LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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POINT – COUNTERPOINT

MANDATORY CONTINUING LEGAL EDUCATION — YES OR NO?

In the following article, State Bar of Michigan President J. Thomas Lenga responds to my article, "Continuing Legal Education — Or Else" which appeared in the last issue of *Lawnotes*, Vol. 8, No. 4 (Winter 1998). In my article, I opposed the State Bar's proposal for mandatory continuing legal education, submitted by the Bar to the Michigan Supreme Court. The proposal, if approved by the Court, would create Rule 17 of the Rules Concerning the State Bar of Michigan. The mandatory CLE program would be governed by a 12-person Continuing Legal Education Committee ("CLEC") appointed by the State Bar president. The Bar's proposal appears at 77 *Michigan Bar Journal* 1364-1368 (December 1998). Following Mr. Lenga's article, I get the last word.

Stuart M. Israel

MINIMUM CONTINUING LEGAL EDUCATION — NOT YOUR FATHER'S OLDSMOBILE

J. Thomas Lenga, *President*
State Bar of Michigan

In the last issue of *Lawnotes*, my colleague Stuart Israel expressed his personal criticism of the State Bar's proposal for minimum continuing legal education (MCLE). Stuart was kind enough to invite me to reply and I appreciate this opportunity. Let me first highlight the proposal.

What is required? Thirty hours of CLE over three years. This is a modest requirement. By comparison, Wisconsin requires thirty hours in two years and Ohio requires twenty-four hours in two years.

Who must comply? All active lawyers and judges with the narrow exceptions of federal judges and Michigan lawyers on active duty in the military. There is also a provision for hardship exceptions determined on a case by case basis.

Are there prescribed courses or subjects? No! Lawyers and judges may take subjects of their choosing. Lawyers and judges should take courses which make them more proficient in their areas of practice. Hence, lawyers and judges must be free to make their own course selections.

While the current proposal does not include it, I would encourage requiring two or three hours devoted to professional responsibility. That subject transcends us all.

Where will lawyers and judges get these courses? The short answer is wherever they find them. The proposal envisions broad-based provider certification. Thus, like Wisconsin lawyers, Michigan lawyers should have access to certified CLE by telephone or the Internet. Local bar associations, specialized bar associations, ICLE, State Bar sections, and private providers are likewise expected to be sources of CLE.

The proposal was published for comment by the Supreme Court in the December *Michigan Bar Journal*. The comment period is *ninety* days (the sixty days noted in the *Michigan Bar Journal* was in error.)

My brother Israel's criticism is essentially threefold. I address them separately.

First, Mr. Israel asserts that MCLE is an acknowledgment that law schools failed in their task to adequately educate us. Not true at all. Rather, MCLE is an acknowledgment that the law is a dynamic ever-changing body of principles and rules. Dare we suggest that since Mr. Israel and I graduated from law school over thirty years ago all the law as it has been applied has remained the same? Clearly, that has not been the case. While the words of the United

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STATEMENT OF EDITORIAL POLICY

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

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

MINIMUM CONTINUING LEGAL EDUCATION

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States Constitution have not changed in thirty years, what that document is deemed to require in the criminal law area alone in the last thirty years fills volumes.

If continuing education is some kind of admission of the failure of the foundational education in law, is the same true of medicine and accounting? There are two professions, which for more years than lawyers, have required extensive annual continuing education. Recently I was talking with a dermatologist who related that in order for her to maintain her professional credentials she was obliged to take 50 hours of continuing education. Honestly now, would you consult with a doctor for yourself or a family member where that doctor had taken no course to update herself or himself on the latest diagnostic techniques? Would you trust your tax return to an accountant who relied solely on his or her college degree courses? The answers are obvious.

The second criticism seems to be that because I'm a lawyer, the public trusts me to maintain my proficiency and competence. I have no doubt that in Mr. Israel's case that is true. And, if the almost 33,000 lawyers of Michigan followed Mr. Israel's template, lawyers would not have the public image problem we do have.

While there are no surveys in Michigan, our research suggests that it is likely that between 50% and 65% of the lawyers of Michigan already routinely take sufficient continuing legal education to satisfy the proposal's requirements. Thus, the behavior of those lawyers would not change if the proposal was adopted. But what of the other 35% to 50% of our lawyers who take no continuing legal education. Should they? I submit it's hard to legitimately argue they should be permitted to rely on their law school education, never having to update. How well are their clients served?

And, it's appropriate to say a word or two about this notion of public trust. Surveys the State Bar took in connection with its long-range planning suggests public trust in lawyers needs significant improvement. Does the public believe that we lawyers, like physicians and accountants, must take continuing education? Just ask your non-lawyer friends and acquaintances. My experience is that they are shocked to find we have no such requirement. And asking the public to "Trust me" unfortunately really doesn't work very well these days.

Finally, does it cost money? Clearly it does. Lawyers will have to pay tuition, an annual administrative fee of $10 or less, and the cost of lost billable hours in attending the CLE. Are those reasons not to have MCLE? No. Attending MCLE is simply a cost of doing business just like office space, computers, office staff, and yes, law libraries in one form or another.

Let's try to remember, this notion of MCLE began in 1975. Since then 40 states (not 39 as Mr. Israel mentioned) have adopted MCLE. None of the criticisms Mr. Israel raises are new. All have been considered carefully in each of the 40 jurisdictions to have adopted MCLE. They were not sufficient then to block adoption, and with all due respect to Mr. Israel, they are not sufficient now to overcome the merits of MCLE.

On a final note, there are those who hear the notion of MCLE, reflect back on the 1989 attempt, and react negatively. Interestingly, Michigan is the only state to have adopted MCLE and later abandoned it, and with good reason. If the current proposal bore any resemblance to that earlier experiment, I too would react negatively. The current proposal is *not* your father's Oldsmobile.

Whether you agree or disagree, like Mr. Israel, I encourage you to submit your thoughtful and constructive comments to the Michigan Supreme Court. ■

ON MANDATORY CLE, TONGUE PIERCING AND OTHER RELATED SUBJECTS

Stuart M. Israel
Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C.

State Bar of Michigan President J. Thomas Lenga's arguments in support of the Bar's mandatory CLE proposal reinforce my conviction that the proposal is a cosmetic gesture, one that would impose a burden on all Michigan lawyers without measurable return.

Mr. Lenga argues that almost everybody else does it, even dermatologists, and we should, too. Forty states have mandatory CLE, he says, some for as long as 20 years. The everybody-does-it argument has surface appeal. All teenagers know this. ("But Dad, all the kids at school are getting their tongues pierced.") It misses the point, however. Before there were dermatologists, all doctors were bleeding patients with leeches. It doesn't matter if everybody is doing it. What matters: is it worth doing? Mandatory CLE is not worth doing.

"everybody does it"

There are basic questions that the Bar's proposal neither asks nor answers. Is there a lawyer incompetence problem? If so, how widespread is the problem? What are the sources of the problem: sloth, inadequate training, an ineffective bar examination, flawed character and fitness screening, drug and alcohol abuse, human frailty, or something else? If we don't define the problem and its scope, we can't know if mandatory CLE is an appropriate solution — or any solution at all.

Mr. Lenga acknowledges as much in his column in the January 1999 *Michigan Bar Journal*. He writes:

> Will this do any good? Will this make us better at what we do? There are no studies that anyone can cite which permit measuring lawyer performance with and without CLE. However, I submit that no studies are needed. We know that education is good and makes people better at what they do. How can lawyers rationally reject that fundamental principle?

To answer Mr. Lenga's rhetorical question: lawyers can't rationally reject that fundamental principle. Education *is* good. So are motherhood and (low fat) apple pie. What I reject is *mandatory* CLE, governed by CLEC mavens who will tell me what "education" is acceptable and make me sit in "a class or seminar setting" although I prefer, and learn better with, efficient, economical and custom-tailored "self-study." There's the rationality gap: *forced* "education" is not good.

This is really about image. We serve the public interest, the Bar will say, by requiring all 32,366 Michigan lawyers to complete 30 hours of CLE every three years or face "involuntary inactive status." I don't buy the connection between mandatory CLE and image. First, I don't think the public pays attention to our CLE endeavors. Second, mandatory CLE does not enhance our image. After more than 20 years of mandatory CLE in 40 states, the public still is appalled by the Monicagate/Paula Jones/O.J. lawyers, lawyer jokes continue to proliferate, and people still love to hate all lawyers except their own.

Speaking of the image question, I'm disappointed that Mr. Lenga ignores my brilliant, simple and cheap idea for enhancing the public image of lawyers by disseminating a client "Bill of Rights." (C'mon, Tom, refer it to a State Bar committee.)

"involuntary inactive status"

Mr. Lenga also doesn't address my concern about a powerful bureaucracy headquartered in the State Bar, imposing its view of acceptable "education." Will CLEC approve for credit my favored form of "self-study," reading advance sheets, journals and books? CLEC certainly will have the budget to give careful consideration to rejecting my "self-study." Mr. Lenga posits "an annual administrative fee of $10 or less" (although proposed Rule 17.10 leaves it to CLEC to set the price tag). At $10 for each lawyer, CLEC's annual budget will be approximately $330,000. That will pay for a lot of bureaucracy.

Mr. Lenga does not respond to my *in loco parentis* criticism. The Bar proposal would require at least a third of mandated CLE to be in "formal courses in a class or seminar setting." The other two-thirds can be divided between law-firm-sponsored programs and "self-study." All CLE must be approved for credit by CLEC, which will determine if a "course or activity" is "of intellectual or practical content" and contributes "directly to lawyers' professional competence or skills, or to their education with respect to their professional or ethical obligations." The approval criteria are listed in proposed Rule 17.7. Why is this approval process necessary? If I am forced to submit a compliance affidavit, isn't it enough to certify that I spent 30 hours reading materials that in *my* judgment contribute to *my* professional development? If CLEC respected my word and my judgment about what CLE is useful to me, and if CLEC extended this respect to all Michigan lawyers, there would be no need for an expensive bureaucracy or for rigid format requirements that do not acknowledge lawyers' varied learning styles, needs and resources. Eliminating bureaucracy and format requirements would not diminish the salutary effects of CLE, but it would make mandatory CLE a far less burdensome gesture.

"annual administrative fee"

I will address four more of Mr. Lenga's points. *First*, Mr. Lenga suggests that our choice is between either embracing mandatory CLE or permitting lawyers to "rely on their law school education, never having to update." That is not the choice. The practice of law is a perpetual learning experience. Lawyers must and do "update" constantly. Lawyers should, and Mr. Lenga acknowledges the majority do, participate in CLE. It doesn't follow that they should be *forced* to do so. Nor does it

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ON MANDATORY CLE, TONGUE PIERCING AND OTHER RELATED SUBJECTS

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follow that CLE must be CLEC-certified to be worthwhile or that lawyers cannot be trusted to meet their professional responsibility to maintain competence unless they are required to submit affidavits attesting to attendance at formal CLE. *Second*, I do not say, as Mr. Lenga suggests, that law schools have failed "to adequately educate us." I only suggest, to paraphrase President Clinton, that they can do better. I say the Bar's efforts and money would be better spent working with law schools to enhance the connection between the basic curriculum and the law as it is practiced, not enforcing mandatory CLE. *Third*, Mr. Lenga says 40 states have mandatory CLE, not 39 as I wrote. My source is the American Bar Association Center for Continuing Legal Education website (www.abanet.org/cle/mcleview.html) which lists the 39 states. If the ABA is wrong, perhaps it cannot be relied on to provide CLEC-certified CLE. *Fourth*, I did not graduate law school "over thirty years ago" as Mr. Lenga states. I graduated in the seventies. Okay, the very early seventies, but I have carefully calculated and can confirm that it's *only* been *almost* thirty years.

I don't want to be too hard on Tom Lenga. He has been a good sport about this and, after all, this is America and he has the right to hold misguided opinions. Still, as I said before, mandatory CLE is a shallow gesture. It is premised on an undefined problem. It lacks measurable objectives. It presumes salutary results on faith. It would require thousands of lawyers to spend millions of dollars on an ineffective effort to improve image. It would entrench a new bureaucracy within the State Bar, with the power to set an "annual administrative fee" and to define for all of us what "education" is acceptable. The Bar's mandatory CLE proposal is a bad idea and *you know it*. Write to the Michigan Supreme Court (P.O. Box 30052, Lansing, MI 48909) and *say so*. Do it *now*, before intertia rules. ■

WE CAN SEE THE FUTURE AND IT IS BUREAUCRACY

If you think concern about a mandatory CLE bureaucracy is overwrought, check out Rule X of the Supreme Court Rules for the Government of the Bar of Ohio, the "Attorney Continuing Legal Education Regulations" that accompany Rule X, and Forms 1a-11 used to communicate with the Ohio Commission on Continuing Legal Education. Rule X and the regulations, which total approximately 34 pages, are available at www.sconet.ohio.gov.

For example, Regulation 407 sets the criteria for law-firm-sponsored CLE suitable for credit toward Ohio's requirement that lawyers complete 24 hours of CLE every two years. A law firm must submit "an application for approval, on a form provided by the Commission, at least sixty (60) days prior to the date of presentation of the program." The program must satisfy the eight criteria "set forth in Regulation 406." Among other things, Regulation 406 requires the "CLE activity" to have "significant intellectual or practical content," to be "an organized program of learning," to have "program leaders or lecturers" who are "qualified by education, or have the necessary practical skill to conduct the program effectively," to provide "written course materials of such quality and quantity to indicate that adequate time has been devoted to their preparation and that they will be of value to the participants," and to be conducted "in a suitable setting, conducive to a good educational environment which provides registrants with adequate writing space or surface."

What's the difference between "adequate writing space" and "adequate writing surface?" Obviously, Regulation 406 leaves refined application of the mandatory CLE requirements to Commission discretion.

In addition, under Regulation 407.1, the law firm sponsor must supply in advance a course description, an "outline or description" of course materials, a resume of each speaker and "a written synopsis or outline of the presentation." One or more speakers "shall not be a member, partner, associate or employee" of the sponsoring firm and the program "shall be open to Attorneys not associated with the Sponsor." After the program the firm must submit "the requests for CLE Credit (FORM 1 and 1(b)) of all Attorneys in attendance." Also, a "list of Attendees at each Approved CLE Activity shall be kept by the Sponsor for at least two (2) years following the presentation." Among the remaining requirements: "The program shall be scheduled under circumstances so as to be free of interruption from telephone calls and other office matters." Don't get the idea that Ohio is too easy on law firms: not more than "twelve (12) hours of CLE credit for any biennial reporting period may be earned by an Attorney" at law-firm sponsored CLE.

Of the 24 CLE hours required every two years, Rule X mandates that 60 minutes must be "related to the Code of Professional Responsibility," 60 minutes must be "related to professionalism (including A Lawyer's Creed and A Lawyer's Aspirational Ideals adopted by the Supreme Court)," and 30 minutes must be "on substance abuse, including causes, prevention, detection, and treatment alternatives." Rule X, Sec. 3(A)(1)(a), (b) and (c). Why stop there? The media recently reported on a Michigan lawyer arrested for armed robbery. While most of us don't resort to robbery-as-rainmaking, it wouldn't hurt to get a little instruction on "criminality, including causes, prevention, detection and treatment." While we're at it, I know a few lawyers who'd profit from some education in fashion sense and table manners. Driving etiquette and nutrition wouldn't hurt, either. Education is good.

As long as we're talking about professional responsibility, consider Michigan Rule of Professional Conduct 1.1.

> A lawyer shall provide competent representation to a client. A lawyer shall not: (a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it; (b) handle a legal matter without preparation adequate in the circumstances; or (c) neglect a legal matter entrusted to the lawyer.

The comment to Rule 1.1 includes the following: "To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education." Do we really need more? Do we need 34 pages of new rules and regulations, a pile of forms, more State Bar staff, and a 12-member commission with a $330 thousand annual budget?

Stuart M. Israel

SUBPOENAS IN LABOR ARBITRATION

Thomas L. Gravelle

Two appellate courts recently decided the authority of labor arbitrators to issue subpoenas under collective bargaining agreements. One decision is by the United States Court of Appeals for the Sixth Circuit: *American Federation of Television and Radio Artists v. WJBK-TV*, (6th Cir., No. 97-2079, 1/14/99)(Guy and Gilman; Clay (dissenting) JJ.). The other decision is by the Michigan Court of Appeals: *MSEA v. Liquor Control Comm.*, 232 Mich. App. 66 (1998)(Bandstra, Griffin and Young, JJ.). The upshot:

Private sector, yea.

State of Michigan classified service, nay.

Other Michigan public sector, hmmm.

PRIVATE SECTOR SUBPOENAS

WJBK-TV is a case of first impression. There, the arbitrator issued a subpoena directing a third party to produce documents. The District Court decided against enforcement of the subpoena on grounds of relevance. *American Federation of Television and Radio Artists v WJBK-TV*, (E.D. Mich., No. 97-70889, 9/16/97). On appeal, the Sixth Circuit majority held that the arbitrator was authorized to issue the subpoena under Section 301 of the Labor Management Relations Act (LMRA) of 1947, 29 U.S.C. Section 185. The majority made the following points:

> Not only does section 301 of the LMRA confer jurisdiction over all suits "for violations of contracts between an employer and a labor organization," it is also a source of substantive law for the enforcement of collective bargaining agreements, including suits to compel arbitration. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).
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> * * *
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> Further, the Supreme Court in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987), expressly recognized that federal courts may look to the FAA [Federal Arbitration Act of 1925] for guidance in labor arbitration cases in the wake of the holding in *Lincoln Mills*. Thus, apart from the question of whether the FAA itself directly applies to the collective bargaining agreement in this case, we may find guidance in the FAA's provisions and in court decisions concerning a district court's power to enforce subpoenas under the FAA.
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> * * *
>
> Just as the subpoena power of an arbitrator under [Section 7 of] the FAA extends to non-parties, a labor arbitrator conducting an arbitration under a collective bargaining agreement should also have the power to subpoena third parties.
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> * * *
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> We hold that under Section 301, a labor arbitrator is authorized to issue a subpoena duces tecum to compel a third party to produce records he deems material to the case either before or at an arbitration hearing. We caution that this decision should not be read to mean that a party to the arbitration is entitled to any such discovery, only that a labor arbitrator may issue such a subpoena. Consistent with federal labor policy, however, the relevance of the information and the appropriateness of the subpoena should be determined in the first instance by the arbitrator.
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> * * *
>
> The judgment [of the district court] is REVERSED and, given that more than two years have already passed since the subpoena issued, the district court is ordered to enter judgment compelling A&M to produce the documents directly to the arbitrator for in camera inspection along with any evidentiary objections A&M may have to the admission of those documents or to their further disclosure.

The dissent in *WJBK-TV* disagreed that LMRA Section 301 provides federal question jurisdiction to enforce a subpoena against a non-party to the arbitration agreement. However, the dissent added that the subpoena would be enforceable in a Michigan state court under the Federal Arbitration Act (FAA) of 1925, 9 U.S.C. Section 7, which (unlike Section 301) does not provide federal question jurisdiction:

> Moreover, I believe the FAA mandates enforcement of the subpoena at issue in this case. ... As we have held, the FAA covers arbitration clauses in "contracts of employment" including collective bargaining agreements. *See Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 599 (6th Cir. 1995). Under this Court's narrow interpretation of the FAA's exclusion clause, the FAA would not exclude from its grasp the type of collective bargaining agreement at issue in this case. *See id.* at 601 [limiting "contracts of employment" exclusion to "class[es] of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are"]; *DeCaminada v. Coopers & Lybrand*, 1998 WL 801933, at 2 (Mich. Ct. App. Nov. 17, 1998). Finally, state courts should grant an arbitrator's judgment the same kind of deference that federal courts must under the FAA. *See, e.g., National Post Office Mailhandlers, Watchmen, Messengers & Group Leaders v. United States Postal Serv.*, 751 F.2d 834, 841 (6th Cir. 1985)(noting that "a court's power to disturb such discretionary determinations is quite limited").

MICHIGAN PUBLIC SECTOR SUBPOENAS

Liquor Control Commission is a published case of first impression for the Michigan Court of Appeals. There, the arbitrator issued subpoenas for attendance of witnesses then or formerly associated with the State of Michigan public employer. The Ingham County Circuit Court ordered enforcement of the subpoenas. On appeal, the Michigan Court of Appeals held that the arbitrator's subpoenas were not judicially enforceable because not authorized either by the parties' collective bargaining agreement or by any Michigan law applicable to collective bargaining in the State of Michigan classified service.

Strictly speaking, *Liquor Control Commission* applies only to arbitration under collective bargaining agreements involving the State of Michigan classified service. *See* A. *below.* In addition, *Liquor Control Commission* states that the party who had obtained enforcement of the subpoenas "conceded on appeal, because the parties' arbitration commenced pursuant to their collective bargaining agreement, it is exempt from several statutes governing other arbitrations, including the Federal Arbitration Act, 9 USC 1 *et seq. (see Bacashihua v United States Postal Service*, 859 F2d 402, 404-405 (CA 6, 1988)." 232 Mich. App. at 68-69. *See* B. *below.*

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SUBPOENAS IN LABOR ARBITRATION

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OBSERVATIONS

The two decisions discussed above reach opposite results but are not contradictory because only one, *WJBK-TV*, was decided under federal law. Further, as explained below, the opinions in *WJBK-TV* may affect future Michigan court decisions in at least two ways.

A. Assuming that *WJBK-TV* remains the law in the Sixth Circuit, it is possible that the Michigan judiciary will adopt the reasoning of the *WJBK-TV* majority for Michigan public sector labor arbitration under collective bargaining agreements: First, *Liquor Control Commission* was decided three months before *WJBK-TV.* Therefore, the Michigan Court of Appeals did not have the benefit of its reasoning. Second, most public sector collective bargaining relationships in Michigan are governed by the Michigan Public Employment Relations Act (PERA), M.C.L. 423.201 *et seq*.; M.S.A. 17.455(1) *et seq*. However, the collective bargaining relationship in *Liquor Control Commission* was *not* governed by the PERA because the employees were in the Michigan classified service. The Michigan Constitution states: "The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." Const. 1963, Art. IV, Section 48; *Service Employees Union v. State Racing Comm'r*, 27 Mich. App. 676, 183 N.W.2d 854 (1970). Therefore, the *Liquor Control Commission* decision is not dispositive as to the public sector collective bargaining relationships in Michigan which *are* governed by the PERA. As to such relationships, the Michigan Supreme Court has explained that federal labor precedents favoring arbitration "are appropriate for contracts entered into under the PERA." *Kaleva-Norman-Dickson School Dist. v. Kaleva-Norman-Dickson School Teachers Assn.*, 393 Mich. 583, 591, 227 N.W.2d 500 (1975); *Port Huron Area School Dist. v Port Huron Education Ass'n.*, 426 Mich. 143, 150, 393 N.W.2d 811 (1986). Therefore, if an arbitrator were to issue a subpoena in a Michigan public sector arbitration and enforcement of it were sought under the PERA, a state court might adopt the reasoning of the *WJBK-TV* majority.

B. In *Liquor Control Commission*, the Michigan Court of Appeals stated that the party seeking enforcement of the subpoena had conceded that the FAA was not directly applicable, and in support the court cited *Bacashihua v United States Postal Service*, 859 F.2d 402 (CA 6, 1988). 232 Mich. App. at 68-69. Therefore, the issue of whether the FAA authorizes enforcement of the subpoenas was not decided. Further, in *Asplundh Tree Expert Co. v. Bates* (a non-collective bargaining case), the Sixth Circuit explained that the court in *Bacashihua* "did refer to a seminal Third Circuit decision which held that the exclusionary language of Section 1 applies only to workers personally engaged in interstate commerce." 71 F.3d 592, 597 (6th Cir. 1995)(citing *Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America, Local 437*, 207 F.2d 450 (3d Cir. 1953). The court in *Asplundh* found *Tenney*'s "reasoning persuasive." *Id.* at 598. *Tenney* involved a collective bargaining agreement; and the dissent in *WJBK-TV* found the FAA applicable to arbitration under collective bargaining agreements. The FAA has been applied to public sector arbitration agreements. *E.g., Ruby-Collins, Inc. v. City of Huntsville, Ala,* 748 F.2d 573 (11th Cir. 1984). Therefore, if an arbitrator were to issue a subpoena in a Michigan public sector arbitration and enforcement of it were sought under the FAA, a state court might adopt the reasoning of the *WJBK-TV* dissent. ■

JUSTICE BLACKMUN: A LIBERAL REPUBLICAN (1908-1999)

John G. Adam
Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C.

While the term liberal Republican may seem an oxymoron in today's political climate, it accurately describes the late Justice Harry A. Blackmun. Best known for his 1973 *Roe v. Wade* opinion, Blackmun became one of the most liberal members on the Supreme Court, where he served from 1970 to 1994. I remember seeing Justices Brennan and Blackmun walking together from the Library of Congress in 1989 and thinking how frail, small and old these two men appeared. Like the recent deaths of Justice Powell in 1998 and Justice Brennan in 1997, Blackmun's death on March 4 at age 90 reminds us of the differences between the current Court and the justices who have served over the past 30 years. His death recalls the passing of the Earl Warren era, even though Blackmun did not serve with Warren who retired in 1969.

Appointed by President Nixon in 1970 from the Eighth Circuit Court of Appeals, to which Blackmun had been appointed by President Eisenhower in 1959, Blackmun was then called one of the "Minnesota Twins" because he was considered a clone of Chief Justice Burger. Blackmun and Burger were Minnesota Republicans and lifelong friends with political connections to Eisenhower and Nixon. Blackmun served as best man in Burger's 1933 wedding. In the beginning, Blackmun lived up to his affinity with Burger. For example, he wrote a dissenting opinion in the Pentagon papers case supporting the Nixon administration. *N.Y. Times v. U.S.*, 403 U.S. 713, 759 (1971). But over time, Blackmun showed he was no twin of the Chief Justice.

In labor cases, he wrote the majority opinions, for example, in *Fall River Dyeing & Finishing v. NLRB*, 482 U.S. 27 (1987), upholding the NLRB's successorship rule, and in *Auto Workers v. Johnson Controls*, 499 U.S. 187 (1991), ruling that the employer's policy of excluding fertile females from certain jobs entailing risk of harm to fetuses violated Title VII of the 1964 Civil Rights Act. He wrote a colorful, if unusual, majority opinion in the baseball antitrust lawsuit brought by Curt Flood, *Flood v. Kuhn*, 407 U.S. 258 (1972). He also supported affirmative action and came to oppose the death penalty.

Blackmun was Nixon's third choice, after Clement Haynesworth and Harold Carswell, whose nominations failed. One can only imagine how the law may have been different if either Haynesworth or Carswell had been confirmed. As a result of his being Nixon's third choice, Blackmun called himself "Old No. 3."

Nixon thought Blackmun was a strict constructionist. In an April 13, 1970 memorandum to Bob Haldeman, Nixon wrote: "As a matter of fact, Blackmun is to the right of both Haynesworth and Carswell on law and order and perhaps slightly to their left, but very slightly to the left only in the field of civil rights." Nixon urged Haldeman to make Blackmun's nomination a "project of the highest urgency," noting that he wanted to meet his "pledge to name strict constructionist to the Court." Bruce Oudes, ed., *From: The President — Richard Nixon's Secret Files*, pp. 114-5 (1989). Blackmun was to Nixon what Warren was to Eisenhower!

Blackmun waited until Bill Clinton's election before he retired in 1994. Blackmun was succeeded by Justice Stephen Breyer. After retiring at age 86, Blackmun took up acting, making a cameo appearance as Justice Joseph Story in the movie *Amistad.* You can visit *Jurist*, the law professor's web site, to learn more about Blackmun, his opinions and related web links at http://jurist.law.pitt.edu. ■

EFFECTIVE INTERNET RESEARCH LINKS

Scott G. Hornby
Esordi, Hornby & Sawicki

As an attorney who takes pride in his ability to thoroughly research any issue for a client, I rely heavily on certain Internet websites, referred to as "links," for research. These links are analogous to the spokes on a wagon wheel, for they radiate out or direct the user from one website to another related (and sometimes even unrelated) website.

I discovered two additional websites worthy of mention. While these sites are not strictly dedicated to labor and employment law practice, they can link the user to such websites.

A. ***200 Legal & Other Useful Links by Search & Serve.***

http://www.users.ap.net/~chenae/links.html.

As the title suggests, this website has 200 legal and other related links, including: courts; federal web locator; law libraries; and, ABA's Lawlink for legal research.

B. ***The Law Engine! Legal Sites, News, References.***

http://www.fastsearch.com/law/sites.html .

Links can be accessed here to U.S. Supreme Court decisions (since 1937); various government agencies; litigation aids; continuing legal education; employment listings within the legal profession; law firms, law schools and law libraries; private investigator and expert witness services; major newspapers; citation formats; and, even *Black's Law Dictionary*.

PRESIDENT CLINTON NAMES LEONARD R. PAGE NLRB GENERAL COUNSEL

The President announced on February 11, 1999 the nomination of former Michigan LELS Chair and *Lawnotes* author Leonard R. Page to serve as General Counsel of the National Labor Relations Board.

Page has served the UAW Legal Department since 1970 and is currently Associate General Counsel. His areas of specialization include the NLRA, collective bargaining, plant closings and relocations, arbitration, strikes, lockouts, and the LMRDA. He is a Founding Fellow of the College of Labor and Employment Lawyers, a member of the NLRB Region 7 Practice and Procedure Committee and the ABA Committee on Practice and Procedure under NLRA.

The NLRB General Counsel has final authority with respect to the investigation of charges and complaints alleging unfair labor practices by employers and unions. The General Counsel oversees 33 regional offices around the country.

VERIFYING FMLA MEDICAL CERTIFICATION

Randal R. Cole
Van Suilichem & Associates, P.C.

The FMLA, the first measure that Bill Clinton signed as President in 1993, requires businesses with 50 or more employees to grant up to 12 weeks of unpaid leave per year to care for seriously ill family members, for the birth or adoption of a child, or to recover from one's own serious health problem. Despite the passage of six years, both employees and employers continue to have difficulty with the procedures for verifying or clarifying medical certification. This article will briefly review the procedures adopted by the EEOC in the Final Regulations, 29 C.F.R. 825.307, which specify certification requirements. (The EEOC regulations have been challenged in court for going beyond the requirements of the statute.)

First, if an employee submits a completed medical certification signed by the employee's health care provider, the employer *may not* request additional information itself. A health care provider representing the employer *may* contact the employee's health care provider (1) with the employee's permission and (2) for the purposes of clarifying and authenticating the medical certification.

Second, if an employer has reason to doubt the validity of or seeks clarification of the certification, the employer *may* require the employee to obtain a second opinion at the employer's expense. The employer is permitted to designate the health care provider to furnish the second opinion, but the provider *may not be employed* by the employer on a regular basis. Sending the employee to the employer's regular clinic would not be permitted. Also, the employer may not regularly contract or otherwise utilize the services of this provider. From the time the first medical certification is provided until receipt of the second opinion, the employee is entitled to benefits including the maintenance of group health insurance. If the certification does not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave but may be treated as paid or unpaid leave depending upon the employer's policy.

Third, if the two opinions differ, the employer may require the employee to obtain certification from a third health care provider. This examination, like the second, is to be at the employer's expense but it is final and binding on both parties. The third health care provider *must* be designated or approved *jointly* by the employer and the employee, each acting in good faith to reach an agreement on whom to select. If the employer does not act in good faith to reach agreement, the employer will be bound by the first certification. Conversely, if the employee fails to act in good faith, the employee is bound by the second certification.

Finally, the employer is required to provide the employee with both the second and third medical opinions upon request. Once requested, the employer has two business days to provide the certification unless extenuating circumstances exist such that this request can not be fulfilled. The employer is also required to reimburse the employee for reasonable out of pocket expenses incurred in obtaining the second and third medical opinions. If the third independent health care provider certifies the employee as able to return to work, then the employer can instruct the employee to immediately return to work or face termination

By following these clear procedural requirements, an employer is able to verify and clarify medical certifications for FMLA leave, while still protecting the rights of employees. ■

VIEW FROM THE CHAIR

Janet C. Cooper, *Chair*
Labor and Employment Law Section,
State Bar of Michigan

Leased employees - Where do they fit? In the global realities of today's markets, employers and labor organizations face new challenges. Mergers bring together different business organizations, with differing work cultures, management styles and sometimes different organized units of different labor unions. How to coordinate these factors into a cohesive unit challenges both management and labor.

One of those areas of challenge is the use of leased workers. Increasing numbers of employers, not only in the U. S. but throughout the world, rely on leased workers for the majority of their new employees.

Most "new" employees are leased from agencies which recruit, place and pay them. Some are temporary employees, and many are contractual employees, often technical in nature. Some leased workers have been in their current placements for five to ten years .

I'm not aware that many, if any, leased employees are unionized. Traditional labor organizations may have addressed the needs of these employees, but the difficulties of organization in such circumstances would be substantial.

Some leased workers express concerns about whether the "form" contracts are adhered to, in particular regarding regular evaluations, position appraisals, performance reviews, reclassifications, and raises. Where an employee is unhappy with a job setting, what opportunity exists for transfer elsewhere, perhaps even with the same contractor? Some leased workers feel transfer may be in their own interest, but is not in the interest of either the leasing agency or the employer, and so nothing becomes available.

Management often saves some money by leasing workers, and certainly saves a significant amount of funds by no longer providing employee benefits. Reducing the staff required to recruit, hire, and monitor employees also results in cost savings. While management in many corporations has moved to implement theories like quality circles, total quality management and a variety of re-engineering strategies, there are often now at least two tiers of employees working on the same projects, side-by-side. Management wants, even expects, dedication from its employees. Where the corporation benefits from good management and effective labor, corporations now often share a percentage of profits with employees. Such profit sharing is, however, limited to "regular" employees and leased workers do not receive any share.

The corporation also benefits because, for leased workers, it need not deal with personnel problems. If those problems are severe, the contract is simply not renewed. The worker is once again at liberty, and unless he/she can file a complaint under federal or state civil rights laws, there is no recourse for perceived unfairness. Leased workers themselves, especially if their skill is in high demand, may also resolve the problem of a difficult supervisor by going elsewhere.

How do the employees feel? Many of them, say management, are grateful simply to be employed! And a number of leased workers, especially younger workers, confirm that perception. Fitting skills to jobs for many people in this country is not done with much success.

Many contracted workers, especially technically skilled workers, came into the marketplace because of downsizing by former employers, not because of poor performance. Many of them lost previous employment because they are older and received higher pay then newly hired workers. Their former employers wanted to reduce salary and benefits outlay, so older and therefore often higher-paid workers went first, despite age discrimination laws.

Many of these workers have a high work ethic. They show up on time. They do their work. They are responsible and pleasant. They get paid, and nothing much more.

Many feel unvalued, or undervalued. When there are employee meetings, they are frequently not included, or specifically excluded. They don't get bonuses or profit sharing, despite the fact that their work may be just as valuable to the employer as that of the "regular" employees with whom they work. They don't get paid for a week off during the holidays and they don't get sick days. While many leasing agencies now provide some level of medical insurance, it's not as comprehensive as that offered by the employers to regular employees.

With declining memberships, you might think unions would be interested in this rapidly growing sector of workers. Negotiating contracts for them does offer new and novel issues, including those about aspects of economic realities. Who is the supervisor? How much independence does the worker have? What training is or should he/she be given? What opportunities with interaction within the corporation would be beneficial?

Unions have challenges as well, especially within the framework of traditional organization. How to organize? How to get lists of employees? Are they employees? Or are they twice-over independent contractors? Does the union have an interest when leased employees stay on the job for 10 years? Can the union influence differences in working conditions? Is two-tier employment only a temporary situation, on the road to only one tier, and that, the lower one?

Are employees becoming fungible? Is that to the benefit of management? Is it to the benefit of the workers? Is it to the benefit of labor organizations? Will we end up with all employees below the highest management levels being leased? Should we?

GEORGE T. ROUMELL, JR. DISTINGUISHED SERVICE AWARD RECIPIENT

Stanley C Moore, III
Plunkett & Cooney, P.C.

George T. Roumell, Jr. was honored by the Labor and Employment Law Section at its Mid-Winter meeting on January 29. George was presented with the 1999 Distinguished Service Award after opening remarks from Andrea Roumell Dickson, George's daughter, who is a shareholder with Butzel Long. That George was selected by the Section to receive this award was most appropriate.

Building on his life's work as a lawyer, George continues to serve as a professor at DCL, where he has taught for 42 years. Additionally, George continues to be an arbitrator of national reputation, as well as a writer and lecturer on labor law. His "Roumell's Primer on Labor Arbitration" is now in its 7th edition. As a lecturer, George speaks throughout the county on labor arbitration. His review of the state of the law of labor arbitration is a highlight of the annual ICLE Labor and Employment Law Seminar.

George takes all of his roles seriously and, in fact, considers his mission in life as a lawyer as almost a sacred calling. Yet he is always friendly, approachable, and personable. It is doubtful that he has ever forgotten a name or face of anyone he has ever met. And, once anyone meets George, they instantly feel they have made a new friend. George's honesty and integrity are beyond reproach. Who but George could have an active management-side practice and yet be repeatedly picked by union lawyers and representatives to be the impartial arbitrator to resolve grievances or contractual disputes?

George sees his role as a lawyer as one that demands not only quality advocacy on behalf of a client, but also complete civility. Who has ever heard George say an unkind word about an adversary, let alone anyone else? George is a true gentleman! I am not suggesting that George is a saint, for I personally know there is a bit of a devil in him, but I do know that although George likes winning, he insists that it always be within the rules.

George believes that being a good lawyer is not enough. His belief that everyone is duty-bound to give something back to the profession is why he took on the responsibilities of being the president of the Detroit Bar Association in 1973-74, and president of the State Bar of Michigan in 1985-86. He has also served as a member of the Section Council.

In 1968, George founded Riley and Roumell with his friends Wallace D. Riley and Justice Dorothy Comstock Riley. That firm has trained some of the finest management-side labor and employment lawyers in the area. Those lawyers who have had the privilege and pleasure to practice with George learned to work hard and to represent their clients diligently and ethically. I know of no attorney who works harder than George or enjoys it more.

George has had many milestones in his career, and one of them is certainly his representation of the Detroit Board of Education before the United State Supreme Court in *Milliken v Bradley*. Additionally, the stories are legend about the legal battles between George and his good friend Ted Sachs arising out of strikes by the Detroit Federation of Teachers. These two advocates vigorously represented their clients' respective interests, but always conducted themselves ethically and in a gentlemanly manner.

Given George's belief that lawyers play an essential and central role in the seeking of social justice, it was very appropriate that Juan Williams was the keynote speaker at the dinner. Mr. Williams was the commentator and author of "Eyes on the Prize" for PBS TV. Mr. Williams spoke about the struggle for civil rights and the roles that Dr. Martin Luther King and Justice Thurgood Marshall played in that struggle. Mr. Williams commented extensively on the role Justice Marshall, as a lawyer, played in the battle for civil rights and how many lawyers have helped this country take the steps that it has towards true equality for all.

Any one who knows George Roumell knows of his wholehearted belief in equality and justice and the importance those concepts and ideals play in the freedom that we all enjoy. In his acceptance remarks, George spoke of the members of the Section as being the elite of the Bar because of their ability to help achieve social change through the law. The dinner brochure quoted George and his remarks bear repeating: "But for the judges and the lawyers of the organized bar, justice would not be a reality, and without justice there would be no freedom."

Present to honor George were many members of his extended family. George introduced those who were lawyers, and took particular pride that not only was his daughter Andrea there to honor him, but also his uncle, Thomas Roumell, a labor lawyer of note in his own right. Unfortunately, George's daughter Lisa could not be present. But in true Roumell fashion, George brought his wife Aphie on stage and presented her with a dozen roses for their 44th wedding anniversary on January 30.

On a personal note, I am pleased to say that I have had the honor to know George for 27 years, as his student, clerk, associate, partner and most importantly, his friend. The lessons I have learned from him about what it takes to be a good lawyer, and what it really means to be a lawyer, I will always treasure.

George has practiced law for 45 years, and in his concluding remarks upon accepting the award, he stated he would never retire. That is the pledge we will all hold him to. It is difficult to imagine the labor-management community without George Roumell being a part of it. As George and Aphie walked off stage to a standing ovation, I am sure everyone in the audience was thinking that the Distinguished Service Award was a most appropriate tribute to an individual who personifies what it means to be a lawyer.

A MIXED BAG AT THE WESTERN DISTRICT

John T. Below
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Most Of Funeral Director's Claim For Overtime Pronounced Dead; "On Call" Time Found Not Compensable.

Rutlin v. Prime Succession, Inc., et. al., No. 1: 97-CV-866 (December 3, 1998). Judge David W. McKeague granted summary judgment in favor of the employer, holding that the plaintiff, funeral director was an exempt "professional" employee under the FLSA and not entitled to overtime pay equal to one and one-half times his pay rate for each hour over forty. Judge McKeague, however, granted summary judgment in favor of the plaintiff for overtime for a period of six months where the plaintiff was *only* paid hourly. Employing the "short test" with respect to "exempt" status under the FLSA for the period before the plaintiff was paid hourly, the court ruled the plaintiff was (i) paid "over $250.00" per week, (ii) in a "predetermined" amount and (iii) conducted professional funeral services (e.g. embalming and cosmetizing bodies) and he generally exercised "discretion and judgment" as a funeral director and, accordingly, was exempt. Also, the court ruled that the plaintiff's "on call" time was not generally compensable because he was able to watch television, work on his computer, talk on the phone with friends and family, and engage in activities with his wife, including going out to dinner, relying on *Martin v. Ohio Turnpike Comm'n*, 968 F2d 606 (6th Cir. 1992).

Applicant Comes Up Short On Qualifications.

Lyles v. Clinton – Ingham – Eaton Community Mental Health Bd., No. 5: 98-CV-66 (December 11, 1998). Before Judge Gordon J. Quist were plaintiff's claims for race discrimination under 42 USC §1981 and §1983, race and age claims under the Michigan Elliott-Larsen Civil Rights Act, as well as an age discrimination claim under the Age Discrimination and Employment Act, 29 USC §§ 621 – 634, all stemming from the denial of a promotion. The new position sought by the plaintiff required, *inter alia*, a bachelor's degree in social work, which the plaintiff did not have. Under Rule 56, the court granted summary judgment for defendant because: (1) The case did not involve facts and circumstances (e.g. the promotion, criteria, etc.) which implicated any "liberty interest or substantive due process right," which required dismissal of the §1983 failure to promote – race claim. (2) The promotion was denied, as a matter of undisputed fact, because plaintiff simply was not "qualified" for the position sought - - requiring dismissal of the race claim filed under §1981. (3) The age and race claims under the Elliott Larsen Civil Rights Act suffered the same infirmity as the §1981 claim, namely, that the plaintiff was not qualified for the position.

***Faragher* And *Ellerth* Used In Race And Religious Harassment Case.**

Agay v. The City of Benton Harbor, No. 1: 97 – CV – 784 (December 16, 1998). The plaintiff, a Caucasian and Jewish male, sued the City of Benton Harbor under 42 USC §§ 1985 and 1986 alleging "conspiracy" to violate the equal protection of others and, under §§ 1981 and 1983 (and the Michigan Elliott-Larsen Civil Rights Act), alleging race and religious discrimination and harassment, all surrounding the plaintiff's employment experience as the "interim" Director of the Department of Public Safety of the City of Benton Harbor. All the individual defendants were African American. The defendants moved for summary judgment under Fed. R. Civ. p.56.

1. *Summary Judgment For Defendant Denied With Respect To Racial And Religious Harassment Claim.* Judge Richard Alan Enslen employed the Supreme Court decisions in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth* in analyzing the harassment claim. Because there was no evidence that the City had "any policy regarding complaints for racial or religious harassment [*but did* with respect to sexual harassment]," the affirmative defense allowed for in *Farager and Ellerth* was not available to the defendants. More importantly, the following facts created genuine issues of material fact precluding summary judgment:
   - Defendants routinely stated with respect to secretarial work – "give it to the Jew;"
   - With respect to Department negotiations for services, etc., derogatory statements were made to the plaintiff, like "jew them down for us;"
   - A vulgar notice was posted;
   - Plaintiff was required to work extensive overtime, some without compensation, while subordinate African American officers were (allegedly) permitted to "lounge around;"
   - Threats to fire plaintiff were made because of his race and religion; and
   - One of the defendants routinely either pulled a firearm or mimicked pulling a firearm while making derogatory comments to the plaintiff; and, on one occasion, a shotgun was held to the plaintiff's head.
2. *Summary Judgment Granted For The City With Respect To The Conspiracy Claim.* The court set forth the elements of a § 1985(3) conspiracy claim, and found the threshold requirement, material facts establishing the existence of an "illegal agreement," was lacking. (Citing *Barkley v. City of Jackon*, 705 F. Supp. 390, 392 (W.D. Tenn. 1988); *See also Jaco v. Bloechle*, 739 F. 2d 239 (6th Cir. 1984)). Section 1986 liability obtains only where a party is found to have neglected to "prevent others from carrying out a Section 1985 conspiracy." (citing *Rogin v. Bethlehem Township*, 616 F2d. 680, 697 (3d Cir. 1980); *Bieros v. Nicola*, 839 F. Supp. 332,336 (E.D. Pa. 1992)). Without the conspiracy claim, the § 1986 claim failed.
3. *Summary Judgment Granted For The City As To Plaintiff's Discrimination Claim Regarding His Employment Contract.* Plaintiff alleged that the City refused to appoint him "permanent" Director of the Department of Public Works because of his age and religion. He had remained the "interim" Director. While analyzing the plaintiffs' claims of racial and religious discrimination with respect to the terms and conditions of his employment, and his employment contract in particular, the court found that the terms and conditions of the "permanent" position of Director as opposed to the "interim" title were the same. Disputed and isolated comments at a particular meeting regarding hiring the plaintiff for the Director position were found to be insufficient. Specifically, the City Commission allegedly stated that it "broke a rule of local politics" by appointing the plaintiff, a Caucasian and Jewish male, because "putting a white officer in charge only raised suspicions in a predominantly black community that has a historical distrust of police departments." Summary judgment was granted for the defendants with respect to the discrimination claim. ■

WHAT HAPPENED TO THE MICHIGAN DEPARTMENT OF LABOR?

Mike Dankert
Chief, Wage and Hour Division
Bureau of Safety and Regulation
Michigan Department of Consumer & Industry Services

In May 1996, the Department of Consumer & Industry Services (CIS) was created by Governor John Engler as Michigan's primary licensing and regulatory department under the direction of Kathleen Wilbur. Regulatory functions in the former Departments of Commerce and Labor were merged together with agencies from five other departments. The name may take some getting used to, but those doing business with the state's newest department appreciate the service-oriented approach the department's name signifies. The reorganization and consolidation of the state's regulatory programs into a single department has resulted in an agency that is more effective and efficient in its delivery of services to the 1.5 million entities and individuals licensed and the customers served by the various regulatory programs. The regulatory areas of CIS include:

- Bureau of Workers' Disability Compensation
- Liquor Control Commission
- Insurance Bureau
- Bureau of Safety and Regulation (MIOSHA)
- Bureau of Employment Services (PERA)
- Bureau of Construction Codes
- Office of Commercial Services (occupation and business licensing) and
- Unemployment Agency

For more information on these and other agencies and services provided by the Department of Consumer & Industry Services check out the department's website: **<www.cis.state.mi.us/>**

Wage and Hour Division

The state's Wage and Hour Division was part of the reorganization. It is a division of the CIS Bureau of Safety and Regulation. It has statutory responsibilities, but over the years has become an information source answering hundreds of inquiries each day about employment related issues - many not directly related to the division's statutory responsibilities. Callers with questions about break laws, termination rights and those looking for the "Labor Board" — that mythical agency many believe addresses all employee complaints, such as unfair discipline or rude language used by employers or co-workers — are invariably referred to the Wage and Hour Division.

The four employment standards laws enforced by the Wage and Hour Division include:

- **PA 390 of 1978 - Payment of Wages and Fringe Benefits Act.** Its provisions affect the timely payment of wages, vacation pay, sick pay, bonuses and deductions from wages and fringe benefits payments.
- **PA 154 of 1964 - The Michigan Minimum Wage Law of 1964.** This provides the minimum wage rate and overtime pay requirements for employees of businesses not covered by federal law and employees that receive gratuities.
- **PA 90 of 1978 - The Youth Employment Standards Act.** This act sets work permit requirements and regulates the hours and occupations for workers under 18 years of age.
- **PA 166 of 1965 -** This is the state's prevailing wage law regulating pay rate of construction workers on state-financed and -contracted construction projects.

Payment of Wages and Fringe Benefits Act, MCLA 408.471 et seq.

A major issue under the Payment of Wages and Fringe Benefits Act is withholding or deduction of moneys from employee wages without the express authorization of law, a collective bargaining agreement, court order or the voluntary, written consent of an employee. Some employers try to take an offset for damage done by an employee or withhold all or a portion of an employee's paycheck when an employee does not repay a loan, takes a cash advance, charges an employee purchase or when an employee is assumed responsible for a cash shortage or missing property. A proper authorization includes the amount to be deducted, the date of the deduction and the signature of the employee. A written acknowledgment of an employer's policy stating that deductions will be made under certain conditions is not written consent.

The authorization must be voluntary. The employee cannot be intimidated or threatened with discharge for refusing to agree to the deduction. A statement of intent to prosecute for theft or file civil action to recover a legal debt is not intimidation. A deduction for an employer's benefit, such as to recover a cash register shortage or the cost of negligently damaged equipment, cannot reduce the gross wages paid below the minimum wage. Deductions for things such as health insurance premiums, credit union deposits, or charitable contributions require only a single authorization and are not subject to the minimum wage guarantee. The same requirements prohibit an employer from holding a check or withholding an amount from the check as a means of disciplining an employee. A deduction may be made without an authorization for an overpayment of wages or fringe benefits if the deduction meets the following criteria:

1. The overpayment resulted from a mathematical or typographical error.
2. The employee receives a written explanation of the error one pay period prior to the deduction.
3. The deduction does not exceed 15 percent of gross wages.
4. The deduction is taken after all other required deductions.
5. The employee receives at least the minimum rate for all hours worked.

Commissions earned by an employee are wages and subject to the same timely payment requirements as hourly wages and the prohibition against deductions. However, commission agreements may involve a formula that takes into account employee draws, losses, charge backs, credit adjustments or bad debts.

The Act also prohibits direct deposit of wages into a bank or credit union without the voluntary written consent of the employee.

There are no regulations addressing uniforms. Employers may require a standard of dress that incorporates ordinary street wear, such as khaki slacks or blue shirt, but should exercise caution in requiring employees to purchase distinctive outfits or accessories that identify a business. The Act does not regulate basic standards of dress, but if an employee is required to purchase a uni-

(Continued on page 12)

WHAT HAPPENED TO THE MICHIGAN DEPARTMENT OF LABOR

(Continued from page 11)

form or an article of clothing from an employer, regulations regarding deductions from wages apply. If the purchase reduces the employee's gross wage below the minimum wage, the employer must reimburse the employee to comply with state or federal minimum wage requirements.

The Act does not address physical examinations. Employers should be aware of the following provisions of the Michigan Penal Code, MCLA 750.354a, regulating this subject:

> It shall be unlawful for any employer in the state of Michigan to compel newly hired employees or employees reporting back to work after a furlough or leave of absence to pay the cost of a medical examination or to pay for being photographed and finger printed, when requested by the employer.

There is no requirement that employers provide any fringe benefits, but vacation pay, sick pay, bonuses or reimbursement for business expenses offered as part of a written policy or employment contract must be paid according to the terms of the contract or policy and may not be subject to deduction unless authorized by the policy or contract or consented to in writing by the employee.

Except for those who harvest crops by hand, employees who quit or are fired must be paid wages earned in the final pay period on the regularly scheduled pay date for that period. The same standard applies to fringe benefits due at termination, such as an accrued vacation time payout required by a written policy or contract. There is no requirement that discharged employees be paid on the date of discharge. It is the employer's responsibility to pay an employee wages that are due. An employer who holds a check requiring a discharged employee to pick it up in person, or to sign a waiver of claim to receive the check, is not likely to be supported by the department. While the Act does not expressly prohibit these practices, departmental administrative law judges have held employers in violation of the provisions that require employers to pay wages to employees when a check was not mailed to an employee.

An employee who believes his employer has violated the Payment of Wages and Fringe Benefits Act may file a complaint with the division within one year of the violation. There are no provisions for group or class action based on a single filing. The Wage and Hour Division receives about 6,000 complaints each year and makes a concerted effort to informally resolve complaints. It is successful in almost 70 percent of the cases.

Employers, however, should be aware that in 1998 a new penalty schedule was established. An employer may pursue an appeal without a penalty. But if civil action is necessary to collect wages or fringe benefits due, a civil penalty of 50 percent of the wages or fringe benefits due, up to $1,000, will be assessed. Employees may also receive exemplary damages, if the violation is flagrant or repeated, and hearing costs and attorney fees. Employers also may be prosecuted for violations.

Michigan Minimum Wage Law of 1964, MCLA 408.381 et seq.

The current minimum wage under state and federal law is $5.15 per hour. Both federal and state law require overtime after 40 hours are worked in a week, but there is no daily overtime required. Overtime cannot be averaged over two or more weeks. There are, however, some differences and employers should know whether they are subject to state or federal requirements. In general, federal law covers:

- Employees who produce goods for sale outside Michigan
- Businesses that earn over $500,000 per year.
- Hospitals and health care facilities.
- Pre-schools, elementary and secondary schools and colleges.
- Federal, state, and local governments.
- Agricultural employers who employ 500 man-days of agricultural labor in a quarter. A "man-day" is any day a person works at least one hour.

State law covers any employee 16 years of age or older not covered by federal law, and certain employees who receive a higher minimum wage than required under federal law. Both laws provide overtime exemptions for agricultural workers and "professional, executive, and administrative" employees paid a specified salary or fee.

The higher state standard applies to employees who receive and report gratuities. Tipped employees may be paid $2.65 an hour provided they receive an average of $2.50 per hour in tips. The sharing or pooling of tips must be done voluntarily; requiring tip pooling as a condition of employment is not voluntary. Only employees who regularly receive tips such as waitresses, waiters and busboys may participate in tip pooling.

Compensatory time, the banking of overtime hours, can be done only under certain conditions. Two important conditions are (1) the employee must voluntarily agree to the banking of hours and (2) the employee must receive ten days of paid vacation, personal or sick leave each year. Accrued compensatory time must be paid at the time of an employee's termination at a rate that is at least equal to the rate of pay the overtime was earned.

As with the Payment of Wages and Fringe Benefits Act, individuals may file complaints. There is a three-year statute of limitations. The division may take action on behalf of all employees upon receipt of a signed complaint. The statute provides for recovery of unpaid minimum wages and overtime, and an equal additional amount as liquidated damages and attorney fees. A civil fine of $1,000 also may be assessed.

Youth Employment Standards Act, MCLA 409.101 et seq.

Employees under 18 years of age, unless specifically exempt, must obtain a work permit from their school district before beginning work. The hours of work are regulated under state and federal law. Employers should use the coverage information provided for minimum wage and determine whether state or federal coverage applies, and obtain the appropriate state or federal standards. Federal standards are more stringent about work hours for 14- and 15-year-olds, and driving regulations. New federal legislation prohibits driving by 16-year-olds, and restricts the amount and distance of driving for 17-year olds. Federal hazardous orders and state-restricted occupations prohibiting work with hazardous substances, such as power driven equipment or meat slicers, are similar. Again, however, coverage should be determined and the applicable standards complied with.

There are a number of state law provisions that apply to all employers; the work permit requirement, hours for 16-and 17-year olds, and the rest period requirement are all state requirements that all employers must follow. The state also has a general prohibition

against employing a minor in an occupation is hazardous or could be injurious. Employers, therefore, must comply with this requirement in addition to complying with either the federal hazardous orders or state restricted occupations that apply to their business.

Workers under 18 years of age cannot work more than five hours without an uninterrupted 30-minute rest period. This restriction is limited to young people. The Wage and Hour Division often is asked if there are meal-and rest-period requirements for adults. There are none. In addition, except for interstate truck drivers, pilots, and firefighters, there are no limitations on the hours that adults may work on a daily or weekly basis.

Home schooled student-workers and charter school student-workers are subject to the same requirements as all other minors. The act was amended to authorize charter schools and private schools to issue work permits. Home school parents or instructors cannot issue work permits. Home schooled students must obtain their work permits from the public or private school in which they reside or will be employed.

Except for egregious violations, the division issues a corrective action notice for violations. Prosecution is requested if violations are not corrected. There are no civil penalties. Violation of the standards is a misdemeanor, and repeated violation of the supervision requirement of Section 12a is a felony.

Prevailing Wage Law, MCLA 408.551 et seq.

The Wage and Hour Division's responsibility under the state prevailing wage law is to issue wage rates that must be paid to workers on state funded, state contracted construction projects. Federally financed projects are not covered, nor are non-state projects that might incorporate the state rates. The rates must be requested by a contracting agent, such as a state agency, school or university, prior to advertisement for bids on the project. The rates become a part of the specifications for the project and must be paid to workers. By law, the rates are based on wages and fringe benefits contained in collective bargaining agreements covering the geographical area where the project is located. The basic wage rate and hourly contributions for fringe benefits are added to obtain the prevailing rate, which is the minimum rate payable. It is important that a contracting agent request rates for all trades that will work on the project. Except for apprentice rates, classifications cannot be added to the rate schedule after the project is awarded. The rate schedule does not require that employees be given fringe benefits, but fringe benefits paid to, or on behalf of employees, may be credited to determine compliance with the required prevailing rate. Violation of the Act is a misdemeanor. The Division accepts complaints for investigation filed within three years of an alleged violation.

Web Surfing

For more information about the laws administered by the Wage and Hour Division and to view posters, guides and publications, consult the divisions' website at: <www.cis.state.mi.us/bsr/divisions/wh/home.htm>. For more traditional methods of contact, call (517) 322-1825 or write: The Michigan Department of Consumer and Industry Services, Bureau of Safety and Regulation, Wage and Hour Division, P.O. Box 30476, Lansing, MI 48909-7976. Updated versions of the four laws discussed and their administrative rules should be on the website by July 1999.

(The views in this article are the author's own and summarize current department policy and guidelines. This should not be construed as legal advice relating to any particular case or application.) ■

1998 APPELLATE REVIEW OF MERC DECISIONS

Roy L. Roulhac
Administrative Law Judge
Michigan Employment Relations Commission

Michigan Supreme Court

Quinn v Police Officers Labor Council, 456 Mich 478 (February 3, 1998), *rev'g* 216 Mich App 237 (1996). In a unanimous decision, the Court reversed the Court of Appeals' disagreement with MERC's conclusion that the POLC had a continuing duty to pursue a grievance it filed before it was decertified and replaced by the Police Officers Association of Michigan (POAM) as exclusive bargaining representative. Citing *United States Gypsum v United Steelworkers of America*, 384 F2d 38, 44-45 (CA 5, 1967) and *International Union, UAW v Telex Computer Products, Inc*, 816 F2d 519, 522-524 (CA 10,1987), the Court reasoned that decertification does not deprive a union of its right to enforce a collective bargaining agreement, and although decertification may change relations between and among employer, union, and employees, the POLC was in the best position to efficiently and knowledgeably process the grievance to its completion. The Court, in expressing agreement with the Commission, noted that shifting the responsibility from the POLC to the POAM improperly imposed the POLC's judgements, contract interpretations, and financial considerations to the POAM. In a footnote, the Court observed that its opinion does not preclude new representatives from voluntarily pursuing existing grievances provided the grievant consents to the assumption. The Commission's decision is reported at 1994 MERC Lab Op 828.

In *Michigan Education Association* v *Alpena Community College*, 457 Mich 300 (May 19, 1998). In lieu of granting leave to appeal, the Supreme Court reversed the judgment of the Court of Appeals and reinstated the Commission's decision to direct an election among certain non-supervisory support personnel to determine whether they wished to be accreted into a unit of clerical employees. In an unpublished 2-1 per curiam decision, (Docket No. 180695, November 18, 1996), the Court of Appeals decided that the employees sought to be accreted were too diverse to be considered to have a community of interest. In reversing, the Supreme Court noted that generally Commission decisions regarding residual bargaining units are to be given deference under the competent, material, and substantial evidence standard and gathering up remaining employees into a residual unit will nearly always involve joining employees with diverse job descriptions. It found no sign that the statutory purposes or the goals of collective bargaining would be frustrated by the unit approved by the Commission. The Commission's decision is reported at 1994 MERC Lab Op 955.

St. Clair Intermediate School District v *Intermediate Education Association and Michigan Education Association Special Services Association*, 458 Mich 540 (July 31, 1998). The Court affirmed the Court of Appeals' and Commission's conclusions that the Michigan Education Association, the collective bargaining agent for teachers employed by the St. Clair Intermediate School District, committed an unfair labor practice by unilaterally implementing a midterm modification of the collective bargaining agreement to increase the lifetime maximum health care benefit through the independent actions of its agent, the Michigan Education Special Services Association (MESSA). The Court concluded that more than a "mere" agency relationship existed between the

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(Continued from page 13)

MEA and MESSA, a nonprofit corporation whose purpose is provide insurance benefits to its members based on the following factors: a formal affiliation and common agreement; MESSA's bylaws provided that MEA members had majority control of its board which made the decisionto increase the benefit level; MESSA had substantial imput in the collective bargaining process and was kept involved and informed concerning marketing its products to MEA members; and the MEA disaffiliation policy allowed the MEA to control both MESSA membership and access to MESSA benefits.

In their dissent, Justices Kelly and Cavanagh stated that no agency relationship existed between the MEA and MESSA because the MEA lacked the ability to control MESSA's actions. The Commission's decision is reported at 1993 MERC Lab Op 101 and 1994 MERC Lab Op 1167 (on remand). The Court of Appeals decision appears at 218 Mich App 734 (1996).

Michigan Court of Appeals

Jackson Fire Fighters Association, Local 1306 v City of Jackson, 227 Mich App 520 (January 23, 1998). The Court affirmed MERC's decision that a daily staffing provision in the parties' contract did not adversely effect fire fighter safety and was therefore a permissive subject of bargaining which the Union improperly submitted to arbitration. The Court also held that the doctrine of collateral estoppel did not preclude the Commission from adjudicating the daily staffing provision despite the arbitration panel's ruling that the provision constituted a mandatory bargaining subject within its jurisdiction. The Court vacated the panel's award and the Jackson County Circuit Court's injunction which required the Employer to comply with the award. MERC's decision is reported at 1996 MERC Lab Op 125. On June 16, 1998, the Supreme Court has granted the Union's application for leave to appeal (Docket No. 111509-12).

Farmington Education Association v *Farmington Public Schools,* (Docket No. 198190, February 13, 1998). In an unpublished 2-1 opinion, the Court affirmed the Commission's decision denying a unit clarification petition filed by the Union to accrete adult education teachers into its bargaining unit of K-12 teachers. The Commission agreed with the Union that Alternative Academy teachers shared a community of interest with K-12 teachers but focused on the fact that the recognition clause expressly excluded adult education teachers. The record showed that a contract was in effect when the Alternative Academy teachers first joined the district. However, five months later when the agreement was rescinded and the parties were ordered to renegotiate, the Union made no attempt to include the Alternative Academy teachers into the bargaining unit.

The Court also rejected the Union's argument that the Commission improperly considered a reply brief filed by Respondent. The Commission interpreted Rule 423.463 to mean that although it preferred that a party first obtain permission, a party *may* file a responsive pleading.

The Commission's opinion denying the unit clarification petition and the Union's motion for reconsideration are reported at 1996 MERC Lab Op 77 and 1996 MERC Lab Op 472, respectively.

Organization of School Administrators v *Detroit Board of Education,* 229 Mich App 54 (March 27, 1998). The Employer operated daytime and evening adult education programs and evening adult vocational education programs. In response to over 50% cuts in adult education programs by the legislature, the Employer limited vocational-technical administrators work to twenty-four hours biweekly and changed their method of compensation from per diem to hourly. The Employer decided that adult education administrators and teachers would not longer be paid overtime for evening work but would receive compensatory time. In dismissing the Union's refusal to bargain charge, the Commission held that it had waived its right to demand bargaining over changes in the hours of work by agreeing to a contract provision which authorized the Employer to set hours when necessary. Regarding the change in the method of compensation issue, the Commission found that a bona fide contract dispute existed over whether the contract was breached and the dispute should be resolved through the contract's grievance procedures.

The Court, in a 2-1 decision, affirmed the Commission's decision that the Employer did not violate its statutory duty to bargain by unilaterally limiting the work hours for the vocational-technical administrators. However, the Commission was directed to provide a clear explanation why do unfair labor practice was committed regarding the Employer's decision to change the vocational-technical administrators' method of compensation from per diem to hourly. The Court also held that the Employer did not unilaterally implement a change in the rate of pay for adult education department heads and teachers, but vacated the Commission's determination that their evening work was not overtime which the Employer could modify without bargaining.

The Commission's decisions are reported at 1996 MERC Lab Op 30 and 1996 MERC Lab Op 207 (on motion for reconsideration). ■

MICHIGAN SUPREME COURT UPDATE

Mary C. Bonnema
Varnum, Riddering, Schmidt & Howlett llp

In *Bobo v. Thorn Apple Valley Inc.* (Supreme Court Order 111224), the Michigan Supreme Court vacated a Court of Appeals decision on the issue of whether a six-month limitation on civil rights claims in a plaintiff's salaried employee handbook was unreasonable. The Court remanded and ordered the trial court to consider whether plaintiff's waiver of the statutory period of limitation was knowing, intelligent, and voluntary under the heightened judicial scrutiny that is applied to the loss of civil rights claims. The Supreme Court ordered the Court of Appeals to retain jurisdiction and to direct the trial court to submit a statement of its findings of fact and conclusions of law. The Court of Appeals will then reconsider and decide plaintiff's appeal on the trial court's rulings on the issue of whether the contractual period of limitation on civil rights claims was reasonable and whether the waiver of the statutory limitation period was voluntary.

SUPREME COURT RULES AT-WILL EMPLOYMENT PROTECTED UNDER CIVIL RIGHTS ACT AND ADDS LABOR AND EMPLOYMENT CASES TO ITS DOCKET

Russell S. Linden and Timothy O. McMahon
Honigman Miller Schwartz and Cohn

The Supreme Court recently added five labor and employment cases to its docket for review this term. Among the more significant issues presented are: ERISA preemption, the standard for awarding punitive damages under Title VII, and the application of judicial estoppel to Americans with Disabilities Act claims. The Court is now scheduled to hear arguments in 13 labor and employment cases this term. To date, the Court has only ruled in four of these cases, including the *Haddle v. Garrison* decision which held that at-will employment is protected by the Civil Rights Act of 1871.

At-Will Employee May Pursue Retaliation Claim Under the Civil Rights Act of 1871

The Court reversed the Eleventh Circuit and held that an at-will employee does suffer an injury recognized under 42 U.S.C. § 1985(2) when he is dismissed from employment for engaging in protected activity. Here, Haddle assisted in a medicare fraud investigation against his employer. The Court ruled that the injury to "person or property" protected by the statute is broader than just "constitutionally protected property interests." *Haddle v. Garrison*, 119 S.Ct. 489 (1998).

Racketeer Influenced and Corrupt Organizations Act

The plaintiffs sued the defendants, insurer and hospital, under the federal Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq*., alleging the insurer defrauded beneficiaries of the insurance policies. The defendants argued that the application of RICO would impair an applicable state law in violation of the McCarron-Ferguson Act (the "Act"), 15 U.S.C. § 1012(b). The Act prohibits application of RICO if it would "invalidate, impair, or supersede" a state's regulations. The Court held that the plaintiffs could rely upon RICO because the Act does not prohibit application of a federal law if it is in harmony with the state statute (e.g., provides additional remedies). Here, RICO did not "frustrate any declared state policy" and enhanced the state regulation. *Humana Inc. v. Forsyth*, 119 S.Ct. 710 (1999).

The Court granted certiorari in the following cases:

1. Federal Employee's Entitlement to Union Representative's Presence During Investigation

An employee of the National Aeronautics and Space Administration ("NASA") was interviewed by an agent from NASA's inspector general's office regarding potential misconduct. The investigator refused to allow the employee's union representative to participate in the interview but did allow the representative to "witness" the interrogation. The Federal Labor Relations Authority found the investigator's action to be a violation of the Federal Labor-Management Relations Statute, 5 U.S.C. §§ 7101, *et seq.*, and that NASA was responsible for the investigator's conduct. The Court will determine whether NASA, as an agency, is responsible for the actions of the inspector general's office. *National Aeronautics and Space Admin. v. Federal Labor Relations Authority*, 119 S.Ct. 401 (1998)(Mem.).

2. Fair Labor Standards Act Suits Against State Employers in State Court

In *Alden v. Maine*, 98-436, 67 USLW 3178, the Court will review the Maine Supreme Judicial Court's decision that the State of Maine could not be sued in state court under the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq*. The Maine court held that because Congress lacks the power to abrogate a state's 11th Amendment immunity in federal court without unequivocally expressing its intent to do so, it must also lack the power to abrogate the immunity in a state court action.

3. Punitive Damages Under Title VII

The Court will review an *en banc* decision of the D.C. Circuit which held that punitive damages could only be awarded under Title VII, 42 U.S.C. §§ 2000e, *et seq.*, for "egregious conduct." This ruling conflicts with several other circuits which have held punitive damages are proper when there is a finding of intentional discrimination. *Kolstad v. American Dental Assoc.*, 119 S.Ct. 401 (1998)(Mem.).

4. Receipt of Social Security Disability Benefits as a Bar to Bringing Suit Under the Americans with Disabilities Act

The plaintiff signed a sworn statement that she was disabled and unable to work as part of her application for Social Security benefits. She then filed suit under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, *et seq*. The Court will review the Fifth Circuit's holding that the sworn representations on her successful application for benefits – which contradicted some allegations in her lawsuit against her employer – created a presumption that she is judicially estopped from asserting her claim under the ADA. *Cleveland v. Policy Management Systems Corp.*, 119 S.Ct. 39 (1998)(Mem.).

5. ERISA Preemption

In *UNUM Life Insurance Co. of America v. Ward*, 97-1868, the Supreme Court will determine whether two California state laws are preempted by ERISA. Specifically, the Court will rule upon whether ERISA preempts (1) a California law requiring an insurer to show prejudice regarding a failure to timely file a claim before denying benefits and (2) California's rule that an employer's knowledge of a claim is imputed to the insurer. ■

IMPROVE YOUR MIND

The 24th Annual Labor and Employment Law Seminar will be held at the MSU Management Education Center in Troy on Thursday and Friday, April 22 and 23. The seminar schedule will include the popular features you've come to expect, including updates, panel discussions, separate tracks for specialized practice areas, a distinguished luncheon speaker, and a distinguished luncheon. For the complete schedule and registration information, contact the Institute of Continuing Legal Education, toll-free, at (877) 229-4350 or visit ICLE's website at http://www.icle.org.

SIXTH CIRCUIT EXAMINES RACIAL HARASSMENT, TIP-POOLING, EFFECTIVE RESIGNATION AND FAILURE TO HIRE UNION ACTIVISTS

Gary S. Fealk
Vercruysse Metz & Murray, P.C.

From November 1998 through January 1999, the Sixth Circuit Court of Appeals published over 25 cases dealing with a variety of labor and employment issues, including the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Employee Retirement Income Security Act (ERISA), the Fair Labor Standards Act (FLSA), Title VII of the Civil Rights Act of 1964 (Title VII) and the National Labor Relations Act (NLRA). The full text of published Sixth Circuit decisions are available on the Web at: www.law.emory.edu/6circuit/.

FARAGHER/ELLERTH ANALYSIS EXTENDED TO RACIAL HARASSMENT CLAIMS

The Sixth Circuit reversed the district court's summary judgment in favor of the Michigan Department of Corrections on a plaintiff's racial harassment claim, holding that the analysis for vicarious liability for supervisor harassment in *Burlington Industries v. Ellerth*, 118 SCt 2257 (1998) and *Faragher v Boca Raton*, 188 SCt 2275 (1998) applies to race harassment cases. The court followed the Fifth and Tenth Circuits which have held that the *Faragher*/*Ellerth* analysis applicable to race harassment.

The court, however, affirmed the dismissal of plaintiff's race discrimination claim because it failed to show that he was rejected for a promotion to sergeant in favor of a person who was not a member of his protected class (African-American). Plaintiff testified in his deposition that he could only name one non-African-American person who was promoted to sergeant and that he did not seek the position at the time this individual was promoted. *Allen v Michigan Department of Corrections*, Docket No. 97-1720 (Jan. 6, 1999).

SIXTH CIRCUIT RECOGNIZES EFFECTIVE RESIGNATION UNDER THE ADA, FMLA AND ERISA

The Sixth Circuit affirmed summary judgment in favor of the employer on plaintiff's ADA, FMLA and ERISA claims, in part, because he effectively resigned his employment. The court stated that an employee effectively resigns when: 1) he expresses an intention to resign, and 2) takes some action to demonstrate that he is relinquishing his position. *Hammon v DHL Airways*, Docket No. 97-4054 (Jan. 12, 1999).

BACK PAY SETTLEMENT HAS TAX CONSEQUENCES

In *Gerbec v United States*, Docket Nos. 97-3224/3225/3269 (Jan 15, 1999), the Sixth Circuit held, in a case of first impression, that the settlement of a wrongful discharge class action is taxable to the extent it represents back or front pay.

ADA: EMPLOYER MUST PROVE THAT PHYSICAL DUTIES ARE AN ESSENTIAL JOB FUNCTION

The employer failed to carry its burden of proving, by a preponderance of the evidence, that physical duties of firefighters were "essential functions of the job" which the plaintiff could not perform. *Hamlin v Charter Township of Flint*, Docket Nos. 97-1026/2105/2129 (January 8, 1999).

FAIR LABOR STANDARDS ACT — TIP POOLS

The Sixth Circuit held that hosts and hostesses at a restaurant are considered employees engaged in an occupation which customarily and regularly receive more than $30 a month in tips. Hosts and hostesses therefore qualify as tipped employees under the FLSA and may be included in an employer's tip pool. The court further held that a 3% tip-out requirement was not excessive, stating that neither the FLSA nor its regulations restrict the size of a tip-out requirement. *Kilgore v Outback Steakhouse*, 160 F.3d 294 (6th Cir. 1998).

EMPLOYEE WHO ELECTED TO RETIRE CAN SUE FOR DISCRIMINATORY DISCHARGE UNDER THE ADEA

An employee — given a 'choice' between early retirement as a result of reorganization, rather than layoff — can sue for constructive discharge based on age. *Scott v Goodyear Tire & Rubber Co.*, 160 F.3d 1121 (6th Cir. 1998).

NLRB CANNOT INFER A FAILURE TO HIRE BASED SOLELY ON ANTI-UNION ANIMUS

When the NLRB alleges that an employer has committed unfair labor practices by failing to hire voluntary union organizers, it is required to show an actual failure to hire in order prove a *prima facie* case. The Sixth Circuit rejected the NLRB's argument that it should be able to establish a *prima facie* case in a refusal-to-hire case by proving that there were some job vacancies applied for by some voluntary union organizers and that the employer harbored animus against these applicants because they engaged in protected activities. The court ruled it is not an unfair labor practice for an employer to harbor animus against union members applying for jobs that do not exist or have already been filled, or for which they are not qualified. *NLRB v. Fluor Daniel*,161 F.3d 953 (6th Cir. 1998).

SIXTH CIRCUIT UPHOLDS JURY'S REFUSAL TO AWARD COMPENSATORY DAMAGES IN ADA CASE

The Sixth Circuit upheld a jury verdict finding that an employee with irritable bowel syndrome was a qualified individual with a disability which required accommodation. The court also upheld the jury's decision not to award compensatory damages. *Workman v Frito-Lay, Inc.*, Docket Nos. 97-5721/5843 (Jan 15, 1999).

COMPANY THAT FOLLOWED ITS OWN PROCEDURES DID NOT COMMIT ULP

The Sixth Circuit held that an employer who adhered to its practices and procedures did not discriminate against two employees due to union activity. The employer, General Security Services (GSS), is a contracting firm which provides security services to federal courthouses. Although the union and the company negotiated a new contract in 1995, it was not ratified. Shortly thereafter, the employees went on a strike. On December 1, 1995, the security officers offered to return to work. However, on December 18, 1995,

the U.S. Marshals' Service (USMS) removed two union activists' authorization to work for the USMS at federal courthouses. The USMS work authorization is known as "credentials." As a result of the employees' loss of credentials, GSS discharged them since it had no other contracts in the area to which they could be assigned. GSS was also required by its contract with the USMS to replace the two employees. The employees appealed the removal of their credentials through the USMS. Eventually, the employees' credentials were reinstated. After the reinstatement of their credentials, GSS rehired the two employees and placed them in new assignments which were open at that time. The employees filed unfair labor practice charges alleging that GSS violated the NLRA by failing to reinstate them into their former assignments. The NLRB agreed with the employees.

Denying the NLRB's application to enforce its order, the Sixth Circuit found that the company had always followed the same procedure with respect to rehiring former court security officers. The company consistently placed returning employees the new hire pool and assigned employees to open assignments as they arose. The company followed this same procedure with the two employees at issue. Accordingly, the court held that the company had proven that it took the same action with respect to the employees as it would have taken in the absence of their union activity. *NLRB v. General Security Services Corp.*, 162 F.3d 437 (6th Cir. 1998).

FAILURE TO PROPERLY TERMINATE CONTRACT LEADS TO ERISA LIABILITY

In *B.A.C. Local 32 Ins. Fund v. Fantin Enterprises, Inc.*, Docket Nos. 97-2016/2058/2072 (Dec. 30, 1998) the Sixth Circuit held that a company which, in 1991, agreed to be bound by a Section 8(f) pre-hire contract between a union and a multi-employer bargaining association, improperly terminated the agreement and remained liable for fringe benefit contributions until the agreement was properly terminated. The court also held that the fact that the union and the employer association signed a new agreement in 1992, which was never signed by the company, did not end the company's liability under the 1991 agreement, which renewed by its terms for successive one year periods. ■

"SPLITTING THE BABY"

Is your arbitrator likely to "split the baby?" LRP Publications provides statistical data, analysis and summaries regarding labor arbitrators and their past decisions. The database includes biographical information and reports percentages indicating how often an arbitrator has ruled in favor of management, the union or issued a "split" decision. Case summaries are also available. The statistical information is generally divided between discipline and non-discipline cases. Like witness preparation and document review, statistical information regarding an arbitrator's decisions is useful in the process of preparing a successful labor arbitration, but as Mark Twain said: "There are lies, damned lies, and statistics." LRP can be reached at 1-800-341-7874, Ext. 274.

John T. Below

NLRB PRACTICE AND PROCEDURE

William C. Schaub, Jr.
Regional Director, Region Seven
National Labor Relations Board

On January 29, 1999, the Region's Local Practice and Procedure Committee met at the Ypsilanti Marriott Hotel in conjunction with the Mid-Winter Meeting of the Labor and Employment Law Section. The Committee discussed a recent Supreme Court case, *Brogan v. the United States*, 522, U.S. 398 (12/6/98), in which the Court concluded that lying to a federal investigator during an investigation being conducted by federal agencies was a felony. The question presented to the Committee was whether this case would have any applicability in NLRB proceedings. After considerable discussion of the pros and cons of using *Brogan* in NLRB proceedings, and while there was some support for this type of an approach, there was also concern expressed that it be limited to truly egregious situations and not detract from the central mission of the Agency. It was noted also that *Brogan* would undoubtedly result in the Agency getting less cooperation from charged parties.

The Committee then, in connection with *Brogan*, discussed whether an expanded use of pre-complaint Section 11 subpoenas would be beneficial in aiding the Agency in gathering evidence. I noted to the Committee that regional directors have been granted authority to issue pre-complaint investigative subpoenas duces tecum for the production of documents or other materials from any party or witness and investigative subpoenas ad testificandum to compel testimony from non-party witnesses. I also indicated that while the Region is currently making a greater use of pre-complaint investigative subpoenas than in past years, they are still used in only a very small percentage of our cases. We do not use investigative subpoenas, for example, where I already have sufficient evidence to warrant issuance of complaint and the only purpose of the subpoena would be to gather additional evidence. Here again, the Committee was concerned that the Board not be distracted from its central mission of enforcing the Act by time consuming battles in federal court for enforcement of investigative subpoenas. Mention was made of the recent Sixth Circuit case *Midland Daily News*, and the time and resources spent on that pre-complaint investigative subpoena. While there was no unanimity on either of the above topics, we did agree that our next meeting would be held at the time of the State Bar's annual meeting in September and that the agenda for this meeting would be developed by the undersigned in conjunction with Committee members Leonard Page and Ted Opperwall. If any of you have a question or issue you would like the Committee to consider, please raise it with any committee member.

Two items of interest that you may have missed: (1) On December 4, 1998, John Truesdale received a recess appointment to serve as Chairman of the NLRB. This is Chairman Truesdale's fifth appointment as a Board Member. (2) On a more local basis, Resident Officer Dave Basso, who has headed our Grand Rapids Resident Office since it opened in 1981, retired effective January 30, 1999. A search is underway for a successor to fill the vacant position and in the meantime the office will be run by acting resident officers.

Finally, I would again call your attention to the NLRB's website which can be accessed at *www.nlrb.gov*. The website has 11 categories, each with a button on the home page. The categories include, *inter alia*, a help desk, weekly summary of Board cases and press releases. A Freedom of Information button will soon be added and will include information about how to file FOIA requests. ■

MICHIGAN COURT OF APPEALS UPDATE

Karl Brevitz, *Education Director*
Institute of Continuing Legal Education

Finding of Fact by Teacher Tenure Commission Binding in Subsequent Arbitration

Dearborn Heights School District No. 7 v Wayne County MEA/NEA and Sherrie Adis. School District filed tenure charges against Adis for battery upon another staff member. A Tenure Commission hearing referee concluded that the assault occurred and recommended suspension. The Tenure Commission affirmed but increased the suspension to three semesters. Its order was affirmed by the Court of Appeals. Subsequently Adis and her union filed a grievance asserting that the suspension violated the collective bargaining agreement. The arbitrator ruled that he was not bound by the Commission's earlier findings, found that no battery had occurred and reduced the suspension to one month. The circuit court affirmed.

The Court of Appeals reversed, holding that the doctrine of collateral estoppel requires the arbitrator to accept the Tenure Commission's factual determination that a battery occurred. The Court held that question of whether Adis committed a battery was an essential issue litigated before and resolved by the Tenure Commission; that the arbitration involved the same factual issue and substantially the same parties (the court concluding that, although Adis was the named party before the Tenure Commission while the union was the named party before the arbitrator, they were in fact substantially identical for purposes of collateral estoppel) and that the decision of the Tenure Commission represented a valid final judgment, thus requiring the application of collateral estoppel.

Comment: The court correctly observes that to permit Adis to relitigate the earlier factual determination before the arbitrator "would reduce the administrative process to a mere dress rehearsal; an employee satisfied with the Commission's findings could accept them, while a dissatisfied employee could start all over with a clean slate by bringing the matter before an arbitrator. Although surely most dissatisfied litigants would enjoy a second bite at the apple, our system disfavors resort to successive litigations to resolve identical issues." The court's opinion highlights the importance of appropriate selection, where possible, of the first forum in which key factual determinations will be made (pointing out that a teacher alleging wrongful termination or other adverse action can generally choose from multiple forums and causes of action). Here factual determinations initially made by a Tenure Commission hearing referee were held binding upon an arbitrator. Conceivably those factual determinations could also be carried forward into a subsequent circuit court action involving a quite different cause of action. For example, suppose Adis had been fired rather than suspended and had subsequently filed a discrimination action against the school district. The hearing referee's factual determination that she had committed a battery would in all likelihood be binding upon the circuit court, with the accompanying adverse consequences for her civil rights suit. See *Guy Cole v. West Side Auto Employees Federal Credit Union, 229 Mich App 639 (1998),* discussed in Vol. 8, No. 3 of *LawNotes (Fall 1998).*

With the trend toward increased use of ADR in employment disputes, along with the various administrative proceedings to which employers and employees may be subject, the doctrine of collateral estoppel becomes a potentially powerful weapon for employers to block employees attempting to pursue recourse to circuit court upon different causes of action. The circuit court, unable to examine for itself the key facts underlying the case, will often find itself bound to grant employers' motions for summary disposition.

The assumption underlying such a result is that there is sufficient confidence in the fact-finding rules, procedures and expertise of the various administrative and alternative dispute resolution tribunals whose determinations may be accorded collateral estoppel effect such that these may be deemed provide adequate protection for aggrieved employees when the findings of such tribunals are substituted for and preempt the fact-finding function of the circuit court and circuit court juries in subsequent litigation, including those involving different causes of action. A question is whether application of the doctrine of collateral estoppel in such subsequent litigation is a logical corollary of the judicial policy favoring voluntary dispute resolution (especially in cases where the "voluntary consent" may derive from a contract of employment which in the vast majority of cases is an unnegotiated document) and of the standards for judicial deference to findings of fact by administrative tribunals.

This opinion, like *Cole*, again highlights the importance of preparing and submitting to the administrative or ADR fact-finder proposed findings of fact which will have the greatest potential collateral estoppel effect in any subsequent arbitration or litigation arising out of the same circumstances that may be filed by the employee. It also highlights the importance, where possible, of choosing the most favorable available ADR or administrative forum, because the factual determinations from that forum may have collateral estoppel effect in any and all subsequent ADR, administrative, and judicial proceedings addressing the same matter. *No. 200468, decided December 8, 1998; O'Connell, Smolenski, Gribbs.*

Arbitrations Under Federal Arbitration Act Not Subject to Any Michigan Public Policy Barring Arbitration of Civil Rights Claims

DeCaminada v. Coopers & Lybrand, LLP. Plaintiff worked for defendant for 30 years prior to his termination. He sued alleging age discrimination. Defendant moved to compel arbitration pursuant to its Partners and Principals Agreement. The lower court denied the motion and defendant appealed. The court of appeals reversed, ruling that as a "written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy...arising out of such contract" the arbitration clause was subject to the Federal Arbitration Act (FAA) (9 USC 1 et. seq.).

The court, citing the opinion of the 6th Circuit in *Asplundh Tree Expert Co. v Bates (*71 F3rd 592) (6th Cir. 19) next ruled that Sec. 1 of the FAA, which excludes from FAA coverage "contracts of employment of seamen, railroad employee *or any other class of workers engaged in foreign or interstate commerce*" (emphasis supplied), applied only to workers involved in the movement of goods and thus did not apply to plaintiff. The court then rejected plaintiff's argument that civil rights claims were outside the scope of the arbitration agreement, reasoning that absent a clear exclusion of any particular subject matter, doubts about the arbitrability of an issue should be resolved in favor of arbitration. The court also rejected plaintiff's argument that he should not be bound by the arbitration requirement because he was unaware these claims would be subject to it, holding that an arbitration clause is enforceable regardless of whether a plaintiff is specifically aware of its scope.

Plaintiff's final argument asserted a contractual arbitration of his age discrimination claim was a violation of Michigan public policy, citing *Heurtebise v Reliable Business Computers* (452 Mich 405) and *Rushton v Meijer, Inc.* (225 Mich App 156). While acknowledging these cases as well as the court of appeals panel con-

vened to resolve the conflict between *Rushton* and *Rembert v Ryan's Family Steak House* (226 Mich App 821), the court, citing the Supreme Court decision in *Doctor's Associates, Inc. v. Casarotto* (517 US 681; 1996), ruled that even if Michigan public policy is ultimately held to preclude arbitrations of civil rights claims pursuant to a contract of employment, the FAA, where it applies, would specifically preempt any state law or policy that invalidates arbitration agreements.

Comment: In the event the holding in *Rushton* were to be affirmed by the *Rushton/Rembert* conflict panel, or on appeal by the Michigan Supreme Court (outcomes that at this writing seem more and more unlikely), counsel for employers seeking to enforce a contractual arbitration clause to a civil rights claim will want to examine the opinion in *DeCaminada* and the FAA closely. If the Federal Arbitration Act applies, arbitration of the civil rights claim will be enforced regardless of any Michigan public policy to the contrary. *No. 200089, decided November 17, 1998; Wahls, Holbrook, Fitzgerald.*

Rymar v. Michigan Bell Telephone Co; "Reasonable Time to Heal" Doctrine Under MHCRA Overruled

Lamoria v. Health Care & Retirement Corporation (Special Panel under MCR 7.215(H)(3). The special panel was convened to resolve the conflict between *Lamoria* 230 Mich App 801, (1998) (discussed with respect to other issues in *Lawnotes,* Summer 1998) and *Rymar v. Michigan Bell Telephone Company*, 190 Mich App 504 (1991). In *Rymar* the Court of Appeals, relying upon legislative history, ruled that reasonable accommodation under MHCRA includes "reasonable time to heal," that temporarily injured employees must be extended such an a reasonable time to heal and failure to do so would be a violation of MHCRA. In *LaMoria,* plaintiff contended defendant's refusal to extend her medical leave beyond the six month period permitted by company policy constituted a failure to provide reasonable accommodation. The original Court of Appeals panel reversed and remanded for trial LaMoria's MHRCA claim based on the employer's failure to extend a reasonable time to heal, but indicated it would have affirmed dismissal on that count were it not for the holding in *Rymar,* supra. The Special Panel in a one page per curiam opinion, overruled *Rymar* and held that MHCRA does not require an employer to allow an employee a reasonable time to heal. *Decided January 29, 1999. Corrigan, Kelly, Gribbs, McDonald, Doctoroff, Markey; Cavanagh (concurring).* ■

LAWNOTES FOR CIVILIANS

By popular demand, *Lawnotes* is now available to the general public! Any person who is not a Section member, or even a lawyer, can now subscribe to *Lawnotes* for the paltry sum of $30 per year (coincidentally, exactly the amount of annual Section membership dues). Yes, anyone — union representatives, human resources directors, CEOs and other sundry civilians — can have a personal copy of *Lawnotes* hand-delivered directly to their homes or offices by official uniformed members of the United States Postal Service, with the same special handling that Section members have come to expect from "bulk rate" service. Tell your clients, friends, neighbors, relatives and benighted colleagues. For subscription mechanics contact: Becky Harold or Twila Willard at the State Bar of Michigan, (517) 346-6300.

MERC UPDATE

Douglas V. Wilcox
White, Przybylowicz, Schneider & Baird, P.C.

Since the last Lawnotes, the Michigan Employment Relations Commission has issued over a dozen decisions and orders on a number of legal fronts. These decisions are now accessible on the web. The Bureau of Employment Relations website, www.cis.state.mi.us/ber, which includes decisions from August 1998 through November 1998. The Commission updates its website every month. Instructions on how to download the Commission's decisions are set forth within the website.

In the past, the *MERC Update* discussed in more detail some of the more interesting decisions issued by the Commission. This *MERC Update* now identifies in less detail all of the recent decisions, thereby making it more *user-friendly* for practitioners.

DUTY TO PROVIDE INFORMATION

City of Battle Creek (Police Dep't), MERC Case No. C97 J-221 (November 13, 1998). MERC reversed the ALJ's decision, which relied on federal law, and concluded that the employer's refusal to disclose witness statements and internal investigative materials in connection with the termination of a bargaining unit member was exempt from disclosure under the confidential information exception to an employer's general obligation to furnish information. The Commission rejected the balancing test used by the NLRB in such cases, claiming it to be unworkable in light of Section 7a(2) of the Labor Relations and Mediation Act, MCL 423.27, which provides that any "writing prepared, owned or used, in the possession of, or retained by the commission in the performance of an official function *shall be made available to the public*." MERC also indicated that its decision was consistent with Section 13(1)(t)(ix) of the Freedom of Information Act, citing *Newark Morning Ledger Co v Saginaw County Sheriff*, 204 Mich App 215 (1994). Because the information requested pertained to an internal investigation file, the employer had no duty to make the materials available to the union. *Citing Kent County (Sheriff)*, 1991 MERC Lab Op 374.

IMPASSE DURING ELECTION CAMPAIGN

Clinton Community Schools, MERC Case No. C97 L-274 (January 14, 1999). ALJ held that the superintendent lawfully declared impasse between the time the rival union's petition for election was filed and the date the district received actual service and notice of the filing of the union's election petition, citing *Paw Paw Public Schools*, 1992 MERC Lab Op 375. (No exceptions.)

DUTY TO BARGAIN

Grand Rapids Community College, MERC Case No. C97 F-114 (December 29, 1997). Commission dismissed the union's refusal to bargain charge finding insufficient evidence of an established past practice regarding the criteria for assignment of overload classes which the college unilaterally changed, citing *Port Huron Educational Ass'n v Port Huron Area School District*, 452 Mich 309 (1996).

Green Oak Twp, MERC Case No. C97 F-134 (November 10, 1998). ALJ dismissed union's claim that employer violated its bargaining obligation by changing established working conditions set forth in the township manual regarding evaluations, pay raises and the employee grievance procedure. Once the union became certified, the employer was required under Section 11 of PERA to deal only with the union relative to wages, hours, and working conditions of employees in the bargaining unit. The proofs also indicated that the township manual was limited to non-union personnel and was not closely followed by the employer. (No exceptions.)

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MERC UPDATE

(Continued from page 19)

INTERFERENCE WITH EXCLUSIVE BARGAINING RELATIONSHIP

Airport Community Schools, MERC Case Nos. C98 C-52, CU98 C-11 & R98 B-52. ALJ dismissed the incumbent union's claim that petitioning union interfered in the grievance process in order to discredit the incumbent union and enhance its own election campaign. The ALJ also found no evidence that the employer allowed the petitioning union to interfere with the grievance process. Regarding the representation matter, the ALJ concluded that the on-call substitute bus drivers should remain part of the bargaining unit of transportation employees. (Exceptions filed on the representation matter.)

DISCRIMINATION

City of Grand Rapids (Fire Dep't), MERC Case No. C97 C-65 (November 25, 1998). MERC found insufficient evidence to conclude that the city refused to promote a fire fighter because of his involvement in protected concerted activities as the union president. The Commission noted that the union was faced with a unique challenge in that the individuals involved in decision-making process regarding promotions were members of the same bargaining unit as the fire fighter who was denied a promotion.

Detroit Board of Education, MERC Case Nos. C97 J-211 &C97 J-223 (October 27, 1998). ALJ held that board retaliated against teacher for engaging in protected, concerted activities. The ALJ rejected the board's claim that the teacher was not engaged in protected activity, noting that the Commission has granted considerable latitude to employees' verbal statements made in the context of grievance or other meetings held to discuss terms and conditions of employment. *Citing City of Kalamazoo*, 1996 MERC Lab Op 556. (No exceptions.)

EVIDENTIARY ISSUES

City of Battle Creek (Police Department), MERC Case No. C96 L-283 (December 23, 1998). Union did not appeal the ALJ 's dismissal of the union's discrimination charge because the evidence was insufficient to establish the required nexus between protected activity and the employer's failure to promote the employee. On exception, the Commission affirmed the ALJ's refusal to grant a continuance of the hearing to allow the union to call two rebuttal witnesses because the union failed to make an offer of proof detailing the excluded testimony, and the substance of the proposed testimony was otherwise not apparent from the record. *Citing Michigan State University (Dep't of Public Safety)*, 1983 MERC Lab Op 587, *et al*.

ACT 312 CASES

Police Officers Association of Michigan, MERC Case No. CU97 J-39 (December 3, 1998). ALJ ordered union to cease and desist from engaging in bad-faith bargaining by submitting nonmandatory bargaining subjects to Act 312 arbitration. ALJ noted that specific contract language clearly indicated that the union had waived its right to bargain over changes in the pension escalator, and therefore could not submit the issue to Act 312 arbitration. (No exceptions.)

Cheboygan County and Cheboygan County Sheriff, MERC Case Nos. UC98 D-22 & UC98 E-26 (November 10, 1998). MERC concluded that the position of corrections officer/communications officer is not eligible for arbitration under Act 312 because the position is not an "emergency telephone operator" under Section 2(2) of Act 312, MCL 423.232.

OBJECTIONS TO ELECTION

Huron County Medical Care Facility, MERC Case No. R97 G-113 (November 12, 1998). Commission dismissed the employer's several objections to the election. The Commission found no evidence of "electioneering" by union representatives nor any interference with the employees' exercise of their right of free choice. Finally, on December 23, 1998, the Commission issued an order correcting its decision regarding the challenged ballots. The Commission held that before the count of the ballots, both parties agreed in writing that the six challenged ballots should not be counted. The employer signed the challenged ballots, agreeing that these individuals were ineligible to vote; the election agent also properly obtained consent from the union to sustain the challenges. Rule 46(2) applies only to unresolved challenged ballots that are decisive of the outcome of the election.

REPRESENTATION ISSUES

Charter Twp of Lansing, MERC Case No. R98 D-53 (November 10, 1998). Commission found a question of representation existed regarding the part-time parks and maintenance position, and indicated that the employer may accrete the position into the unit or request a mail ballot election be conducted. The Commission rejected the township's argument that part-time employees have historically been excluded from the unit, noting the Commission's overriding policy of including regular part-time employees in bargaining units of full time employees. *Citing Holland Public Schools (Food Service Program)*, 1989 MERC Lab Op 584. *See also, Airport Community Schools*, *supra*, (substitute bus drivers included in bargaining unit.)

DUTY OF FAIR REPRESENTATION

Mt. Clemens Community Schools, MERC Case Nos. C98 B-17 & C98 B-19 (October 27, 1998). ALJ concluded that the union did not violate its duty to fairly represent its members concerning its interpretation of a group arbitration award on the issue of longevity pay. It was not illegal for the union to disseminate information about the award through its newsletter and at union meetings instead of making copies of the award for its members. The union's decision to file a group grievance instead of a grievance asking for specific relief for specific employees was a good faith, rational decision. The ALJ also dismissed the union's claim against the employer for breach of contract. (No exceptions.) ■

IT'S TIME YOU REGISTERED FOR THE 1999 MERC CONFERENCE ON PUBLIC SECTOR LABOR LAW

The Michigan Employment Relations Commission (MERC) will present its 1999 Michigan Public Sector Labor Law Conference on May 13 and 14, 1999 at the Kellogg Hotel & Conference Center on the Michigan State University campus in East Lansing. The Conference is cosponsored by the Labor and Employment Law Section. The Conference is designed for people who work in public sector labor law — elected officials, administrators of public employers, union officers, staff and members, arbitrators, attorneys, and academics. The conference provides an opportunity to stay current on MERC decisions and developments in Act 312 arbitration, fact finding, unfair labor practice proceedings and related areas of law.

For registration forms and additional program information, call Maria Selweski at the Michigan Bureau of Employment Relations at (313) 256-2767.

THE NLRB STARTS 1999 WITH TRUESDALE AS NEW CHAIRMAN

George M. Mesrey
Clark Hill, PLC

The NLRB enters 1999 with a new chairman — John C. Truesdale — a long- time Board employee with more than 40 years of Agency experience. In a recent interview, Truesdale laid out his vision of the NLRB: "The Board needs to be *out* of politics and stick to being adjudicators, and our principal purpose is to get the cases out and apply the laws Congress has written, that will be the hallmark while I am here." Truesdale's nomination must be confirmed by the Senate.

The following is an outline of the most significant cases decided by the NLRB during the last three months.

BECK ISSUES

Electrical Workers (Paramax Systems Corp.), 327 NLRB No. 79 (January 13, 1999). The NLRB analyzed various issues under *Beck*.

COMPLIANCE ISSUES

Endicott Forging & Manufacturing, Inc., 327 NLRB No. 66 (December 28, 1998). The NLRB addressed compliance specification issues related to allowances for medical expenses and bonuses.

DEFERRAL ISSUES

Hallmor, Inc., 327 NLRB No. 61 (December 11, 1998). Analysis of the NLRB's deferral policy under *Collyer Insulated Wire.*

DISCRIMINATION

Modern Electric Company, 327 NLRB No. 25 (October 30, 1998). The employer violated section 8(a)(3) of the NLRA by failing to consider a union organizer for employment.

Mohave Electric Cooperative, 327 NLRB No. 7 (October 30, 1998). A discharge case involving protected concerted activity, retaliation for invoking the Board process and disloyalty to the employer.

Pioneer Concrete of Arkansas, Inc., 327 NLRB No. 64 (December 31, 1998). The NLRB analyzed the successorship doctrine and determined that the employer violated Section 8(a)(5) of the NLRA by refusing to recognize and bargain with the incumbent union.

Carpenters' Health & Welfare Fund, 327 NLRB No. 39 (December 8, 1998). The employer fringe benefit fund violated Sections 8(a)(1) and (3) of the NLRA by threatening employees with reprisal because of their protected wage complaints and discharging union supporters.

Hospital San Pablo, Inc., 327 NLRB No. 59 (December 15, 1998). Discharge of employee for engaging in union activity.

Donald A. Pusey, Inc., 327 NLRB No. 41 (November 27, 1998). The NLRB found that the employer violated section 8(a)(3) of the NLRA when it failed to hire an applicant because of his union affiliation and sympathies. The NLRB rejected as pretextual the employer's reason that it did not hire the employee because of its policy of not hiring applicants who would be taking a substantial pay cut.

E&L Transport Company, 327 NLRB No. 76 (December 31, 1998). The NLRB analyzed the employer's refusal to hire a unit employee to a confidential position.

The Grand Rapids Press of Booth Newspapers, Inc., 327 NLRB No. 72 (December 31, 1998). The NLRB concluded that the employer violated section (8)(a)(3) of the Act by refusing to hire substitute employees because they engaged in an economic strike on behalf of the Detroit Newspaper unions.

DUTY TO BARGAIN

Electrical South, Inc., 327 NLRB No. 58 (December 11, 1998). Unilateral implementation of health insurance proposal after impasse in bargaining.

Gadsden Tool, Inc., 327 NLRB No. 46 (November 30, 1998). The NLRB found that the employer engaged in bad faith surface bargaining with the union even though the parties ultimately reached a complete collective bargaining agreement.

EAJA

Broadway, Inc., 327 NLRB No. 20 (October 30, 1998). Dismissal of application for attorney's fees and expenses under the Equal Access To Justice Act.

EMPLOYEE COMMITTEES/SECTION 8(A)(2)

EFCO Corp., 327 NLRB No. 71 (December 31, 1998). The NLRB concluded that the employer's employee benefit committee, employee policy review committee and safety committees were labor organizations unlawfully dominated by the employer in violation of section 8(a)(2) of the NLRA.

FAILURE TO EXECUTE CONTRACT

Jaflo, Inc., 327 NLRB No. 24 (October 30, 1998). Failure to execute a collective bargaining agreement.

HIRING HALLS

Ironworkers Local #843, 327 NLRB No. 11 (October 30, 1998). The NLRB concluded that the union violated the NLRA by failing to place a member's name on the hiring hall weekly referral list.

INTERROGATION

LaSalle Ambulance, Inc., 327 NLRB No. 18 (October 30, 1998). The NLRB concluded that the employer's statement the day before the election that "if the Union were voted in the Company could not change employee wages unless and until there was a contract" violated the NLRA.

JURISDICTIONAL DISPUTES

Laborers' Local #113, 327 NLRB No. 31 (October 30, 1998). Jurisdictional dispute between the Operating Engineers and the Laborers. The NLRB awarded the tunnel digging work to the Laborers.

Carpenters' Local #210 Western Connecticut, 327 NLRB No. 4 (October 30, 1998). Jurisdictional dispute between the Carpenters and the Sheet Metal Workers. The NLRB awarded the metal stud erection and drywall interior wall work to the Carpenters.

Teamsters Local #40, 327 NLRB No. 60 (December 14, 1998). Jurisdictional dispute between the UAW and the Teamsters. The NLRB awarded the dock work to the Teamsters and assigned the truck driving work to both unions based on the percentage of freight/point of deliveries.

Teamsters' Local #222, 327 NLRB No. 49 (November 30, 1998). Jurisdictional dispute between the Teamsters and the Operating Engineers. The NLRB awarded the distributor truck work to the Operating Engineers.

OBJECTIONABLE CONDUCT

United Cerebral Palsy Association, 327 NLRB No. 14 (October 30, 1998). The NLRB ordered a new de-authorization election under the test in *Kalin Construction Co*, 327 NLRB 621 (1996), based on the employer changes to the "paycheck process" during the election.

Shephard Tissue, Inc., 327 NLRB No. 28 (October 30, 1998). Interrogation of employees concerning their union sympathies during the course of an organizing campaign.

Field Crest Cannon, Inc., 327 NLRB No. 29 (October 30, 1998). The NLRB directed a third election in the face of pervasive and purposeful unfair labor practices by the employer.

(Continued on page 22)

THE NLRB STARTS 1999 WITH TRUESDALE AS NEW CHAIRMAN

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SETTLEMENT AGREEMENTS

K&W Electric, Inc., 327 NLRB No. 21 (October 30, 1998). The NLRB analyzed the mechanics of settlement agreements.

Liberty Fabric, Inc., 327 NLRB No. 13 (October 30, 1998). The NLRB approved a non-board settlement of unfair labor practices committed by an employer and the subsequent dismissal of a decertification petition.

SUCCESSORSHIP/ALTER EGO

Pacific Custom Materials, Inc., 327 NLRB No. 23 (October 30, 1998). A successor employer unlawfully refused to hire former employees of a predecessor employer to avoid bargaining with the incumbent union.

Branch International Services, Inc., 327 NLRB No. 50 (November 30, 1998). The NLRB analyzed the alter ego doctrine.

Viking Industrial Security, Inc., 327 NLRB No. 43 (November 30, 1998). The NLRB discussed the single employer doctrine and derivative liability.

SUPERVISORY STATUS

Custom Mattress Manufacturing, Inc., 327 NLRB No. 30 (October 30, 1998). The NLRB addressed supervisory issues.

Victoria Partnership & Mirage Resorts, Inc., 327 NLRB No. 19 (October 30, 1998). The NLRB adopted the Administrative Law Judge's findings that two employees were not statutory supervisors and thus, the employer violated the NLRA by discharging them because of their protected concerted activities.

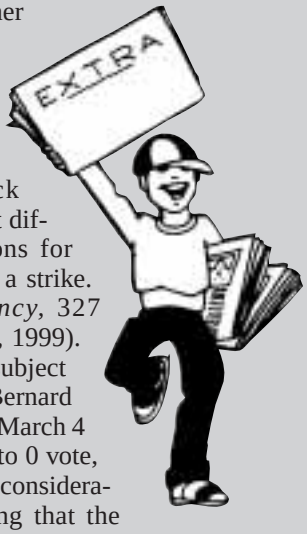
UNDOCUMENTED ALIENS

General Counsel Memorandum 98-15 (December 4, 1998). The NLRB General Counsel issued a memorandum addressing issues related to reinstatement and back pay remedies for discriminatees who are undocumented aliens.

USE OF INTERPRETERS IN BOARD PROCEEDINGS

Solar International Shipping Agency, Inc., 327 NLRB No. 69 (December 31, 1998). The NLRB addressed and clarified the General Counsel's longstanding policy to provide and pay for interpreters in representation proceedings. ■

Editors' note: In yet another decision arising out of the Detroit newspaper strike, the NLRB, by a vote of 3 to 2, declined to overrule the *Service Electric* rule which permits a struck employer to unilaterally set different terms and conditions for strike replacements during a strike. *Detroit Newspaper Agency,* 327 NLRB No. 164 (March 15, 1999). *Service Electric* was the subject of discussion at the 1998 Bernard Gottfried Symposium. In a March 4 decision, the NLRB in a 4 to 0 vote, denied DNA's motion for reconsideration of the decision finding that the strike was motivated by the employers' unfair labor practices and directing the reinstatement of strikers with backpay. 327 NLRB No. 146 (1999).



THE JOY OF LABOR LAW

Unimpeachable. In a sexual harassment case, the Michigan Court of Appeals ruled that the employer could not attempt to impeach the plaintiff's credibility by showing she allegedly used illegal drugs off the work site. *Tolbert v. Bockeride Dental Clinic*, Case No. 198303 (October 27, 1998)(unpublished). Perhaps the employer wanted the jury to look the plaintiff in the eye when she was asked about drug use. With all the recent talk about live witnesses - as opposed to dead witnesses - the value of impeachment by bad acts cannot be overstated. The lesson - If you want to impeach, a live witness is better than a dead witness.

Esjuderm Generis. Known to Latin-educated labor attorneys, this phrase means "of the same kind." As applied, it means when a general word is used after specific words, the meaning of the general word should be limited to the kind of things in the specific group. For example, in applying a contract that reads "employee may be immediately discharged for theft, fighting or other acts of misconduct" the word "misconduct" should be interpreted to refer only to offenses of a seriousness equivalent to "theft" and "fighting."

In a 1974 book, *Impeachment: A Handbook*, law professor Charles Black, Jr. applied this doctrine to the Constitution. "The President.... shall be removed from Office on Impeachment for, and conviction of Treason, Bribery, or other High Crimes and Misdemeanors." (This is what I call the "just cause" provision for presidents.) The specific words - "Treason, Bribery" - give meaning to the more general language – "other High Crimes and Misdemeanors." I wonder how labor and management attorneys would come down on this issue. Too bad there were no labor arbitrators in the House or Senate.

Speaking of foreign words and just cause, a Westlaw search restricted to labor cases revealed that federal courts have used a certain word of Scandinavian origin that got a public employee in D.C. in trouble. The word was used at least 93 times in published federal cases and least 13 times by the NLRB. The word was used to stress that narrow or stingy interpretations should not be given to labor statutes or remedies. See, *e.g.*, *Complete Auto Transit v. Reis*, 451 U.S. 401, 406 (1981)(Brennan, J.) and *Times Herald Printing Company*, 315 NLRB 700 (1995). This is enough to make one "anti-Semantic."

Poor Jacob. Baby Jacob, a fetus when his mother's employer fired her, cannot sue the employer under the Michigan Civil Rights Act (MCRA), the Whistleblowers' Protection Act (WPA) or the Handicappers' Civil Rights Act (HCRA). Indeed, he will not likely even be an eyewitness, since he was a fetus at the time of the firing. His mother alleged her wrongful termination led to Jacob's premature birth. In refusing to recognize a "new derivative cause of action in the area of civil rights or the WPA for prenatal injuries allegedly inflicted upon the child," the Court of Appeals, in a 2 to 1 decision, ruled "that the Legislature... did not intend to create the private right of action brought in this case by" Jacob's mother on behalf of Jacob. *Burchett v. RX Optical*, 232 Mich App. 174 (October 9, 1998). In short, the civil rights act does not create fetal rights.

No cause of action? No testimony from Jacob? This stingy, miserly interpretation must upset Right to Life! Dissenting, Judge Neff would allow Jacob's claim under the MCRA and HCRA. She could have paraphrased Justice Blackmun's impassioned dissenting opinion in a child abuse case. *DeShaney v. Winnebago County*, 489 U.S. 189, 213 (1989)("Poor Joshua!)

John G. Adam

EVIDENTARY LESSONS FROM MICHIGAN COURTS: LITIGATOR'S UPDATE

Joseph R. Furton, Jr.
Keller, Thoma, Schwarze, Schwarze, DuBay & Katz, P.C.

1) MICHIGAN SUPREME COURT REVIEWS MRE 803, 804

In *People v Hendrickson*, Case No. 110397 (Dec. 28, 1998), the Michigan Supreme Court, in an opinion by Justice Kelly, examined the foundation for the "present sense impression" exception to the hearsay rule, MRE 803(1). In the case, a woman called 911 to inform the police that she had "just had the living sh— beat out of (her)" by her live-in boyfriend, and that she was going to the hospital. She later went to the Police Department, gave a statement, and had her injuries photographed. She later recanted, and refused to testify against the defendant. The prosecutor sought to use the 911 tape under MRE 803(1). The Supreme Court ruled that the present sense impression hearsay exception requires independent corroboration of the events of the hearsay statement. The Court held that the photographs of the woman's bruises were proper corroboration of the beating and thus admission of the statement was proper.

Justice Boyle concurred, but noted that the text of MRE 803(1) does not require corroborating evidence to admit a res gestae statement. Justice Brickley, dissented, writing that an 803(1) statement required corroboration and that burden had not been met. He also noted that the "extrinsic evidence" requirement did not allow use of the statement itself to establish foundation.

The Court addressed another evidentary issue in *People v Meredith*, Michigan Supreme Court Case No. 111977 (December 9, 1998). The Court, in a per curiam opinion, held that a witness who cites a privilege (such as the Fifth Amendment) is "unavailable" for purpose of MRE 804(b)(1). Thus, admission of prior testimony would be proper if the opposing party had an opportunity and motive to cross-examine previously.

2) A MAP TO A SUCCESSFUL *DAVIS-FRYE* OBJECTION: MRE 702

In an unpublished opinion, a Michigan Court of Appeals panel (Judges Holbrook, Young, Batzer) set forth a good road map on how to exclude unreliable expert testimony under MRE 702. In *DePyper v Navarro, et al.*, Case No. 191949 (November 6, 1998), plaintiff wished to present expert testimony that the ingestion of Bendectin, a drug commonly prescribed to women suffering from morning sickness during pregnancy, caused serious birth defects. The defendants objected, claiming that the testimony was inadmissible under MRE 702 and the *Davis-Frye* standard for admissibility of expert testimony. The trial court agreed, later granting defendants' motion for summary disposition.

The Court of Appeals first articulated the proper formulation of the issue at a *Davis Frye* hearing. It is: "do impartial and disinterested experts in the field of _____ generally accept the method employed by plaintiff/defendant's expert in assessing _____?" The Court then noted that it would examine the trial court's decision whether to admit or exclude expert testimony only on an abuse of discretion standard.

3) EXCLUDING EVIDENCE OF DRUG USE IN SEX HARASSMENT CASE: MRE 404

In *Tolbert v Brockriede Dental Clinic*, Case No. 198303 (October 27, 1998), the defendant sought to introduce testimony that the plaintiff used drugs while employed at the defendant dental clinic. The defendant argued it was permissible character evidence under MRE 404(b) to establish that the plaintiff was not the person she portrayed herself to be. Defendant argued that the exclusion of such evidence would leave the jury with "an incomplete picture of Rosemary [the plaintiff] and her actions." The trial court disagreed, holding that the testimony had nothing to do with the allegations of sex harassment, and sustained plaintiff's objection.

The Court of Appeals agreed, holding that the exclusion of the evidence was not an abuse of discretion. They called the evidence "irrelevant and collateral" and "prejudicial." They noted that the drug use was remote in time and never occurred in the workplace. Finally, they noted that drug use does not relate to the character trait of truthfulness or untruthfulness, and was thus not admissible under MRE 608.

4) EXPERT TESTIMONY EXCLUDED AS A PENALTY FOR THE EXPERT'S MISCONDUCT.

In *Daratony v Bumgardner, et al.*, Case No. 202562 (November 13, 1998), the Court of Appeals (Judges Whitbeck, Cavanagh, Neff) reviewed a case in which the plaintiff's expert had examined a fire scene to determine the cause and origin of a fire. He admitted at his deposition that anyone coming onto the fire scene after he was through with it would have had a difficult time determining the cause of the fire. The defendants moved to exclude his testimony because they had been effectively precluded from responding to his conclusions by his misconduct. The trial court excluded his testimony. The Court of Appeals upheld the decision, citing *Brenner v Kolk*, 226 Mich App 149 161; NW2d 65 (1997).

5) TRIAL COURT ABUSED ITS DISCRETION BY OVERTURNING JURY VERDICT BASED ON ALTERNATE JUROR'S MISCONDUCT

In *Larson v Ford Motor Co.*, Case No. 195563 (December 29, 1998), the trial court overturned a jury verdict of "no cause" for the defendant based on a finding of misconduct by an alternate juror. The court, after a hearing, made a finding that the alternate juror had expressed bias against the plaintiff's attorney and expert. It granted the plaintiff a new trial.

The Court of Appeals reversed (Judges Hood, Griffin, Markey) and reinstated the jury verdict. First, it noted that a jury verdict may only be impeached for allegations of misconduct or mistake for two reasons: undue influence by outside parties or clerical errors. They held that an alternate juror does not constitute an "outside party." Second, they noted that no evidence existed that deliberating jurors took into account the alternate's bias in their verdict. Thus, plaintiff had failed to establish prejudice, as required by MCR 2.611(A) and MCR 2.613(A)

6) TRIAL COURT CAN PERMIT LATE ANSWERS TO REQUESTS TO ADMIT

In *Daniel v Cesar*, Case No. 200273 (December 4, 1998), the Court of Appeals (Judges Griffin, Gage, Danhof) ruled that a trial court did not abuse its discretion by refusing to deem unanswered requests to admit as admitted, even though the 28 days for responding had passed. The court held that the trial court's concern that doing so would not be in "the interest of justice" was not an erroneous ruling. ■

INSIDE *LAWNOTES*

- State Bar President Tom Lenga makes his case for *mandatory* continuing legal education for Michigan lawyers. Stuart Israel is unpersuaded, and gets the last word. Both urge you to communicate your views to the Michigan Supreme Court.
- Tom Gravelle reviews the latest court decisions on a labor arbitrator's authority to issue subpoenas.
- Randal Cole reviews EEOC regulations governing medical certification under the FMLA.
- Mike Dankert, chief of the Wage and Hour Division, explains exactly what happened to the Michigan Department of Labor.
- Stan Moore writes a tribute to LELS 1999 Distinguished Service Award winner George Roumell.
- Roy Roulhac reports on the courts' review of MERC decision.
- Information on upcoming events and LELS business: the LELS-ICLE-FMCS 24th annual labor and employment law seminar on April 22 and 23 in Troy; the 1999 LELS-MERC public sector labor law conference on May 13 and 14 in East Lansing; *Lawnotes'* availability by subscription to non-Section members; and more.
- Labor and employment law decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC; the Joy of Labor Law; websites to visit; and more.
- Authors John G. Adam, John T. Below, Karl Brevitz, Mary C. Bonnema, Randal R. Cole, Janet C. Cooper, Mike Dankert, Gary S. Fealk, Joseph R. Furton, Jr., Thomas L. Gravelle, Scott G. Hornby, Stuart M. Israel, J. Thomas Lenga, Russell S. Linden, Timothy O. McMahon, George M. Mesrey, Stanley C. Moore III, Roy L. Roulhac, William C. Schaub, Jr., Douglas V. Wilcox and more.

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