — a jury who swore they had neither heard, read, talked about nor expressed an opinion concerning a murder which the very cattle in the corrals, the Indians in the sagebrush and the stones in the streets were cognizant of! It was a jury composed of two desperadoes, two low beer-house politicians, three bar-keepers, two ranchmen who could not read, and three dull, stupid, human donkeys! It actually came out afterward, that one of these latter thought that incest and arson were the same thing.
>
> The verdict rendered by this jury was, Not Guilty. What else could one expect?

Modern critics of the American jury will find a kindred spirit in Twain.

> The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury. It is a shame that we must continue to use a worthless system because it *was* good a thousand years ago. In this age, when a gentleman of high social standing, intelligence and probity, swears that testimony given under solemn oath will outweigh, with him, street talk and newspaper reports based upon mere hearsay, he is worth a hundred jurymen who will swear to their own ignorance and stupidity, and justice would be far safer in his hands than in theirs. Why could not the jury law be so altered as to give men of brains and honesty an *equal chance* with fools and miscreants?

Twain was pessimistic about acceptance of his proposed reform.

> I am a candidate for the legislature. I desire to tamper with the jury law. I wish to so alter it as to put a premium on intelligence and character, and close the jury box against idiots, blacklegs, and people who do not read newspapers. But no doubt I shall be defeated — every effort I make to save the country "misses fire."

While Twain may not have succeeded in saving the country from trial by jury, the country may not have needed saving. Thirty years after *Roughing It*, Francis L. Wellman expressed a more sanguine view of trial by jury. In his classic *The Art of Cross-Examination*, published in 1903, Wellman, who recalled having examined and cross-examined about fifteen thousand witnesses, wrote:

> Present day juries, especially in large cities, are composed of practical business men accustomed to think for themselves, experienced in the ways of life, capable of forming estimates and making nice distinctions, unmoved by the passions and prejudices to which court oratory is nearly always directed. Nowadays, jurymen, as a rule, are wont to bestow upon testimony the most intelligent and painstaking attention, and have a keen scent for truth. It is not intended to maintain that juries are no longer human, or that in certain cases they do not still go widely astray, led on by their prejudices if not by their passions. Nevertheless, in the vast majority of trials, the modern juryman, and especially the modern city juryman, — it is in our large cities that the greatest number of litigated cases is tried, — comes as near being the model arbiter of fact as the most optimistic champion of the instruction of trial by jury could desire.[4]

Faith in the American jury, Wellman thought, was the inevitable product of experience with it; its critics knew not of what they spoke:

> I am aware that many members of my profession still sneer at trial by jury. Such men, however, — when not among the unsuccessful and disgruntled, — will, with few exceptions, be found to have had but little practice themselves in court.

The debate continues and, thanks to the likes of O.J. Simpson, William Kennedy Smith, the Menendez brothers, Lorena Bobbitt, the woman who spilled McDonald's coffee onto her lap, the man whose BMW was repainted, and the insurance industry, the debate rages.

For some critics, the debate is confined to the most effective ways to limit trial by jury. They call for caps on pain and suffering damages, legislative limitations on liability, the elimination of punitive damages, barring jury trials of complex cases, and other methods of controlling jurors and narrowing jury discretion.

Other critics concentrate on ways to improve quality without restricting the historical scope of trial by jury. They call for reforms likely to produce more representative juries: broadening jury pools, making it difficult to evade jury service, and limiting, or eliminating, peremptory challenges. They propose reforms likely to enhance the performance of juries. They call for comprehensible jury instructions, delivered in writing as well as orally, at the beginning of trial, and during trial when appropriate, as well as at the end. They would permit jurors to take notes, to review evidence and discuss it during trial, and to submit proposed questions for witnesses. They would incorporate social science research, providing jurors with information about such things as memory, perception and eyewitness identification, to provide a realistic context for traditional instructions on weighing evidence and assessing witness credibility. They would more explicitly define the judicial responsibility to expedite and focus the trial and to provide jurors with the tools necessary to intelligent deliberation.

The challenge will be to sift among proposed reforms to select those that preserve the jury as an instrument of justice and democracy while addressing the flaws that prompted Twain to rail that trial by jury "puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity and perjury."

ENDNOTES

1. Deprivation of "the Benefits of Trial by Jury" was one of the King's offenses specified in the Declaration of Independence. The United States Constitution guarantees the right to trial by jury. Article III, Section 2 provides that the trial of "all crimes, except in cases of impeachment, shall be by jury." The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." The Seventh Amendment preserves the right of trial by jury in suits at common law, "where the value in controversy shall exceed twenty dollars . . . ."
2. These are the words of Stephen J. Adler, the legal editor of *The Wall Street Journal*, in his 1994 book, *The Jury — Trial And Error In The American Courtroom*, at page xiii.
3. The passages from Mark Twain are in *Roughing It*, volume II, the Harper and Row edition copyrighted 1913, at pages 56-58.
4. The passages from Francis L. Wellman, identified by his publishers as "one of the great nineteenth century trial lawyers," are from the fourth edition of *The Art of Cross-Examination*, at pages 1-2.

NLRB PRACTICE AND PROCEDURE

William C. Schaub, Jr.

Regional Director, Region Seven

I appreciate this opportunity to address you concerning practice and procedure issues at the National Labor Relations Board. I hope that the information in this and future columns will make your practice before the NLRB more effective and enjoyable.

You may have noticed in the last edition of *Lawnotes*, that a local practice and procedure committee has been formed. This committee will provide a forum for discussion of practice and procedure issues at the NLRB and specifically at Region Seven. By the time you read this article, the committee should have had its second meeting. Our first meeting was devoted largely to discussion of how we will function as a group, the types of topics and issues we hope to address and how issues will be presented. I welcome any suggestions you may have concerning the functioning of this group or questions or topics you wish to present to me or the entire group for consideration.

Those of you who regularly practice before the NLRB know the importance of having a copy of the Board's rules and regulations. The Rules and Regulations give you the where, what, how many, when and why of NLRB practice. While I often hear from you about the differences in practice at other regional offices, I suspect the differences are really

few as each region is required to follow the Board's Rules and Regulations. Further, the emphasis in recent years has been to stress uniformity although there are still some areas of regional discretion which I hope to comment on in future columns.

Those of you who attended the Region's third annual Bernard Gottfried Labor Law Symposium, which was held on October 19, 1995, heard about some of the recent procedural changes that have been undertaken by the Board and the General Counsel. I think it is fair to expect that there will be additional changes in the near future. As General Counsel Fred Feinstein, who was the featured speaker at the Symposium, noted, the potential budget cuts the NLRB faces, not to mention the already existing case backlogs in many regions, will require that the Agency direct its resources to those cases which have the greatest impact. This does not mean that only high impact cases will be investigated, but it does mean that some cases may not be handled as expeditiously as others. Further, you can anticipate that more emphasis will be placed on witnesses coming to the regional office from greater distances and on the use of alternative cost saving investigative techniques. I will have more to say about this in future columns as the General Counsel's office moves into an impact analysis method of casehandling.

Finally, I want to call your attention to a recent decision by General Counsel Feinstein authorizing issuance of an unfair labor practice complaint against an employer that discharged an employee who refused to sign an agreement requiring that any dispute about his employment be submitted to binding arbitration. In this regard the General Counsel joins the EEOC which has already attacked these so called mandatory arbitration contracts when they are imposed as a condition of employment. The use of private dispute resolution procedures is a growing phenomenon. The Board has long favored private resolution of labor disputes (*see Collyer Insulated Wire*, 192 NLRB 837 (1971); *Dubo Mfg. Corp.*, 142 NLRB 431 (1963)), provided employees are not also required to waive their statutory right to file an unfair labor practice charge. E.g., *National Licorice Co. v NLRB*, 309 U.S. 350 (1940). For those interested, the case is *Bentley Luggage Corp.*, 12-CA-16658.

FEDERAL COURTS UPDATE

E. Sharon Clark

UNITED STATES DISTRICT COURT – EASTERN DISTRICT OF MICHIGAN

Statutory Civil Rights Claims Not Subject to CBA Arbitration Clause

In a hostile work environment racial discrimination case brought under the Civil Rights Act of 1866, 42 U.S.C. §1981, and the Elliott-Larsen Civil Rights Act, M.C.L.A. §§ 37.2101 *et seq.*, the Eastern District held that plaintiffs were not required to arbitrate their statutory claims under the terms of a collective bargaining agreement. *Jackson v Quanex Corporation*, 889 F. Supp. 1007 (E.D. Mich. 1995). The CBA which covered plaintiffs Jackson and Miller provided that the final step of the grievance procedure for violations of the joint Company-Union civil rights policy was arbitration. Defendant Quanex Corporation moved to dismiss the case, arguing that plaintiffs were required to arbitrate their federal statutory claims under the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, as construed in *Gilmer v Interstate/Johnson Lane Corp*, 500 U.S. 20 (1991), and that they were also compelled to arbitrate their Elliott-Larsen claims under *Heurtebise v Reliable Business Computers, Inc.*, 207 Mich. App. 308 (1994). The court noted that the Supreme Court in *Gilmer* specifically distinguished prior cases which involved arbitration under a CBA and that the cases cited by Quanex involved plaintiffs who had signed individual agreements compelling arbitration. The court also noted that the Sixth Circuit has broadly construed the language of the FAA exemption for "contracts of employment of seamen, railroad employees, or any other class of workers employed in foreign or interstate commerce," declining to limit the exemption to workers in transportation, in contrast to the approach taken by other Circuits. In holding that plaintiffs were not required to arbitrate their state claims, the court distinguished *Heurtebise*, which involved an individual employment contract rather than an arbitration provision in a CBA.

UNITED STATES COURT OF APPEALS – SIXTH CIRCUIT

Liquidation of SUB Fund Results in Wages

In a case of first impression, the Sixth Circuit held in *Sheet Metal Workers Local 141 Supplemental Unemployment Benefit Trust Fund v Internal Revenue Service*, No. 94-3689, 1995 Fed. App. 0269P (Sept. 5, 1995), that distributions to employees from the liquidation of a supplemental unemployment benefit trust fund were "wages" within the meaning of the Federal Insurance Contributions Act ("FICA") and the Federal Unemployment Tax Act ("FUTA"). The trustees of the Fund conceded that an initial partial distribution was subject to FICA and FUTA, but maintained that the source of the funds for the remainder was income from the investment of the trust corpus and not wages. Contributions to the fund had not been made by employees but rather by the contractor/employers, and eligibility for the planned residual distribution was based on length of service with a participating contractor. The court thus found persuasive the IRS's argument that because receipt of a residual distribution was contingent on past or present employment, the payment was tied to hours of past service and was in essence remuneration for employment.

Punitive Damages Available in Rehabilitation Act Section 504 Intentional Discrimination Case

Moreno v Consolidated Rail Corporation, Nos. 94-1231/1247, 1995 Fed. App. 0266P (August 29, 1995), also presented questions of first impression for the Sixth Circuit: whether a railroad which receives federal funds from a state

under the Federal-Aid Highways Act of 1944 ("FAHA"), 23 U.S.C. §§ 101 *et seq.*, is a recipient of federal financial assistance within the meaning of section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, and whether punitive damages are an available remedy for intentional discrimination under section 504 of the Rehabilitation Act. Plaintiff, a 36-year employee of Conrail, was fired when Conrail learned that he had diabetes and was subject to certain restrictions at work. He subsequently sued, alleging intentional discrimination in violation of section 504, and a jury awarded him $1.3 million in punitive damages in addition to amounts for wage loss, pain and suffering. The district court struck the punitive damages award, and both parties appealed. Conrail argued that it was not a recipient of federal funds because under the FAHA states receive the federal funds and decide how and to whom to distribute them. The court found this argument unpersuasive, finding that although indirectly, Conrail nevertheless accepted federal money to cover its costs in repairing and upgrading railroad crossings and as compensation for the fair market value of its services on designated projects. Conrail also claimed that it was merely an incidental beneficiary of the funds and therefore not liable under section 504, but the court found this argument unpersuasive: Conrail actually received the aid, albeit indirectly through the state; in addition, it had the choice of accepting or rejecting the funds along with the obligations imposed by the statute. Conrail also argued that the federal funds it received were for services rendered pursuant to a contractual relationship, making them compensation, not a subsidy, and therefore the funds could not constitute Federal financial assistance. The court found, however, that when Conrail received FAHA funds, it was paid to make repairs which it would otherwise have to make, sooner or later, using its own funds. In addition, the court found, FAHA provides a cost percentage deemed to be the net benefit to the railroad, and beyond these cost percentages, the federal funds dispersed constituted a subsidy. In sum, the court found that Conrail was a "recipient" of federal funds under the FAHA, that the federal funds Conrail received under the FAHA constitute "Federal financial assistance" and that accordingly Conrail may be held liable under the Rehabilitation Act.

In deciding that punitive damages are an available remedy for intentional violations under section 504, the court relied on the general rule that absent clear Congressional directives, the federal courts may award any appropriate relief in a cognizable, albeit implied, cause of action brought under a federal statute (*Franklin v Gwinnett County Public Schools*, 503 U.S. 60 (1992)). Adopting the *Franklin* methodology of examining the state of the law before and after the statute in question was passed to determine Congressional intent, the court found that Congress has carefully crafted various amendments to other parts of the entire package of civil rights legislation, but has never acted to limit the remedies available to a plaintiff under section 504, thus compelling the conclusion that the traditional presumption in favor of all appropriate relief applies.

In considering whether punitive damages were an "appropriate" remedy where the plaintiff has established an intentional violation of section 504, the court reasoned that section 504 is a civil rights statute and should be construed broadly; in addition, section 504's remedial purpose may be served not only by compensating disabled individuals for past discrimination but also deterring defendants from discriminating against disabled persons in the future by the imposition of punitive damages. Additionally, Congressional approval of punitive damages in the context of Title VII and related statutes demonstrates that punitive damages can be an appropriate remedy for civil rights violations. The court also considered the tort-like nature of a section 504 cause of action as an additional reason for finding punitive damages to be an appropriate remedy for intentional violations of section 504. The court considered but rejected the proposition that a "common law" has emerged under section 504 which does not contemplate punitive damages,and found that post-*Franklin* case law supports the court's conclusion that punitive damages are an appropriate remedy.

The court also found that a reasonable jury could conclude Conrail acted with malice or reckless disregard for Moreno's rights so as to warrant the imposition of punitive damages and reversed the district court's decision to strike the jury's punitive damages award. The court found the following persuasive evidence of malice or reckless disregard: Moreno was an exemplary employee; his diabetic condition did not interfere with his job performance; his condition was controlled with oral medication and he always carried a tube of glucose and a roll of Lifesavers; Conrail took little care in assessing Moreno's actual condition, made little effort to accommodate his disability, and poorly articulated a basis for its safety concerns; Moreno received the registered letter advising him of his disqualification on Christmas Eve; Conrail violated its labor agreement by refusing to convene a board of doctors to determine Moreno's fitness before permanently removing him from his position and refusing to offer Moreno alternate supervisory employment. The court also found significant the evidence that Conrail ignored the warning of its own medical director of the risks inherent in failing to reinstate or otherwise accommodate Moreno. The court remanded the case to the district court for a review of the size of the punitive damages award.

Nepotism Policy Does Not Violate Due Process and Equal Protection

In *Wright v MetroHealth Medical Center*, No. 94-3548, 1995 Fed. App. 0207P (July 13, 1995), the Sixth Circuit held that an employer's nepotism policy did not violate the Due Process Clause and the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment. Martha Sabol Wright, a registered nurse, was employed by MetroHealth, a public hospital in Cuyahoga County, Ohio, and was assigned to the emergency airlift medical service unit. John C. Wright, Jr. was employed as a helicopter pilot by PHI, the provider of helicopters to MetroHealth for its emergency airlift medical service. In October, 1991, Martha and John became engaged; they later announced to their employers their intention to marry. In November, 1992, MetroHealth informed plaintiffs that as a married couple in the same unit, they would be in

violation of MetroHealth's nepotism policy and that one of them would have to transfer to another unit. The Wrights subsequently sued MetroHealth and PHI, and the district court granted defendants' motions for summary judgment and to dismiss plaintiffs' state law claims. On appeal, plaintiffs argued that the district court erred in failing to subject the nepotism policy to the strict scrutiny review required when fundamental rights, such as the right to marry, are at issue. In determining that the district court properly subjected the nepotism policy to rational basis rather than strict scrutiny analysis, the Sixth Circuit found that MetroHealth's policy did not significantly interfere with the decision to marry because no direct legal obstacle was imposed that would result in a direct and substantial interference with a class of people from marrying; further, the policy merely required that one person be transferred to another department rather than be terminated. In addition, the court found that MetroHealth's stated reasons for its nepotism policy — to avoid potential conflicts that might arise when two closely related persons allow their personal lives to impinge on their professional lives, and to prevent the deterioration of morale among other workers due to the unique relationship between the married co-workers — provide a rational basis for the policy that furthers a legitimate governmental interest. The court was not persuaded by plaintiffs' argument that MetroHealth's application of its nepotism policy contradicted the policy's stated goals; the hospital's subjective, case-by-case determination of violations of the policy did not show that the policy was not rationally related to the legitimate governmental interests of avoiding conflicts of interests and preventing morale problems. The court also ruled that the district court properly dismissed plaintiffs' pendent state law claims for tortious interference with a business relationship, intentional infliction of emotional distress and breach of Ohio public policy.

NLRB: FALL UPDATE

George M. Mesrey

National Labor Relations Board

The Board has issued a number of decisions during the last three months of which practitioners should be aware. This article shall serve to highlight some of the most important substantive and procedural developments during this period. It should be noted, however, that the views expressed in this article are those of the author and not necessarily those of the National Labor Relations Board.

ELECTION NOTICES

In *Maple View Manor, Inc.* 319 NLRB No. 15 (September 29, 1995), the Board refused to set aside an election involving two competing unions where the employer failed to post election notices for the required three working days. In reaching this conclusion, the Board acknowledged that, assuming that the notices were not posted for the requisite period of time, a literal reading of Section 103.20 of the Board's Rules and Regulations would require that the election be set aside. The Board refused, however, to apply Section 103.20 literally in cases such as this where more than one union is involved because it suggests to an employer who favors one union over another that willful objectionable conduct will result in the favored union being able to file objections and secure a second election.

PIERCING THE CORPORATE VEIL

In *White Oak Coal Co., Inc.*, 318 NLRB No. 89 (August 25, 1995), the Board reexamined the principle of "piercing the corporate veil" and adopted a two-pronged test derived from Federal common law. For years, the Board disregarded the corporate form and imposed personal liability on shareholders when it was employed to perpetrate fraud, evade existing obligations or circumvent a statute. *Riley Aeronautics Corp.*, 178 NLRB 494 (1969). In *White Oak Coal*, the Board concluded that the *Riley* standard was unclear and unwieldy. In its place, the Board adopted the following test to pierce the corporate veil: (1) there is such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individuals are indistinct, and (2) adherence to the corporate form would sanction fraud, promote injustice or lead to an evasion of legal obligations.

This decision is particularly helpful in that it sets forth specific factors that the Board will consider in applying this new test. In regard to the first prong of the test, the Board will consider generally (a) the degree to which the corporate legal formalities have been maintained, and (b) the degree to which individual and corporate funds, other assets, and affairs have been commingled. Among the specific factors that the Board will consider are: (1) whether the corporation is operated as a single entity; (2) the commingling of funds and other assets; (3) the failure to maintain adequate corporate records; (4) the nature of the corporation's ownership and control; (5) the availability and use of corporate assets, the absence of the same, or undercapitalization; (6) the use of the corporate form as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of corporate formalities and the failure to maintain an arm's length relationship among related entities; (8) diversion of corporate funds or assets to noncorporate purposes; and (9) transfer or disposal of corporate assets without fair consideration.

When assessing the second prong of the test, the Board will determine whether adhering to the corporate form and not piercing the corporate veil would permit a fraud, promote injustice or lead to an evasion of legal obligations. The showing of inequity necessary to warrant the equitable remedy of piercing the corporate veil must flow from the misuse of the corporate form and the individuals charged personally with corporate liability must be found to have personally participated in the fraud, injustice or inequity.

DISTRIBUTION OF DISSIDENT UNION MATERIAL

In *Laborers' Union Local No. 324 (AGC of California)*, 318 NLRB No. 66 (August 25, 1995), the Union adopted a no

solicitation/no distribution rule designed to preclude the distribution of dissident union material and threatened a member with removal from its hiring hall and arrest if he refused to stop distributing such material. The Board concluded that the Union's conduct ran afoul of the principles set forth in *Scofield v NLRB*, 394 U.S. 423 (1969) and thus, violated Section 8(b)(1)(A) of the NLRA. Under *Scofield*, a union is free to enforce a properly adopted internal rule which reflects a legitimate union interest, impairs no policy embedded in the labor laws, and is reasonably enforced against members who are free to leave the union and escape the rule. In the instant case, the Board concluded that the sole motivation for adopting the rule was to silence the dissident member. The majority opinion rejected the dissent's argument that the rule was necessary to operate a fair and reasonably efficient hiring hall. Moreover, the majority found that the rule was aimed at stifling the kind of free speech that Congress sought to protect under Federal labor law.

RERUN ELECTION

In *Glass Depot, Inc.*, 318 NLRB No. 94 (August 25, 1995), an election was conducted among a unit of 19 employees. The tally of ballots showed 6 for and 9 against the Petitioner. The remaining employees in the unit were unable to reach the polling location because of a heavy snowstorm. The Regional Director sustained an objection and set aside the election based on his conclusion that the snowstorm was an act of nature which compromised the laboratory conditions under which elections are supposed to be conducted. See *V.I.P. Limousine*, 274 NLRB 641 (1985). Contrary to the Regional Director, the Board decided to overrule the objection and certify the results of the election. All five Board members participated in this decision which resulted in a two member majority, a one member concurrence and a two member dissent. The majority promulgated a rule whereby the Board will determine whether an act of nature or other unexpected event constitutes "extraordinary circumstances" justifying a new election based on an examination of the event itself and whether it resulted in a situation where less than a representative complement of employees voted in the election. Chairman Gould concurred with the majority but rejected the "representative complement" test. Instead, he argued that the Board should adopt the same rule that is applicable in political elections; namely that acts of nature are immaterial in determining whether an election is valid. The dissent concluded that the "representative complement" test is unworkable and will invite unnecessary litigation. Practitioners should monitor this area of law closely because it appears that it is still unsettled.

RULE MAKING/SINGLE LOCATION UNITS

A common issue in pre-election hearings is the appropriateness of single facility versus multi-facility bargaining units. By its nature, this issue engenders lengthy litigation. On September 28, 1995, the Board published notice of proposed rule making on this subject. See 29 CFR Part 103. Under the Board's proposed rule, a single facility unit shall be found appropriate, absent extraordinary circumstances, when (1) the unit consists of 15 or more employees; (2) the employer does not have any other facilities within one mile of the requested location; and (3) a supervisor within the meaning of Section 2 (11) of the NLRA is present at the requested location on a regular basis. Practitioners should note that, under this proposed rule, "extraordinary circumstances" will exist, *inter alia*, if 10 percent or more of the unit employees have been temporarily transferred to other employer facilities for 10 percent or more of their time during the 12 month period preceding the filing of a petition for an election or, where no petition has been filed, during the 12 month period preceding either the demand for recognition or the time when a bargaining obligation would arise. If "extraordinary circumstances" exist, the appropriateness of the requested single unit shall be determined by adjudication.

MICHIGAN SUPREME COURT UPDATE

David A. Rhem

Varnum, Riddering, Schmidt & Howlett LLP

***Drouillard v Stroh Brewery Co*, 449 Mich 293 (1995).**

The court ruled 5-2 that workers' compensation and pension benefits are subject to coordination in plant closing situations where the employees are required to accept early pension benefits. The case arose out of Stroh's 1985 closing of its Detroit brewery and liquidation of its employee pension plan. The plan rejected the plaintiff's argument that they were "compelled" to accept the pension benefits and were therefore exempt from Section 354's coordination requirement. The court determined, instead, that Section 354(12) was "intended only to void any inference that Section 354 itself might permit or encourage employers to coerce early application for Social Security or pension benefits by withholding workers' compensation."

***Sokolek v General Motors Corp*, 450 Mich 133 (1995).**

In separate opinions involving three consolidated cases (Sokolek, Mullins, Riza), the court held that a 1985 amendment limiting reimbursement for nursing and attendant care services to 56 hours per week applied retroactively to cases involving pre-1985 injuries. The justices reached this conclusion in different ways. The determining factor for the lead opinion (Justices Brickley, Levin, Mallett) was the absence of legislative intent to exempt pre-1985 cases from the reimbursement limitation amendment. Justice Boyle agreed with the result but relied upon the "procedural/substantive" approach to statutory interpretation issues. Finding the amendment to effect a procedural change of a substantive right, she concludes that the amendment applies retroactively to pre-1985 injury cases. Justices Riley and Weaver agree that the amendment should be applied retroactively because it involves a procedural change but dissented for other reasons. Justice Cavanaugh dissented because the law in effect on the

date of injury should control an injured employee's right to benefits.

***Michales v Morton Salt Company*, 450 Mich 479 (1995).**

A workers' compensation plaintiff must do more than prove a work-related injury in order to recover workers' compensation benefits; he must also establish a limitation on his wage earning capacity. Although the plaintiff established a work-related hearing loss, he failed to establish any limitation on his wage earning capacity because he continued to perform his job duties under the same conditions as other employees. Although the plaintiff subsequently quit his job because of a non-compensable manic-depressive illness, the *Sotomayer* doctrine had no application because the plaintiff failed to establish a limitation on his wage earning capacity. The court also rejected the plaintiff's effort to expand the favored work concept "beyond recognition" to include general improvements made by the employer in the workplace environment.

Leave Granted In Three Intentional Tort Cases.

The Michigan Supreme Court has granted leave to appeal in three intentional tort cases signaling a possible change in the intentional tort standard. The cases are *Golee v Metal Exchange Co*, 205 Mich App 380 (1995), *Travis v Dreis and Krump Mfg Co*, 207 Mich App 1 (1994), and the consolidated cases of *Lennox v International Research & Development Corp (IRDC)*, No. 150106 (1994) and *McGeorge v IRDC*, No 150107 (1994). Stay tuned.

MICHIGAN COURT OF APPEALS UPDATE

Daniel Misteravich

Civil Rights — National Origin Harassment — Limitation of Actions — Evidence — Harmless Error

***Malan v General Dynamics Land System*, No. 147876, August 11, 1995**

Plaintiff brought claims of national origin harassment under the Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq.; MSA 3.548(101) et seq., and loss of consortium. At trial evidence was introduced regarding events which took place outside of the period of limitation of actions. There was also evidence of harassment within the period. The jury returned a verdict in favor of the plaintiffs. The Court of Appeals affirmed.

The Court of Appeals held that there is a cause of action under the Elliott-Larsen Civil Rights Act for national origin harassment. The court articulated the general principle that "harassment based on any one of the numerated classifications is an actionable offense." The court looked to previous appellate decisions which acknowledged actions for harassment based upon the act's classifications, to the legislative history of the act, and to the purpose of the act.

The Court of Appeals also held that while it was error to admit evidence of wrongdoing which occurred outside of the period of limitations, it was harmless error because there was sufficient evidence of wrongdoing within the period and because the plaintiff's damages arose within the period of limitation.

Civil Rights — Racial Discrimination — Intentional Affliction — Venue

***Barnes v IBM*, 212 Mich App 223 (1995)**

Plaintiff sued his employer claiming racial discrimination under the civil rights act and intentional infliction of emotional distress. The employer's alleged discriminatory decision was made in Oakland County. The employer resided in Oakland County. The plaintiff alleged that he did some work in Wayne County and that injury resulted in Wayne County. Plaintiff brought his action in Wayne County. The trial court denied defendant's motion for change of venue. The Court of Appeals granted the defendant's application for leave to appeal and reversed the trial court's ruling as to venue.

As for the tort action, the court held that, when plaintiff only alleges that his damages resulted in a particular county and not that the breach or injury occurred there, he may not pursue his tort action in that county. The court relied upon *Gross v General Motors Corp*, 448 Mich 147, 165; 528 NW2d 707 (1995). The statutory venue provision at issue was MCL 600.1629(1)(a)-(d); MSA 27A.1629(1)(a)-(d).

As for the civil rights action, the court held that, when a plaintiff brings a cause of action under the civil rights act, plaintiff may not bring his action in a county were his damages resulted if the alleged violation occurred in another county. The statutory venue provision at issue was MCL 37.2801(2); MSA 3.548(801)(2). The court followed the perceived reasoning of *Gross v General Motors Corp, supra*, which articulated a need to avoid forum shopping. The court also relied on the language of MCL 37.2801(2); MSA 3.548(801)(2) which says that venue is proper where "the alleged violation occurred." The court made a distinction between where the "violation" occurs and where the "injury" occurs. Suggesting a limitation to its holding, the court made it clear that there had been no evidence of any discriminatory decision having been made in Wayne County. In footnote three, the court noted that it was the corporate decision itself which allegedly gave rise to the injury. The court pointed out the distinction between this case and the design defect case in which there was a corporate decision in one county and a design of product in another county.

Wrongful Discharge — Procedural Due Process — Civil Rights — Sex Discrimination

***York v Fiftieth District Court*, 212 Mich App 345 (1995)**

Plaintiff worked for the Fiftieth District Court as a clerk typist. She left the security of that job which was covered by

a collective bargaining agreement to become the court reporter for the chief judge. Plaintiff alleged that the chief judge gave her assurance of job security if she were to leave the position of court reporter. The chief judge retired, and a new chief judge transferred her to another job. Plaintiff alleged that a new position of court warrant officer had been created and that she had not been considered for the position. Plaintiff had not applied for the position of warrant officer. Plaintiff alleged that the position was filled by a male with less seniority and less experience. Plaintiff's employment was terminated. Plaintiff sued the employer alleging wrongful discharge in failing to give her procedural due process in terminating her property right and alleging sex discrimination under the Civil Rights Act, MCL 37.2202(1)(a); MSA 3548(202)(1)(a). The trial court granted the defendant's motion for summary disposition. The Court of Appeals affirmed.

The Court of Appeals held that the trial court had not erred in granting summary disposition of the wrongful discharge claim pursuant to MCR 2.116(C)(8) because the plaintiff had not made any factual allegation to support an allegation that as court reporter she was anything more than an at-will employee. The court also noted that the first chief judge did not have authority to give job security which went beyond his term as chief judge.

The Court of Appeals held that the trial court had not erred in granting summary disposition of the plaintiff's sex discrimination claim pursuant to MCR 2.116(C)(10) because there was no dispute that the plaintiff had not applied for the position of warrant officer and because the plaintiff had not alleged any facts to support an allegation that she was qualified for the position.

Handicappers' Civil Rights Act — Civil Rights — Sex Discrimination — Sexual Harassment

***Koester v City of Novi*, No. 161135, September 29, 1995**

This case involves a female road patrol police officer who twice became pregnant and both times received work restricting instructions from her physician. The court's opinion contains a lengthy, detailed recitation of facts. The officer complained that she had a right to be accommodated, that she had been subjected to harassing comments about her pregnancy, and that she had been treated differently than disabled male officers. Based on these events, plaintiff sued defendants under the Handicappers' Civil Rights Act and the Elliot-Larsen Civil Rights Act, alleging pregnancy discrimination, sex discrimination, and sexual harassment. Plaintiff's HCRA claim was dismissed on defendants' motion for summary disposition. Her claims under the ELCRA went to the jury. The jury found that plaintiff failed to prove sex discrimination, but awarded plaintiff $5000 on her sexual harassment claim. The Court of Appeals affirmed in part, reversed in part and remanded for a new trial.

Handicappers' Civil Rights Act. The court of appeals held that the trial court did not err in granting defendant summary disposition of plaintiff's two claims of pregnancy discrimination under the Michigan Handicappers' Civil Rights Act (HCRA), MCL 37.1101 et seq.; MSA 3.550 (101) et seq. when, as a pregnant patrol officer, plaintiff was restricted by her physician from performing duties associated with being a patrol officer and when the employer did not transfer the plaintiff to a more accommodating job during her pregnancy. It was important to the court's reasoning that the doctor's restrictions prevented the plaintiff from performing her job as a road patrol officer. The court also relied on *Hall v Hackley Hospital*, 210 Mich App 48; 532 NW2d 893 (1995) in reasoning that the city was under no obligation to accommodate the plaintiff with another job.

Elliot-Larsen Civil Rights Act — Sex Discrimination. The court held that in relation to the plaintiff's sex discrimination claim the trial court abused its discretion in suppressing evidence that disabled male officers not in the Plaintiff's bargaining unit were given light-duty during their disability when the plaintiff was not given light-duty. The court also made two holdings in regard to jury instructions requested by the plaintiff: (1) the trial court did not abuse its discretion in rejecting the plaintiff's instruction that the city was not legally prohibited by the Handicappers' Civil Rights Act from treating pregnant employees more favorably than other employees; and (2) the trial court did not abuse its discretion in rejecting plaintiff's instruction which would have required comparison between plaintiff and pregnant wives of other officers.

Elliot-Larsen Civil Rights Act — Sexual Harassment. The trial court erred in failing to grant defendants' motion for summary disposition and directed verdict on the issue of sexual harassment when plaintiff was subjected to comments involving pregnancy, career choice, and child rearing. The court reasoned that comments arising out of the plaintiff's pregnancy were not "of a sexual nature" in light of the language of the civil rights act.

MESC — Evidence of Intoxication

***Korzowski v Pollack Industries*, No. 170306, September 1, 1995**

Plaintiff and two friends went home for lunch. One of his friends later testified that he had seen the Plaintiff smoke marijuana. Back at work, Plaintiff was observed to have red, glassy eyes. Plaintiff refused the employer's request to take a drug test. He was discharged. The collective bargaining agreement did not require an employee to take a drug test. The hearing referee concluded that plaintiff's refusal to submit to the drug test amounted to misconduct under section 29(1)(b) of the Michigan Employment Security Act, MCL 421.29(1)(b); MSA 17.531(1)(b). Because plaintiff's actions amounted to statutory misconduct, the referee disqualified plaintiff from receiving unemployment benefits. The MESC Board of Review affirmed the referee's decision, but on a different basis. It found the evidence to establish that plaintiff was intoxicated at work, which provided grounds for discharge. The Court of Appeals reversed and remanded.

The court held that evidence of red glassy eyes, even together with the fact that a witness testified to observing plaintiff smoke marijuana, is insufficient to prove

intoxication when there is no evidence to show that plaintiff's physical or mental faculties were disturbed by his alleged use of marijuana.

MERC — Representation Questions — Burden of Production — Evidentiary Hearing

***Sault Ste Marie v Michigan Educ Assn*, No. 170381, September 1, 1995**

Since 1960, in determining when substitute teachers will be included in the bargaining unit of full time teachers, MERC has gone from a per diem policy (no inclusion) to a workday formula (inclusion based upon number of days worked) and back to a per diem policy. While the workday formula was in effect, MERC issued an order approving the MEA's inclusion of substitute teachers into the bargaining unit of full time teachers when the substitutes had worked at least 20 days in the previous year or the current semester. Then, when MERC returned to the per diem policy, the school board petitioned for an order rescinding the previous order approving the MEA's inclusion of substitute teachers. The petition relied on MERC's decision to return to the per diem policy. MERC issued a show cause order to MEA. MEA responded and requested a hearing. Without a hearing, MERC granted the school board's petition. MEA appealed. The Court of Appeals affirmed.

The court held: by issuing a show cause order requiring a response from the respondent, MERC did not improperly shift to the respondent the burden of production of evidence in a representation question, when the petition relied upon previous rulings of MERC regarding the inclusion of substitute teachers in a bargaining unit.

The court held: MERC did not abuse its discretion by not holding an evidentiary hearing to determine a representation question when MERC had previously determined the appropriateness of including substitute teachers in a bargaining unit, when MERC issued a show cause order to the MEA, and when the response of the MEA did not raise any factual issues requiring resolution.

PERA — Constitutionality

***Michigan State v Michigan Empl Rels Commn*, Nos. 184125, 184126 & 184227, August 1, 1995**

This opinion involves a number of constitutional challenges to amendments to the Public Employment Relations Act (PERA), MCL 423.201 et seq.; MSA 17.455(1) et seq. The trial court denied most of the plaintiffs' constitutional challenges contained in their motions for summary disposition. The Court of Appeals affirmed. Because of the length and complexity of the court's opinion, the reader is recommended to the opinion itself.

MERC UPDATE

Kathleen Corkin Boyle

White, Przybylowicz, Schneider & Baird, P.C.

***City of Detroit (Department of Transportation)*, MERC Case No. C93 K-317 (July 19, 1995).**

MERC disagreed with the conclusion of Administrative Law Judge Lynch and found that the employer had a duty to bargain regarding the removal of vending machines from Department of Transportation terminals. The union charged that the employer committed an unfair labor practice by unilaterally terminating an established past practice under which the union was permitted to maintain vending machines and pay-for-play games at terminals and to collect the profits from those machines. The vending machines and games had been maintained by the union for more than 20 years. The revenue from the machines was used to fund recreational activities for bargaining unit members. In 1993, the machines were removed at the city's direction and replaced with machines operated by a different vendor, who would forward profits to the city. The union made a demand to bargain over the removal of the vending machines. MERC found that the proceeds from the vending and game machines were a "benefit" to bargaining unit members, and that the issue was therefore a mandatory subject of bargaining. MERC ordered that the city bargain with the union regarding the vending and pay-for-play machines, and that the employees be made whole for revenue lost as a result of the removal of the union's vending machines.

***Oak Park Schools*, MERC Case No. C93 I-264 (August 22, 1995).**

On exceptions, MERC reversed the findings of Administrative Law Judge Wicking and held that the employer violated its duty to bargain. The employer had unilaterally increased student contact time for elementary school teachers by eliminating planning periods that had been scheduled to coincide with art, music, and physical education classes in the school. The school eliminated the art, music and physical education program and assigned the teachers to use one-half hour of previously unassigned time at the beginning of each day as planning time. This increased teacher-student contact time by 30 minutes per day. MERC held that this increase in student contact time constitutes a significant change in the terms and conditions of employment over which the employer had a duty to bargain. MERC refused to grant the union's request to restore the status quo, stating that it lacked authority to require the school district to reinstate the art, music, and physical education classes. Instead, MERC issued a cease and desist order and directed the employer to compensate the affected school teachers for the additional time actually spent by teachers outside of their regular working hours as a result of the unilateral change.

***Waterford Township*, MERC Case No. C94 A-6 (September 11, 1995).**

On exceptions, MERC adopted the Decision and Recommended Order of Administrative Law Judge Wicking, finding

that respondent had violated Section 10 of PERA by refusing to bargain with the union concerning the clerical position of Confidential Secretary to the fire chief. That position was created in January of 1994, and filled by an employee who had previously been employed as a Clerk Typist II in the union's bargaining unit. The city notified the union that the vacated Clerk Typist II position would not be filled. Rejecting the employer's claim that the matter should have been addressed through unit clarification procedures, MERC found that a refusal to bargain charge was an appropriate method of resolving the unit status of the new position. MERC determined that the duties of the Confidential Secretary were not confidential in the labor relations sense, and therefore the positions should be included in the bargaining unit. MERC further stated that even if the duties of the new position were confidential, since the new position included duties which had been exclusively performed by bargaining unit members in the past, the employer was required to obtain union agreement or an order clarifying the unit before removing the position from the bargaining unit.

***Hurley Medical Center and AFSCME Local 825*, MERC Case Nos. C93 D-109 and C93 D-44 (September 11, 1995).**

On exceptions, MERC adopted the Decision and Recommended Order of Administrative Law Judge Lynch, finding that both the union and the employer violated PERA in the discharge of an employee for failure to pay $80 in back union dues. MERC noted that the charging party had initially taken a rather cavalier attitude towards payment of the money owed, and that she had tendered a check which was eventually returned for non-sufficient funds. After being informed of the termination of her employment, the charging party attempted to pay the money due in cash, but the money was refused by both the employer and the union.

MERC agreed with the Administrative Law Judge that the record does not establish a "willful and deliberate attempt" by the charging party to avoid her responsibility to the union. Both MERC and the Administrative Law Judge noted that the charging party had been a member of the bargaining unit for more than 24 years and was paying dues at the time of her discharge. MERC also agreed that, whatever efforts to collect the union had made previously, it had a responsibility to personally inform the member that her check had bounced and to give her a final chance to meet her financial obligation.

UNITED STATES SUPREME COURT TO RESOLVE "EMPLOYEE" STATUS OF UNION ORGANIZERS

H. David Kelly, Jr.

In October, the United States Supreme Court heard oral argument in *NLRB v Town & Country Electric, Inc.*,[1] a decision of the Eighth Circuit from which the Board sought certiorari for review of that Court's refusal to enforce a Board order premised, in part, on the Board's long-settled position that a paid union organizer is engaged in conduct protected under the NLRA when applying for employment in order to organize.[2] The Eighth Circuit had held that there is no violation of federal labor law when an employer refuses to hire paid union organizers or even rank-and-file union members when those individuals apply for a job in order to further the union's efforts to organize that employer's non-unionized workforce.[3] That Court joined the Fourth Circuit in rejecting the Board's determination that such individuals are within the Act's protection because, it is said, those individuals are not "bona fide applicants" and can not be "employees" as defined in section 2(3) of the NLRA since they were, or would be, subject to the union's direction while in the Respondent Employer's employ.[4] The Supreme Court's decision in this case will resolve a split in the circuits over whether paid union organizers are Section 2(3) "employees".[5] This much anticipated decision will have substantial ramifications for all covered employers, their present and potential employees, and for the labor movement.

In this regard, it is perhaps no coincidence that a week after the Court heard argument in *Town & Country Electric*, the AFL-CIO, meeting for its annual convention in New York City, chose SEIU President John Sweeney as its new President. President Sweeney was chosen after he and Interim President Thomas Donahue engaged in numerous debates around the country in which Sweeney repeatedly declared that the primary task his administration would undertake would be to organize the unorganized and to do so he would seek to increase efforts ten-fold. Following Mr. Sweeney's election, the director of the Federation's Organizing Institute stated that the Federation will seek to expand use of the "salting" or "colonizing" tactic which gave rise to the organizing effort denied protection in the *Town & Country Electric* case.[6] Thus, it is fair to suggest that the Supreme Court's resolution of this controversial issue will be among its most significant decisions in recent years since it will likely determine whether the Federation, its member unions and their members will be able to continue using this particularly effective tactic in their organizing efforts.

SALTING EFFORTS INVOLVE MEMBERS AS WELL AS PAID UNION ORGANIZERS

In the context of the various union organizing programs which have given rise to the current controversy, the term "salt" refers to an individual, including a paid union organizer, who applies to a non-unionized firm in order to pursue

the union's organizational goals. It also includes union members who participate in their union's organizing efforts, whether they do so solely at the behest of the union or as signatories of a "salting" resolution. Some unions use a resolution simply to authorize its members to accept employment with a non-signatory employer (ordinarily conduct which would violate the union's constitution) and to protect such members from intra-union charges, while under some programs the resolution also provides for a stipend or benefits to those participating members who obtain employment with the targeted employer. Some "salting" resolutions provide that participating members will withdraw from their employment if the union's organizing effort is concluded.

THE BOARD HAS CONSISTENTLY HELD THAT EMPLOYEES WHO ARE ALSO PAID UNION ORGANIZERS ARE ENTITLED TO THE PROTECTION OF THE NLRA

In decisions stretching back as far as 1974, the Board has consistently held that the fact that an individual was a paid union organizer did not deprive that individual of the protections extended to "employees" under the NLRA, such that an employer violated the Act if it discriminated against that individual because of union affiliation.[7] Prior to 1988 and issuance of its decision in *H.B. Zachry Co.*[8], the Board had applied its determination to require reinstatement of individuals discharged for organizational activity, even though the individuals were union organizers while in the employ of the respondent-employer.[9] At the time it was considering the charge of discriminatory refusal to hire a paid union organizer-applicant in *Zachry*, its determination had been accepted by the Second Circuit, then the only Court of Appeals to consider the Board's determination in an enforcement proceeding.[10]

In *H.B. Zachry Co.*[11], the employer had refused to hire an individual, Barry Edwards, who it had previously been found to have discriminatorily discharged from another project. Edwards had become a full-time union organizer in the interim and the record revealed that the union would supplement his wages and benefits. It also established that Zachry had blacklisted Edwards despite a Board order requiring his reinstatement. The Board dismissed as without merit Zachry's claim that it did not hire Edwards because it had a policy not to hire employed persons or to avoid creating an appearance that it supported or gave financial assistance to the union.

On review, the Fourth Circuit denied enforcement and specifically rejected the Board's determination that a paid union organizer was an employee within the meaning of Section 2(3) of the Act.[12] It declared that as an employee of the union, Edwards could not be a "bona fide applicant" because he wanted to be an employee of Zachry to perform his duties for the union and would be under the union's direction while he worked for Zachry. The Court asserted that the plain meaning of the statutory language necessitated its ruling and that to accept the Board's decision would disrupt the balance struck by Congress in the Act, noting that union access to an employer's property has been restricted by the courts.[13] The opinion is striking for the court's failure to accord any deference to the Board on this statutory issue and for the absence of any reference to the substantial Board and Supreme Court precedent which the Board regarded as supporting its determination.

THE ZACHRY OPINION CREATES A CONFLICT AMONG THE CIRCUITS

Despite the Fourth Circuit's rejection of its position, the Board did not acquiesce but rather continued to make determinations based on its long-held position that paid union organizers are employees within the meaning of the Act.[14] Significantly, the Board received additional support for its determination from several courts, including the District of Columbia Circuit in *Willmar Electric Services, Inc. v NLRB*.[15] Whereas the Board had emphasized the factual record to distinguish *H.B. Zachry*, the Court found that persons with employment ties to a union did not lose the Act's protection when they applied for another position, stressing that moonlighting is too widespread to support the employer's contention that concurrent employment serves to remove an individual from the statute's purview.[16] The Court also found that neither the common law, the purported risk of disloyalty, nor the perceived conflict with the protection afforded employers by the *Babcock & Wilcox* and *Lechmere* decisions, warranted a finding that the Board's determination was vulnerable upon judicial review.[17]

It was at this juncture that the Board was considering its decision in *Town & Country Electric* and a companion case, *Sunland Construction* and, in recognition of the serious import of its decision and of the Fourth Circuit's rejection of its long-held position, the Board heard oral argument and accepted submissions from numerous *amici*. *Town & Country* involved the attempt by two union organizers to obtain employment for themselves and several fellow IBEW members they had induced to appear for a hiring interview with this out-of-state employer, while *Sunland Construction* arose from the efforts of boilermakers to obtain employment on a major project by delivering the "batched" applications of 90 members, including two paid organizers. In neither case were the organizers hired and the one member hired by Town & Country was subsequently discharged when he pursued organizational activities. Sunland Construction was found to have failed to consider any of the union member-applicants despite the fact it had stated publicly that it needed employees with the craft skills those applicants possessed. In both cases, the Board concluded that the employers had violated Section 8(a)(3) and (1) by their actions, including their failure to consider the paid union organizer-applicants.[18]

In its analysis, the Board first examined the statutory language at issue, the definition of "employees" found in Section 2(3), and proceeded to consider its meaning the exclusions contained in the Act, the pertinent legislative history, Supreme Court opinions interpreting the Section, and the common law. It then reviewed the respective obligations of the Board and the courts in making determinations under the Act, and articulated a comprehensive array of policy considerations that it found uniformly supported its consistently-held position that full-time, paid union organizers are

"employees" entitled to the Act's protections. The Board specifically rejected the contention that its holding improperly diminished employers' property rights or deprived them of the loyalty they can reasonably expect from their employees, stressing that the Act is "founded on the belief that an employee can give allegiance to both a union and an employer".[19]

Despite the Board's effort to establish the reasonableness of its determination, the Eighth Circuit denied enforcement to its order in *Town & Country Electric*, noting that it found its fellow circuit court's opinion in *Zachry* "more persuasive".[20] The Court then extended its ruling further to hold that the union member-applicants were not "employees" because they were signatories of a "salting" resolution and were, therefore, "under the Local's control" and "were encouraged to apply and to organize Town & Country's employees".[21] It asserted this "third-party control" rendered these individuals incompatible as employees and found that there was "an inherent conflict of interest" where the applicant seeks employment to organize, rather than for financial gain.[22] As the Board's decision suggests, the Court's opinion in *Town & Country Electric* seems at odds with core aspects of the Act as it denied the Act's protection to those who are motivated to encourage others to embrace their statutory rights. The Board sought *certiorari* to overturn the Eighth Circuit's decision and to establish the propriety of its own determination.

While it might well be described as a fool's errand to speculate on the Supreme Court's ultimate resolution of this issue[23], it should be acknowledged that the Court will need to distinguish much of its own precedent regarding both the purview of Section 2(3) and the standard for judicial review of the Board's determinations if it is to reject the Board's determination, as it unquestionably involves a matter of statutory construction committed to the Board in the first instance.[24] Whether the Court resolves the issue by affirming the Board's construction of Section 2(3) or by removing certain categories of "salts" from the Act's reach, it will have a significant impact on labor-management relations and Section members will want to review the Court's opinion carefully when it issues later this term.

ENDNOTES

1. Dkt. No. 94-947, *cert. granted* January 23, 1995, to review 34 F.3d 625 (8th Cir. 1994), *denying enforcement* to 309 NLRB 1250 (1992). Oral argument was heard October 10,1995.
2. *Town & Country Electric, Inc.*, 309 NLRB 1250 (1992).
3. 34 F.3d at 629.
4. *NLRB v Town & Country Electric, Inc.*, 34 F.3d 625, 629.
5. In rejecting the Board's considered opinion regarding the protected employee status of paid union organizer-applicants, the Eighth Circuit joined two others, the Sixth and the Fourth, which held they were not statutory employees; the Second, Third and District of Columbia Circuits have held that they are and that a violation of the Act occurs when an employer refuses to consider such an individual for employment or, if employed, suffers discrimination because of union affiliation.
6. *New York Times*, Sunday, October 29, 1995 at E 3.
7. *See, Dee Knitting Mills*, 214 NLRB 1041, 88 LRRM 1273 (1974), *enf'd mem*, 538 F.2d 312 (2d Cir. 1975); *Oak Apparel*, 218 NLRB 701, 89 LRRM 1381 (1975); *Pilliod of Mississippi*, 275 NLRB 799, 119 LRRM 1279 (1985); *Multimatic Products*, 288 NLRB 1279, 130 LRRM 1482 (1988).
8. 289 NLRB 838, 130 LRRM 1510 (1988), *enf. denied* 886 F.2d 70, 132 LRRM 2377 (4th Cir. 1989).
9. See cases cited in n. 7 above.
10. *See, NLRB v Henlopen Mfg. Co.*, 599 F.2d 26, 30, 101 LRRM 2247, *denying enf.* On other grounds (2d Cir. 1979), in which the Second Circuit noted its own earlier opinion according deference to and accepting the Board's determination in *Dee Knitting Mills*, 538 F.2d 312 (1975), *enf'g* 214 NLRB 1041 (1974), and the Sixth Circuit's decision to the contrary.

    While the Board concedes that the Sixth Circuit "disagree(s) with the Board", *Town & Country Electric*, 309 NLRB 1250, 142 LRRM at 1046, citing *NLRB v Elias Bros. Big Boy*, 327 F.2d 421 (6th Cir. 1964), that opinion did not benefit from the Board's prior consideration of the contested status of paid union organizers as it had no reason to address the issue on the facts of that case. In addition, it should be noted that, in denying enforcement to the Board's order, the Court declared that it refused to be bound by the credibility findings adopted by the Board and decided that the alleged discriminatee, a waitress discharged when she admitted her union sympathies and who was subsequently employed by the union as an organizer, was not a "bona fide employee within the intent of 2(3) of the Act", 327 F.2d at 426. The Court based this conclusion upon the inference it drew that she was an employee of the union before she accepted employment as a waitress. *Id.*
11. 289 NLRB 117, 130 LRRM 1510 (1988).
12. *H.B. Zachry v NLRB*, 886 F.2d 70, 132 LRRM 2377 (4th Cir. 1989).
13. 886 F.2d at 72-74, citing *NLRB v Babcock & Wilcox*, 351 U.S. 105, 110 (1956), as establishing protection offered employers which would be rendered ineffective by the Board's determination.
14. *See, Willmar Electric Service, Inc.*, 303 NLRB 245, 137 LRRM 1365 (1991), *enf'd* 968 F.2d 1327, 140 LRRM 2745 (D.C. Cir. 1992); *Escada (USA), Inc.*, 304 NLRB 845, *enf'd*, 970 F.2d 898 (3d Cir. 1992); *Ultrasystems Western Constructors, Inc.*, 310 NLRB 545 (1993), *enf. denied*, 18 F.3d 251 (4th Cir. 1994); *Sunland Construction Co.*, 309 NLRB 1224 (1992); *Town & Country Electric, Inc.*, 309 NLRB 1250 (1992), *enf. denied*, 34 F.3d 625 (8th Cir. 1994), *cert. granted* 63 LW 355 (January 23, 1995); *Sunland Construction Co.*, 311 NLRB 685 (1993).
15. 968 F.2d 1327, 140 LRRM 2745 (1992), *enf'g* 303 NLRB No. 33, 137 LRRM 1365, *cert. denied*, ___ U.S. ___, 113 S.Ct. 1252 (1993).

    This opinion served to consolidate the Board's position, as Member Oviatt cited the "recent, thoughtful opinion in *Willmar*" as prompting her decision to abandon her *Zachry*-based dissent in *Escada (USA)*, and join the Board majority. *Sunland Construction*, 142 LRRM at 1034-1035. Member Oviatt stressed that the question is answered by resort to the statute and not from the members' view of what our labor policy should be and noted that "... underlying the Act is the Congressional goal of 'facilitating the organization and recognition of unions ...'" *Id.* She concluded that the legislative materials and Supreme Court opinions reveal that paid union organizers are not excluded from the Act's protections. *Id.*

16. 968 F.2d at 1329.

17. 502 U.S. 527, 122 S.Ct. 841, 117 L.Ed.2d 79 (1992).

18. The Board's decisions are reported at 309 NLRB 1250, 142 LRRM 1036 and 309 NLRB 1224, 142 LRRM 1025, respectively.

19. *Town & Country Electric*, 142 LRRM at 1044.

20. 34 F.3d 625, 628, 147 LRRM 2133 (1994).

21. 34 F.3d at 629.

22. *Id.*

23. See, e.g., *Lechmere, Inc. v NLRB*, 502 U.S. 527, 122 S.Ct. 841, 117 L.Ed.2d 79, 139 LRRM 2225 (1992); *NLRB v Health Care & Retirement Corp. of America*, 114 S.Ct. 1778, 146 LRRM 2321 (1994), for recent examples of Supreme Court opinions which surprised many court watchers.

24. As regards the proper construction of Section 2(3), the Board has looked to the Supreme Court's opinions in *Phelps Dodge Corp. v NLRB*, 313 U.S. 177, 8 LRRM 439 (1941); *Chemical Workers v Pittsburgh Plate Glass Co.*, 404 U.S. 157, 78 LRRM 2974 (1971); and *Sure-Tan, Inc. v NLRB*, 467 U.S. 883, 116 LRRM 2857 (1984); to confirm its understanding of the statutory language and of Congressional intent as requiring that Section 2(3) be interpreted broadly and to cover individuals not explicitly excluded. *Town & Country Electric*, 142 LRRM at 1041.

    The Court has repeatedly declared that a reviewing court, including itself, must defer to an agency's interpretation of the statute authorizing its operation, if that interpretation is "reasonable". See, e.g., *Beth Israel Hospital v NLRB*, 437 U.S. 483, 501, 98 LRRM 2727 (1978); *Curtin-Matheson Scientific v NLRB*, 494 U.S. 775, 787, 133 LRRM 3049 (1990); *NLRB v E.C. Atkins & Co.*, 331 U.S. 398, 403, 20 LRRM 2108 (1947) (The Board's determination as to whether one is an "employee" must be accepted by courts if not inconsistent with the law). See also, *Lechmere, Inc. v NLRB*, ___ U.S. ___, 112 S.Ct. 841, 139 LRRM 2225, 2231 (1992), White, J., dissenting, ("We will uphold a Board rule so long as it is rational and consistent with the Act, . . . even if we would have formulated a different rule had we sat on the Board") (citations omitted); and *ABF Freight Systems, Inc. v NLRB*, 114 S.Ct. 835, 145 LRRM 2257 (1994), where the Court found deference to the Board was required where its decision was not "arbitrary, capricious, or manifestly contrary to the law", and a concurrence found the Board's decision in that instance "unintelligent but nonetheless lawful".

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