LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

Volume 10, No. 1 **Spring 2000**

NEW LIMITS ON PUBLIC SECTOR UNIONS' INFORMATIONAL RIGHTS

Alison L. Paton
Alison L. Paton, P.C.

Just when those of us representing public sector unions had recovered from the shock of the Michigan Employment Relations Commission's decision in *Battle Creek Police Department*, 1998 MERC Lab Op 685, establishing a *per se* rule that a union representing disciplined members does not have the right under the Public Employment Relations Act (PERA), MCL 423.201, to obtain the employer's internal investigative disciplinary reports and witness statements, now comes an equally disturbing decision from the Court of Appeals — *Kent County Deputy Sheriffs' Ass'n v Kent County Sheriff and Kent County*, 238 Mich App 310 (1999), app for lv pdg — holding that such investigative disciplinary reports and witness statements are also not obtainable by a union under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*

The first sign of trouble under PERA appeared with the Commission's decision in *Kent County Sheriff*, 1991 MERC Lab Op 374, wherein the union processing grievances on behalf of disciplined members sought copies of the employer's investigative reports and witness statements relied upon by the employer in making its decision to discipline. In a decision which appeared to be based upon the particular facts presented, the Commission held that the employer met its burden of establishing that the requested documents were confidential and thus not subject to disclosure under PERA, noting that the employer had already revealed in the disciplinary write-ups provided to the union the specific factual basis for the discipline and the names of witnesses.

The issue was presented to MERC again in *Battle Creek Police Department*, 1998 MERC Lab Op 685. Administrative Law Judge Roy L. Roulhac issued a Decision and Recommended Order upholding the right of the union, which was proceeding to grievance arbitration on behalf of a disciplined member, to copies of the employer's investigative disciplinary reports and witness statements. ALJ Roulhac distinguished the Commission's decision in *Kent County*, finding that the City of Battle Creek had merely asserted, and had not factually established, that disclosure would interfere with its ability to conduct internal investigations. Furthermore, ALJ Roulhac reviewed the numerous federal precedents under the NLRA applying a case-by-case balancing of the union's need for the information against any legitimate and substantial confidentiality interest of the employer, and requiring the employer to accommodate disclosure as much as possible even where a legitimate and substantial confidentiality interest is shown.

On exceptions, the Commission in *Battle Creek Police Department* took the opportunity to "clarify" that in *Kent County* it had adopted a *per se* rule that internal investigative disciplinary reports and witness statements are not subject to disclosure under PERA. Acknowledging that such a *per se* rule is contrary to long-standing federal precedents under the NLRA, which MERC commonly looks to for guidance, the Commission noted that it is not obliged to follow federal precedent, and opined that the NLRA balancing test "would prove unworkable in the public sector" since the information at issue would "become part of the public record" and thus be disclosed even if MERC ultimately determined that PERA did not require disclosure. Hmmm.... aren't NLRB evidentiary records in unfair labor practice cases a "public record" subject to disclosure no less than in MERC unfair labor practice cases? And, in any event, isn't this the type of situation that *in camera* inspections and evidentiary protective orders are designed to address?

There is no question that MERC ALJs have the authority to issue *in camera* inspection orders and protective orders in the course of presiding over unfair labor practice evidentiary hearings (Rule 423.462(2)), yet inexplicably the Commission did not consider these devices as an alternative to its *per se* rule of non-disclosure. One bone, however, was thrown to the union in *Battle Creek Police Department* — namely, the Commission's holding that if the witnesses interviewed in the investigative proceeding are later called by the employer to testify at an arbitration hearing, then the union at the arbitration hearing would be entitled to "those portions of the witness statements which relate to that testimony." Query, why wouldn't the witness' prior statement in its entirely "relate to" that testimony, and who is to decide what portions "relate" — the employer? Further, what of exculpatory witnesses that the employer chooses not to call, whose identity may never become known to the union? Moreover, if the *per se* rule is justified by the employer's interest in conducting internal investigations, how is that interest any less weighty at the arbitration stage than at the pre-arbitration grievance steps where the grievance might potentially be settled? Finally, shouldn't the Commission be following a policy favoring disclosure of information undeniably relevant to the merits of a grievance challenging discipline so as to facilitate collectively-bargained resolutions, consonant with PERA's fundamental purpose of labor peace, and not a *per se* rule of non-disclosure making it impossible for the union to fully evaluate the merits of its grievance (not to mention fully representing its members) and forcing the union to arbitrate?

Indeed, the Commission's concession in *Battle Creek Police Department* to a PERA right of the union to receive at a grievance arbitration hearing any prior statements of a witness that "relates to" his/her testimony at the arbitration hearing is hardly meaningful and falls far short of what most labor arbitrators require an employer to produce based on contractual rights of due process implicit in any "just cause for discipline" clause — due process rights for the grievance arbitrator, not MERC, to apply in any particular case. Fortunately, we have in our labor community many astute and fair-minded arbitrators who, upon hearing an employer witness testify that the decision to discipline was in whole or in part based on an investigation the results of which were documented in some fash-

(Continued on page 2)

CONTENTS

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*

NEW LIMITS ON PUBLIC SECTOR UNIONS' INFORMATIONAL RIGHTS

(Continued from page 1)

ion, will require the employer to produce those documents for the union's review, and who will admit those documents into evidence upon submission by either party. Labor arbitrators at least, if not MERC, recognize that only in this way can the union, the grievant, as well as the arbitrator himself/herself know of all the evidence gathered by the employer, knowledge necessary to fully evaluate whether just cause existed, and only in this way can the union fully and meaningfully cross-examine employer witnesses. These implicit contractual due process rights generally recognized by labor arbitrators are especially important in discipline/discharge cases involving public sector employees who also have a constitutional right of due process, and thus where it can be argued that the grievance arbitration proceeding serves as the post-discipline full evidentiary hearing required by the constitutional right of due process, where all procedural due process rights must be accorded, including the right of full cross-examination.

Given MERC's *per se* rule precluding prearbitration disclosure of the employer's internal investigative reports and witness statements, what of the right of a union to obtain these documents under FOIA? This brings us to the latest slamming of a union's informational rights, this time by the Court of Appeals in *Kent County Deputy Sheriffs' Ass'n,* a decision reaching far beyond internal investigatory documents to virtually any document requested by a public sector union under FOIA. In this case, the union grieved the discipline of some members, and instead of making a request under PERA, the union made a request under FOIA for internal investigatory records, including witness statements. The Court ruled that the union was not entitled to this information under FOIA. The Court's reasons (set forth as objectively as possible by this writer) are set forth below, followed by the writer's admittedly not-so-objective (but well-intentioned) criticisms of same:

1. *The state courts lack jurisdiction over a public sector union's request for information under FOIA because such a request "create[s] an unfair labor practice issue that falls within MERC's exclusive jurisdiction." Further, "[b]ecause a public employer's response to a union's request for documents and other information is properly characterized as an unfair labor practice issue, the MERC has exclusive jurisdiction over this matter, and the the trial court has no jurisdiction to consider the matter."*

So, is MERC now to decide issues regarding the scope of a union's informational rights under FOIA? If so, what possible statutory or state constitutional provision confers upon MERC the jurisdiction and authority to do so? And if not, isn't the Court effectively ruling that a union, because it enjoys some degree of informational rights under PERA, has virtually no informational rights under FOIA? Furthermore, how does a public body's refusal to provide information requested exclusively under FOIA willy-nilly become transformed into a refusal to provide information in violation of PERA so as to be within MERC's exclusive jurisdiction?

2. *"It is well-established in Michigan labor law that the MERC's exclusive jurisdiction forecloses actions under other statutes or legal theories where the alleged wrongdoing raises an unfair labor practice issue," citing Rockwell v Crestwod School District, 393 Mich 616 (1975) and Lamphere Schools v Lamphere Federation of Teachers, 400 Mich 104 (1977).*

This is an overstatement of the holdings in *Rockwell* and *Lamphere.* Neither case stands for the proposition that the existence of a possible ULP remedy under PERA forecloses other statutory bases for relief. Rather, both cases involved claims relating to alleged illegal public employee strikes. There is no statute other than PERA which addresses public employee strikes, and hence it is no surprise that the Supreme Court found the claims in *Rockwell* and *Lamphere* to fall within MERC's exclusive jurisdiction. In *Kent County,* informational rights are at issue, and PERA is not the only statute which addresses the informational obligations of a public entity — FOIA does as well. Further, nothing in FOIA excludes public sector unions from its coverage, despite the fact that PERA was enacted, and thus public sector unions existed, well before FOIA. Moreover, FOIA Section 13(1)(n) makes explicit reference to PERA in providing that documents relating to collective bargaining are not included within the scope of this exemption from disclosure if PERA requires disclosure. If the Legislature intended that PERA be a public sector union's sole source of information rights, surely it would have included in FOIA such an exemption in its long list of Section 13 exemptions, or would have excluded public sector unions from the Section 2(c) definition of a "person" covered by the Act, which expressly includes "associations" without exception.

3. *"If this category of unfair labor practice claims could be recast as FOIA claims, . . . conflicting decisions would muddle the field of public sector labor law in this state."*

What is conflicting about MERC holding that a particular document is not subject to disclosure under PERA, and a court holding that the same document is subject to disclosure under the FOIA? After all, for MERC to hold that PERA does not mandate disclosure does not make it illegal for the employer to disclose should it choose to do so in response to a PERA request. Indeed, a responsible employer which feels it has nothing to hide, and which seeks to avoid arbitration of a grievance it believes lacks merit, should make full disclosure to the union in response to a PERA request even if not legally obliged to do so.

4. *As in Ramsey v City of Pontiac, 164 Mich App 527 (1987), the union's FOIA claim is "'factually indistinguishable and inseparable' from its claim that it needs the documents to pursue the officers' grievances."*

Ramsey involved a union-represented employee's suit protesting his failure to be promoted, wherein he brought a breach of contract/duty of fair representation claim together with tort claims; the Court dismissed the tort claims because they were factually the same as the contract breach claim, and the latter could not be sustained since the union had not breached its duty of fair representation. In contrast, the only basis upon which *Kent County* found the union's FOIA claim "factually indistinguishable and inseparable" from a PERA request is because the union admitted it sought the information for purposes of the pending grievances. Query, if a union in a future case states no purpose for its FOIA request, or asserts a purpose (for example, a political or public welfare purpose) not involving a grievance or collective bargaining, will a different result obtain? Further, why should a union's asserted purpose for its FOIA request have any legal bearing whatsoever when nothing in the FOIA requires a requesting party to assert any purpose or intended use in support of its request? See *MSEA v Dept of Management & Budget,* 428 Mich 104 (1987).

5. *The Court's prior decision in Local 312, AFSCME v City of Detroit, 207 Mich App 472 (1994), does not require a different result because it did not involve the same question as in this case, and therefore the doctrine of stare decisis does not apply. The narrow issue involved in Local 312, AFSCME was whether a union qualified as a "person" entitled to seek records under FOIA, and the opinion "makes no reference at all to the issue of MERC's exclusive jurisdiction over unfair labor practice claims."*

This is an extremely strained reading of *Local 312, AFSCME,* to be charitable. True *Local 312, AFSCME* does not specifically utter the phrase "MERC's exclusive jurisdiction over unfair labor practice claims," but that was the essence of the employer's argument, which the opinion expressed as the employer's "belief that the parties' labor dispute was governed by the Public Employment Relations Act (PERA) [citations omitted], and that the documents were exempt from disclosure." *Local 312, AFSCME* rejected the employer's PERA-based defense, holding that "[t]he PERA and the FOIA are not conflicting statutes such that the PERA would prevail over the FOIA," and concluding that the union was entitled to the information requested under FOIA despite the information's relationship to a subcontracting dispute between the parties. The *Kent County* panel's shamefully baseless distinction of *Local 312, AFSCME* to avoid its *stare decisis* impact is highlighted by footnote 7, in which the Court attempts to further justify its refusal to follow *Local 312, AFSCME* by noting that the opinion in that case is only one-and-one-half pages long; perhaps we should henceforth call this the "too succinct for stare decisis" rule.

6. *Even if the state courts had jurisdiction, PERA as the dominant law precludes the union's FOIA action. Since the Legislature intended PERA to be the dominant law in public-sector labor relations, "controversies over information disclosure can be resolved only under the PERA, not under the general FOIA provisions."*

Kent County makes no mention of the Supreme Court's decision in *Lansing Ass'n of School Administrators v Lansing School District Bd of Ed,* 455 Mich 285 (1997), which held that a collective bargaining provision negotiated pursuant to PERA limiting disclosure of employee evaluations to school administrative personnel did not preclude disclosure under FOIA, since "no exemption provides for a public body to bargain away the requirements of the FOIA." Obviously, the Supreme Court in *Lansing* did not find PERA to dominate FOIA. If PERA is not dominant so that FOIA requires disclosure of bargaining unit employee information to a third party despite a negotiated contract provision prohibiting disclosure, how can *Kent County* hold that PERA is dominant so as to permit the public employer to refuse to disclose bargaining unit member information to the union? It's difficult to avoid the cynical conclusion that it depends on who is making the request — if a member of the public, PERA is not dominant, but if a union, PERA is dominant, notwithstanding that bargaining unit member information is involved in both cases. Further, given the Supreme Court's reasoning in *Lansing* that no FOIA exemption permits the public employer through a PERA-negotiated contract clause to bargain away its FOIA obligations, how can the PERA bargaining relationship itself effectively exempt the public employer from its FOIA obligations as found by the Court of Appeals in *Kent County*?

7. *Footnote 8: "Though we need not decide this question, we seriously question the proposition that the FOIA applies to a public sector union's request for information from a public sector employer whose employees the union represents."*

Oh, really, this issue was not decided in this case? What possibly can remain of this issue given the *Kent County* holding that the courts don't even have jurisdiction to address a union's FOIA

(Continued on page 4)

NEW LIMITS ON PUBLIC SECTOR UNIONS' INFORMATIONAL RIGHTS

(Continued from page 3)

claim, and even if they did, PERA as the dominant law exempts the public employer from making disclosure to a union under FOIA? The inescapable, undeniable result of *Kent County* is that a public sector union has no enforceable FOIA rights vis-a-vis the public employer whose employees the union represents, yet the Court in footnote 8 pretends it has not addressed this issue. Hopefully, the Court will never have to address this phantom remaining issue, since presumably public sector unions and their attorneys will be smart enough to now make all FOIA requests in the name of some person or entity other than the union. A request in the name of an individual union officer or union member would make an interesting test case. Is the Court prepared to hold that individuals waive their FOIA rights when they elect under PERA to be represented by a union, relegating themselves to the same status as an incarcerated criminal having no FOIA rights under Section 2(c)'s definition of a "person" covered by FOIA? Alternatively, if not desirous of testing those waters, the public sector union can simply have some friendly person outside the union make the FOIA request, since nothing in FOIA prevents a person obtaining information under FOIA from disclosing it to others. *MSEA v Dept of Management & Budget*, *supra* at 125-126; *MSU Union v MSU Trustees*, 190 Mich App 300, 303 (1991). In addition, the individual employee disciplined can always seek disclosure of internal disciplinary investigation documents under the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq*. Had *Kent County* paused to consider the real-life implications of its decision, and how a public sector union will still be able to obtain the information indirectly if not directly under the FOIA, perhaps the Court would have realized that the tremendous straining engaged in to reach its desired result was not worth the effort.

8. *Alternatively, the internal investigation documents requested by the union fell within the Section 13(1)(t)(ix) exemption for "personnel records of law enforcement agencies," and the public interest in disclosure does not outweigh the public interest in non-disclosure.*

Why then did the Court even find it necessary to render the far-reaching opinion it did, effectively holding that no public sector union has any FOIA rights vis-a-vis the public employer whose employees the union represents? It certainly allows for speculation that the Court saw an opportunity, and seized upon it. Perhaps too the Court realized that if it decided the case solely on the basis of the Section 13(1)(t)(ix) exemption, the upshot would be to preclude police unions, but not other public sector unions, from obtaining internal investigatory documents pertaining to their members, and the *Kent County* panel considered such a result unacceptably impolitic.

In the final analysis, had MERC in addressing internal investigative information under PERA done the responsible and sensible thing, and followed the federal NLRA case-by-case balancing approach, the *Kent County* Court would have never had to engage in the tortuous and unconvincing analysis it did to preclude disclosure under FOIA. Perhaps the Michigan Supreme Court will grant leave to appeal, and upon a more reasoned analysis reach a different result (but don't hold your breath). ■

INDIRECT EXAMINATION

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

A law clerk for a British appellate court prepared a letter for the judges to send to the Queen. The draft began: "Your Majesty, keenly conscious as we are of our many grave deficiencies...." One judge wanted none of this ceremonial humility, protesting he was not conscious of having many grave deficiencies. The letter was amended to accommodate this judge, to read: "... keenly conscious as we are of one another's many grave deficiencies...."[1]

Have I ever been guilty of bad direct examination techniques? Likely so, but that does not diminish my standing as a critic, being keenly conscious as I am of others' many grave deficiencies.

On to direct examination. Professor Thomas A. Mauet writes: "effective direct examinations that clearly, forcefully, and efficiently present the facts of the case will usually have a decisive effect on the outcome of a trial." Hard to argue with that. Mauet writes that, "direct examinations should let the witness be the center of attention. The lawyer should conduct the examination so that he does not detract from his witness."[2]

This means, of course, we should ask short, simple, open questions to elicit description and explanation from the witness. We should refrain from long-winded, convoluted, unnecessarily-leading, lawyer-centered questions that detract from the witness. We should not say, "Let me now ask you, that if you had occasion to attend a January 17, 1997 meeting with my client and others in the human resources office to discuss an allegation of discrimination, would you indicate what, if anything, you recall being said there, and by whom it would have been said?" Rather, we should ask: "What happened next? Where and when was the meeting? Who was there? What was said?"

Some lawyers habitually ask questions guaranteed to detract from the strength and clarity of direct testimony. One of the worst sorts of these questions uses the "recall" formulation.

Q. *Mr. Collinson, what do you recall happening next?*

Q. *Who do you recall being at the meeting?*

Q. *What was said, as you recall?*

The problem is that these questions address the witness' memory, not the facts. The time to focus on "recall" is during investigation, not at trial.

[WITNESS INTERVIEW]

Lawyer: *I'd like to find out about the meeting at the human resources office.*

Witness: *Sure, but the meeting was more than a year ago, and I'm not sure that I remember everything.*

Lawyer: *Don't worry. Nobody expects you to have a perfect memory. You may not remember what everyone said word for word, or every detail. You may just remember the essence of what was said. Just do your best. As we talk, I may be able to show you documents or tell you what others said about the meeting to stimulate your memory. Again, we don't expect perfection. Your job is to be truthful. Okay, tell me what you recall about the meeting.*

Witness: *I was there, of course. Mrs. Dupree, Ms. Barber and Mr. Cheatham were there, as I recall.*

Lawyer: *Anyone else? What about Mr. Stanley?*

Witness: *No, Stanley wasn't there. Me, Mrs. Dupree, Ms. Barber and Mr. Cheatham.*

Lawyer: *You're sure that was everyone? This is important. I want to bring this out at trial and we want your testimony to be strong and confident.*

Witness: *I'm sure. It was me, Dupree, Barber, and Cheatham.*

Once you know what the witness has to say about who was at the meeting, you are beyond the "recall" stage. Your direct examination should be designed to bring out the key facts clearly and forcefully. Practice with the witness.

[WITNESS PREPARATION]

Lawyer: *Next, I'm going to ask you about the human resources meeting. Let's try it.*

Witness: *Okay. This is very helpful.*

Lawyer: *All right, here goes. Mr. Collinson, who was at the meeting?*

Witness: *I was there. Also Mrs. Dupree, Ms. Barber and Mr. Cheatham were there.*

Lawyer: *Good. That's the way to say it. Clear, strong, confident.*

If you revert to the "recall" formulation at trial, you regress. You give the witness permission to qualify his answer, or worse, to not recall. Your formulation is important because almost invariably, human nature being what it is, the answer will reflect the form of the question.

[TRIAL]

Q. *Mr. Collinson, who do you recall being at the meeting?*

A. *Well, as I recall, it was me, Mrs. Dupree, Ms. Barber, and Mr. Cheatham.*

It could be worse.

Q. *Mr. Collinson, who do you recall being at the meeting?*

A. *Well, the meeting was over a year ago, and I'm not sure I remember everything, but as I recall, besides me, Mrs. Dupree, Ms. Barber and Mr. Cheatham were there.*

Or even worse.

Q. *Mr. Collinson, who do you recall being at the meeting?*

A. *Well, as I told you in your office when we were preparing this testimony, the meeting was over a year ago, and I'm not sure I remember everything, but as I recall, besides me, Mrs. Dupree, Ms. Barber, and Mr. Cheatham were there.*

Even if the witness rises above the question and gives an unequivocal answer, the "recall" formulation causes the listener to discount the testimony as "recollection" rather than fact.

Another frequently-heard, self-destructive examination technique is the "would have" formulation, as in: "Mr. Collinson, who would have been at the meeting?" Or, "What would you have done to investigate the discrimination complaint?" Such questions invite weak, ambiguous answers.

Q. *Mrs. Dupree, what would you have done to determine if there was a pending grievance alleging discrimination?*

A. *I would have searched the filing cabinets in the human resources offices where all active grievances are kept.*

Q. *Do you recall if there was any such pending grievance?*

A. *I don't recall there being any such grievance.*

Did Mrs. Dupree testify that she searched the filing cabinets or that she "would have" if anybody had asked her? Did she testify there was no pending grievance or that she didn't recall one? Indirect questions produce indirect answers. The examination could have gone like this:

"What was it you would have done next, as you recall?"

Q. *Mrs. Dupree, what did you do to find out if there was a pending grievance alleging discrimination?*

A. *I searched the filing cabinets in the human resources office where all active grievances are kept.*

Q. *Was there a pending grievance alleging discrimination?*

A. *No. There was not.*

To present direct testimony forcefully, questions should be direct, clear and focused on the facts. In direct examination, be careful of what you ask for, because you may get it.

— END NOTES —

[1]From Frank E. Cooper, *Writing In Law Practice* (1963) at 3, note 5.

[2]Thomas A. Mauet, *Trial Techniques* (5th ed., 2000) at 95. ■

NLRB WEB SITE KEEPS GETTING BETTER

If you haven't looked at the NLRB's web site recently you are missing out on great information and resources. Www.nlrb.gov has just added NLRB volumes 308 through 320, which contain hundreds of decisions issued between July 28, 1992 and December 3, 1995. Volumes 321 and up were part of the original site. The site also has added selected General Counsel memos under Public Notices.

In addition, An Outline of Law and Representation, updated September 1997, is now on the web site under the heading Manuals, and will soon be updated again. This is a well-written source prepared by the Office of the General Counsel. The web site also has all three NLRB manuals, on ULPs, representation, and compliance proceedings.

I have to admit that I am a NLRB web addict, and that I spend my spare moments reading GC memos and the latest NLRB press releases. Someone has to do it! The NLRB site, free to all, shows there is no reason for anyone not to know the law!

John G. Adam

FEDERAL SECTOR EMPLOYMENT DISCRIMINATION CLAIMS

Mimi M. Gendreau*
Administrative Judge,
Equal Employment Opportunity Commission

Federal employees have the same protection against employment discrimination as employees in the private sector or state and local government as provided in Title VII of the Civil Rights Act, (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act (29 U.S.C. 621 et seq.), the Equal Pay Act (29 U.S.C. 621 et seq.) and the Rehabilitation Act (29 U.S.C 791 et seq.). The Rehabilitation Act provides federal employees protection from disability discrimination and is now interpreted identically to the ADA. However, federal employees must follow an administrative process different than the private sector. This process is in 29 C.F.R. Part 1614 et seq.

The Equal Employment Opportunity Commission published revisions of the federal sector complaints processing regulations (29 C.F.R. 1614 et seq.) on July 12, 1999 in the *Federal Register*. *See* Federal Sector Equal Employment Opportunity: Final Rule, 64 Fed. Reg. 37644-37661. The revisions became effective on November 9, 1999 and apply to all pending complaints. Federal employees must comply with the administrative process prior to filing a civil action in U. S. District Court. Many attorneys are unfamiliar with this process and, therefore, have not represented parties in the administrative process though there is a need for competent representation. This article summarizes the administrative process and the revisions to 1614 made by the EEOC in its final rule and regulations.

The revisions seek to address inefficiencies and to address the perception that the process was unfair because the agency could reject an administrative judge's decision and replace it with its own decision. *See* Summary of the Federal Sector Equal Employment Opportunity: Final Rule published July 12, 1999 in the *Federal Register* ("*Final Rule*").

The revisions contain major changes. A common theme is the prevention of fragmentation of complaints. The revisions require that all federal agencies have an alternative dispute resolution program during and after the pre-complaint process. The revisions provide for amending the complaint before the end of the investigation without returning to the pre-complaint process. The revisions change the dismissal provisions. The administrative judge's authority is expanded during the hearing process and when issuing decisions pursuant to sections 1614.109 and 1614.110. *See Final Rule.* These major changes are addressed ahead.

A. Fragmentation of Claims

Fragmentation is the breaking up of a complainant's legal claim into separate factual allegations or incidents. Fragmentation occurs when the agency identifies the evidence that supports a legal claim and separates the evidence into separate claims and complaints. The splitting of claims into separate allegations can cause a complainant's valid claim to be found to be without merit because of the inability to present a pattern of incidents or as critical mass of evidence to support the claim. *See* discussion on fragmentation in the *Final Rule*. Complaints involving terms and conditions claims, harassment claims and continuing violation claims are most often subject to fragmentation. Fragmentation causes increased workload for the agencies and the Commission because claims are processed separately when they should be processed together.

For example, a female employee complains that her supervisor is more strict about the time and attendance rules with her than with male employees. She cites several incidents when the supervisor denied her annual leave request or marked her tardy for being late from lunch but did not do so with male employees. This is a claim of disparate treatment. Fragmentation occurs when the agency treats each incident as a separate claim and complaint. On some occasions when allegations were split into separate complaints, some incidents were dismissed as untimely because they occurred outside the 45 day deadline to seek counseling. The complainant could appeal such a dismissal under the prior version of 1614 but this led to further fragmentation of the case. *See* Management Directives, ("MD-110"), Chapter 5, Section III.

The revisions in 1614 addressed the fragmentation problem in several ways. The Commission changed the words "matter alleged to be discriminatory" or "allegations" to the word "claim" to prevent agencies from misidentifying claims or issues. *See* discussion on fragmentation in the *Final Rule*. The revisions permit amending complaints prior to the investigation without going through the pre-complaint process. The Commission added a mandatory consolidation provision in the revised regulations. *See* section 1614.606. The Commission eliminated remands by administrative judges. Appeals of partial dismissals were eliminated. A provision requiring mandatory dismissal of spin-off complaints was also added to prevent fragmentation.

B. EEO Counseling and the ADR Program

Under 1614.105(a)(1), federal employees who want to complain about being discriminated against on the basis of race, color, religion, sex, national origin, age or disability must contact an agency's EEO Counselor before filing a formal complaint of discrimination. The purpose of EEO counseling is to identify the issue being raised by the employee and to try to informally resolve the matter. The employee must request counseling within 45 days of the discriminatory action. Section 1614.105(a)(2) provides an exception to the 45 day time limit to seek EEO counseling. The revisions have not changed the counseling requirement or the 45 day time limit. The revisions now require that the EEO Counselor set forth the rights and responsibilities of the complainant in writing. Traditional EEO counseling should be completed in 30 days but can be mutually extended up to 90 days. If traditional EEO counseling does not resolve the claim, the EEO Counselor must notify the complainant of his/her right to file a formal complaint. *See* section 1614.105(2)(d) and (e). *See also* MD-110, Chapter 2 for guidelines on how the EEO Counselors should conduct counseling. Employees should be aware of the regulations applicable when they have appeal rights to the Merit System Protection Board and/or rights under a negotiated grievance process. *See* sections 1614.301 and 1614.302.

A major change is the new requirement that all agencies have an ADR program operational by January 1, 2000. The agencies have the flexibility to determine what type of ADR method(s) they choose and which cases the ADR program will be offered. While agencies are free to specify issues inappropriate for ADR, the agency cannot eliminate an entire basis of discrimination from the ADR program. For example, an agency may determine that all termination cases will not be offered ADR but the agency may not bar all claims of race discrimination from the ADR program. *See* MD-110, Chapter 3, Section II, 5.

The ADR program must contain four key features to be acceptable under the regulations. The program must provide for confidentiality by the participants and the ADR mediator or facilitator. Participation must be voluntary. The complainant must be told by the EEO Counselor that he/she may freely choose whether to participate in the ADR program. The complainant must be informed that if ADR fails, he/she is allowed to go forth with filing a formal complaint of discrimination and the remainder of the administrative process. Finally, any agreement reached during the ADR process must be enforceable. *See* MD-110, Chapter 3, Section VII.

If the employee chooses to participate in the ADR program, traditional EEO counseling terminates. The parties have 90 days to complete the ADR process. If the claim is not resolved within 90 days, the notice informing the complainant of the right to file a formal complaint must be issued. The complainant must file a formal complaint within 15 days of receipt of the notice. *See* section 1614.105(b)(2)(d) and (f).

C. EEO Complaints and Amendments

The employee has 15 days after receiving the notice to file a formal complaint of discrimination pursuant to section 1614.106(a) and (b). The revisions allow the complainant to amend the complaint at any time prior to the conclusion of the investigation to add issues or claims like or related to those in the complaint without being required to go through the pre-complaint processing. Complainants may also file a motion before the administrative judge to amend the complaint without having to go through the pre-complaint process. This also applies to adding a class complaint. *See* section 1614.204(b). The administrative judge will continue to determine whether to certify a class. *See* section 1614.204(d). While the previous regulations allowed for amendment of the complaint to add like and related claims, they also required complainants to go back through the pre-complaint process. This procedure led to the fragmentation of complaints and delay in investigation. The revisions allow for the entire complaint and amendments to be investigated together. *See* section 1614.106(d).

The revisions do not change that the agency's EEO investigator will continue to conduct the investigation of the discrimination complaint. The agency must complete its investigation within 180 days of the original complaint. If there are amendments to a complaint or consolidation of complaints, the agency has 180 days from the date of the last amended or consolidated complaint to complete the investigation. In any case, the agency must complete the investigation no later than 360 days from the original complaint. The complainant may request a hearing on the complaint, including the amended and consolidated complaints, before an EEOC administrative judge after 180 days from the date of the original complaint. *See* section 1614.106(e)(2). *See also* section 1614.108 and MD-110, Chapter 6 for a description of the proper method for investigating complaints of discrimination.

After the investigation, the complainant has the choice of an administrative hearing, or receiving a final decision from the agency and appealing that decision to the EEOC, Office of Federal Operations. After receiving the agency's final decision, the complainant may also file a civil action in U.S. District Court. *See* section 1614.108(f) and 1614.407(b).

D. Dismissals

The revisions to 1614 made several changes in the section 1614.107 dismissal provisions. There are two new bases for dismissal of complaints. In section 1614.107(a)(8) and (9), spin-off complaints and complaints found to misuse or abuse the EEO process must be dismissed. The provision that allowed dismissal because the complainant failed to accept a certified offer of full relief (formerly section 1614.107(h)) was eliminated. In section 1614.107(b), the Commission also eliminated the interlocutory appeal of partial dismissal of complaints by the agency.

1. Spin-off Complaints

Under section 1614.107(a)(8), spin-off complaints must be dismissed. Spin-off complaints are complaints about the processing of another complaint previously filed under these regulations. Although spin-off complaints will be dismissed, complaints about the process will be addressed during the processing of the original or underlying complaint. Thus, complainants will be informed that they must raise complaints about processing with the agency official or administrative judge. Such complaints will be addressed with the underlying complaint to ensure the integrity of the process. For example, if the complaint about the process concerns the preservation of evidence in the underlying complaint, the failure to address this concern during the investigation of the underlying complaint would raise questions about the integrity of the decision on the underlying complaint. The dismissal of spin-off complaints will also prevent the fragmentation of complaints because all issues related to the original complaint will be addressed at the same time rather than having issues being split among separate complaints. *See* section 1614.107(a)(8) and *Final Rule*. *See also* MD-110, Chapter 5, Section IV, D for the procedure that should be used to raise complaints of unfairness or discrimination concerning the processing of a discrimination complaint.

2. Abuse of Process Complaints

Complaints filed to misuse or abuse the EEO process must be dismissed pursuant to section 1614.107(a)(9). There must be a clear pattern of misuse of the EEO process for a purpose other than the elimination or prevention of employment discrimination. This dismissal provision sets forth strict criteria necessary to establish a clear pattern of abuse of process. There must be evidence of multiple complaints plus evidence of one of the following: (1) similar or identical allegations, allegations that have already been resolved, or vague allegations or; (2) evidence of circumventing other administrative processes, retaliating against the agency's in-house administrative processes or overburdening the EEO complaint system. *See* section 1614.107(a)(9)(i-iii). The Commission emphasized that evidence of multiple complaint filings by the same complainant without evidence of one of the other factors showing improper motives is insufficient to find a pattern of misuse of the process. This dismissal provision should be rarely used because a complainant's right to use the EEO process should be preserved. *See* discussion in the dismissal section of the *Final Rule*.

3. Offer of Resolution

The provision that allowed a complaint to be dismissed because the complainant failed to accept a certified offer of full relief (formerly section 1614.107(h)) was eliminated because it was often difficult for the complainant to assess what constituted full relief, particularly after compensatory damages became available to complainants.

In eliminating this dismissal provision, the Commission added the new offer of resolution provision in section 1614.109(c). This provision is similar to the offer of judgment provision in Fed. R. Civ. P. 68. The offer of resolution limits attorney's fees and costs incurred after the complainant fails to accept an offer of resolution and does not receive more favorable relief in the decision. The offer of resolution must be in writing and must include monetary relief, a provision for attorney's fees and costs and any non-monetary

(Continued on page 8)

FEDERAL SECTOR EMPLOYMENT DISCRIMINATION CLAIMS

(Continued from page 7)

relief. The offer must also include a notice setting forth the consequences of failing to accept the offer. An offer of resolution may be made anytime after the formal complaint is filed if the complainant is represented by an attorney but before 30 days prior to the hearing. If the complainant is not represented by an attorney, an offer of resolution cannot be made by the agency until after the administrative judge is assigned to the complaint. The complainant has 30 days to accept the offer. *See* section 1614.109(c)(1)-(3). The provision will not be applied where the interest of justice would not be served. For example, an agency makes an offer of resolution to the complainant but the complainant is told by an agency management official that the agency will not comply with the offer. Based on this, the complainant does not accept the offer. Later, the complainant received less relief in the decision than the offer. It would not be in the interest of justice to deny attorney's fees and costs after the acceptance period in this situation. *See* MD-110, Chapter 6, XIV for discussion of offer of resolution.

4. Partial Dismissals of Complaints

The Commission eliminated the complainant's ability to appeal complaints that are partially dismissed. Pursuant to section 1614.107(b), complaints can still be partially dismissed by the agency based on one of the provisions in section 1614.107(a)(1)-(9). To prevent fragmentation of complaints, complainants will no longer be able to take an interlocutory appeal of a partial dismissal while the remainder of the complaint is processed. When an agency dismisses part of a complaint, it must notify the complainant in writing of its decision, the reasons for the partial dismissal and that those claims will not be investigated. These documents and any supportive information that the agency used to base its decision must be placed in the investigative file. If a hearing is requested, the administrative judge has authority under the revised regulations to review the agency's partial dismissal and determine if the agency's decision was correct. *See* section 1614.107(b). If the administrative judge does not agree with the partial dismissal of a claim, the administrative judge will reinstate the claim and hear the claim along with the remainder of the complaint. The evidence relating to the reinstated claim will be developed through discovery. There will be no remands for further investigation of such claims under the revised regulations so that fragmentation will be prevented. *See* discussion of hearings in *Final Rule.* If the administrative judge agrees with the partial dismissal of a claim, that decision and rationale must be documented in the hearings record. The complainant cannot appeal the partial dismissal until after the hearing and final action has been issued on the remainder of the complaint. *See* section 1614.107(b) and MD-110, Chapter 5, Section IV, C.

E. Hearings

The change in the procedure for complainants to request a hearing is intended to eliminate delays in beginning the hearing process. *See* discussion on hearings in the *Final Rule*. A complainant wanting a hearing before an administrative judge will now send the request directly to the EEOC office with jurisdiction, with a copy to the agency. *See* sections 1614.106(e) and 1614.109(a). The EEOC Detroit District Office has jurisdiction for Michigan. The agency must inform the complainant when it acknowledges receipt of the complaint as to the EEOC office and address to send a hearing request. *See* section 1614.106(e). A list of EEOC offices and their jurisdictions can be found in the MD-110, Appendix J. The agency must forward the investigative file to the EEOC within 15 days of receipt of the complainant's hearing request. *See* section 1614.108(g).

The revisions provide the administrative judges with expanded authority over complaints. Pursuant to section 1614.109 an "administrative judge shall assume full responsibility for the adjudication of the complaint, including overseeing the development of the record." The administrative judge will no longer be bound by the statement of the issue in the agency's acceptance letter. The administrative judge will ensure that the issue is framed properly. Because of this expanded authority, administrative judges will no longer be permitted to remand complaints to complete the investigation. This applies even though both parties request the case be remanded. *See* discussion of hearings in the *Final Rule*. The administrative judge will see that the record is appropriately developed through the discovery process in section 1614.109(d). This will apply mostly in cases where the agency mistakenly dismissed a portion of a complaint and in cases where the administrative judge has permitted amendment and consolidation of complaints. In these instances, there would not be an investigation on a portion of the complaint. *See* MD-110, Chapter 7 for the hearings process.

The revised regulations continue to provide for discovery. *See* section 1614.109(d). Parties may obtain relevant information through interrogatories, depositions and requests for admissions and stipulations or requests for production of documents. The parties carry the cost of conducting their own discovery. A party may file an objection to discovery. While the MD-110 sets forth the procedural guidelines for discovery, the administrative judge's order which sets forth the discovery schedule and procedure must be complied with. *See* MD-110, Chapter 7, Section IV. The administrative judge has the authority to sanction a party who does not comply with an order to produce discovery or fails to comply with his/her orders in areas other than discovery. These sanctions include but are not limited to drawing an adverse inference against the offending party, excluding evidence, issuing a decision in full or in part in favor of the opposing party or other appropriate action. *See* section 1614(f)(3)(i-v). This latter provision provides administrative judges the discretion to formulate the sanction that fits most appropriately the offending conduct.

Administrative judges have the authority to regulate the conduct of the hearing. Thus, many judges require the submission of prehearing statements by both parties, or post-hearing briefs. Typically, a scheduling order will be issued to schedule a prehearing conference, a schedule for submitting witness lists, prehearing statements and a hearing date. The administrative judge also has the authority to decide that a decision without a hearing or summary judgment will be issued. The decision may be pursuant to a party's motion or on the administrative judge's own initiative after notice. *See* section 1614.109(g)(1-3). The standard for granting summary judgment is set forth in the *Final Rule* and the MD-110. It is important for both parties to submit an appropriate response when an administrative judge issues a notice of intent to decide a case without a hearing. *See Patton v. United States Postal Service*, EEOC Request No. 05930055 (1993).

Since the hearing is a continuation of the investigatory process, it is closed to the public. The hearing has the same general trappings of any other administrative hearing. A court reporter prepares a verbatim transcript of the hearing. The parties may have representatives present to ask questions. Representatives are not required to be attorneys. Some agencies have attorneys represent them and others use labor relations specialists. Many times the complainants have non-attorney representatives who may be co-workers. A complainant may also represent himself but have a technical assistant present taking notes. Approximately 50% of the complainants in this jurisdiction represent themselves during a hearing. Following opening statements, both parties may call witnesses. Witnesses are subject to cross-examination. Although the rules of evidence are not strictly applied, the parties may make objections to questions and evidence. Because the administrative judge is responsible to ensure a complete record, typically the judge will question the witnesses if the parties do not bring out relevant evidence.

A major change in the regulations is the effect of the administrative judge's decision. Under the prior regulations, the administrative judge's findings were considered a recommended decision that the agency could accept, reject, or modify and substitute its decision. The complainant had the burden to appeal an agency's decision. In the majority of the cases taken on appeal, EEOC affirmed the administrative judge's decisions when the agency rejected the decision. This created a perception of unfairness in the process. *See* discussion of hearings in the *Final Rule*.

The new regulations provide that administrative judges will issue decisions, not recommended decisions. The agency will have 40 days to issue a final order indicating that it will or will not implement the administrative judge's decision. If the agency does not intend to implement the decision fully, it must simultaneously appeal the decision. The agencies are no longer permitted to write their own decision or add new evidence. *See* section 1614.110. If the agency's final order indicates that it will implement the administrative judge's decision, the complainant will have 30 days from receipt of the agency's final order to file an appeal with the EEOC, Office of Federal Operations. *See* sections 1614.402 and 1614.403. The Commission also added a new provision for interim relief pending the agency's appeal. *See* section 1614.505.

The administrative judge has the authority to grant make whole relief when an agency is found to have discriminated.. This relief may include reinstatement, back pay plus interest, compensatory damages and attorney's fees and costs. The MD-110 now instructs the administrative judge to calculate the award of compensatory damages and permits an administrative judge to order medical examinations. *See* MD-110, Chapter 7, Section III.D. The revised regulations give the administrative judges the authority and responsibility to calculate the award of attorney's fees and costs including expert witness fees. *See* section 1614.501(e)(1) and (2). The complainant's attorney must submit a verified statement of attorney's fees and costs, and an affidavit itemizing the charges for legal services, within 30 days of receipt of the notice that the complainant is a prevailing party. The agency has 30 days to respond. Thereafter, within 60 days, the administrative judge will issue a decision determining the amount of attorney's fees and costs awarded. The standard for awarding attorney's fees is found in section 1614.501(2)(ii)(B). This standard is consistent with that found in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *See also* MD-110, Chapter 11.

The agency and complainant may appeal the administrative judge's decision to the Office of Federal Operations. *See* section 1614.403. *See also* section 1614.404 for appellate procedure. The complainant also has the option of filing a civil action in U.S. District Court at several points in the administrative process. The complainant may initiate a civil action after 180 days of the formal complaint, after notice, if no final action has been taken; after 90 days of receipt of the agency's final decision; after 90 days of receipt of the Commission's final decision on an appeal; or after 180 days from the date of filing an appeal from the final action if there has been no final decision issued by the Commission. *See* section 1614.407. The filing of a civil action will end the EEOC's processing of the complaint. *See* section 1614.409.

F. Conclusion

The administrative judge's authority to ensure the correct framing of the issue, the amendment and consolidation of complaints and the elimination of remands should ensure that all the relevant evidence is heard as a whole rather than fragmented in separate hearings. The result should be a more efficient process. The revisions of 29 C.F.R. 1614 are expected to correct perceptions of unfairness and inefficiencies in the process.

The revised regulations and the revised MD-110 can be found on the EEOC website at *www.eeoc.com*. This site should be reviewed for updates on the Commission's interim guidance regarding the implementation of the revised regulations. Cases decided on appeal from the Office of Federal Operations can be found in the Digest listed on the website, as well as on several other reporter services.

— END NOTE —

*Mimi M. Gendreau is an EEOC Administrative Judge. The views stated in this article are her own and do not constitute EEOC policy or guidance. ■

PUBLIC SECTOR LABOR LAW CONFERENCE CELEBRATES PERA's 35TH ANNIVERSARY

Plan to attend the fourth annual Public Sector Labor Law Conference co-sponsored by the Michigan Employment Relations Commission and the State Bar of Michigan Labor and Employment Law Section. The conference, on Tuesday and Wednesday, June 6 and 7, 2000, at the Kellogg Center on the Michigan State University campus in East Lansing, will commemorate the Public Employment Relations Act's 35th anniversary.

The program includes workshops and presentations on MERC and PERA in the courts, the duty to bargain, the duty of fair representaiton, the duty to provide information, collaborative negotiations, pay for performance plans, workplace technology and the labor relations practitioner, FMLA, free speech and other constitutional rights in the public sector workplace, and more.

For details and registration information contact: Maria Selweski, MERC Detroit offive at (313) 256-1111.

1999 APPELLATE REVIEW OF MERC DECISIONS

Roy L. Roulhac,
Administrative Law Judge
Michigan Employment Relations Commission

Duty to Bargain - Unilateral Removal of Bargaining Unit Work - Supervisory Status. *City of Detroit* v *Association of City of Detroit Supervisors*, Docket No. 204946, February 9, 1999, unpublished. The employer assigned nine non-supervisory sanitation workers represented by Teamsters Local 214 to fill vacant foremen positions within the ACODS units. The sanitation workers received "out-of-class" pay and the employer continued to send their dues to Local 214. Within 14 months the employees had been formally promoted to foremen and their dues were paid to ACODS. The Commission rejected ACODS' claim that the employer unilaterally removed bargaining unit work and assigned it to non-unit employees because the dues allegedly lost by ACODS did not constitute the kind of adverse impact contemplated in *Detroit Water & Sewerage*, 1990 MERC Lab Op 34, 40-41.

The Court affirmed the Commission's decision and rejected ACODS' attempt to factually distinguish *Detroit Water.* The Court noted that even if the MERC erred in applying the adverse impact test by examining the impact on the non-supervisory sanitation workers instead of on the ACODS unit itself, the error was harmless. The Court also concluded that the sanitation workers' temporary supervisory assignments did not violate PERA's prohibition against including supervisor and non-supervisors in the same bargaining unit. The Commission's decision is reported at 1999 MERC Lab Op 346.

Duty to Bargain - Employer Status or Identity. *Grand Rapids Employees Ass'n of Public Administrators Police Officers Labor Council* and *Grand Rapids Employees Independent Union v City of Grand Rapids*, 235 Mich App 398 (April 30, 1999). In a unanimous decision, the Court of Appeals affirmed MERC's dismissal of unfair labor practice charges against the City of Grand Rapids and the Grand Rapids Housing Commission. The charges alleged that the City and the Commission violated PERA by announcing that the Housing Commission was a separate employer and was, therefore, no longer bound by contracts between the unions and the City. The Court adopted MERC's reasoning that 1996 amendments to the Housing Facilities Act, MCL 125.651 *et seq.;* which permitted housing commissions to employ and fix the compensation of their employees in the absence of a city resolution to the contrary, was sufficient authority for the Commission to qualify as a separate employer under PERA.

The Court rejected the Unions' assertions that the 1996 amendments were only minor, non-substantive modifications and the separation of the Housing Commission from the City retroactively impaired its employees' vested rights. The Court observed that the Housing Commission was not bound by the collective bargaining agreements, was not a party to them, and did not take part in negotiations. Moreover, the Court noted that Housing Commission employees retained their contractual rights and any displaced employees would be given jobs with the City pursuant to the terms of the agreement. The Commission's decision is reported at 1997 MERC Lab Op 358.

Representation Issues - Act 312 Eligibility. *Police Officers Association of Michigan v City of Southfield*, Docket No. 208703, August 20, 1999, unpublished. POAM represents 13 public safety technicians (PSTs) who provide emergency dispatch services for the Southfield police and fire departments and the Lathrup Village police department. Although the PSTs are included in the Civilian Support Services (CSS), a component of the public safety group which also includes the police and fire departments, the MERC dismissed the union's petition for compulsory arbitration under 1969 PA 312, MCL 423.321 *et seq.* It observed that while budgets for all public safety groups are presented together, the PSTs' budget was separately prepared, defended, and administered by its civilian director, who, like the police and fire chiefs, reports to the city administrator; only the director has authority to hire, fire, discipline, promote, or suspend PSTs; and although the parties' last contract designated police chief as a participant in the grievance procedure, he had no control over the PSTs terms and condition of employment that would likely be the subject of a grievance.

The Court affirmed MERC's findings and rejected the union's attempt to distinguish *POAM* v *Lake County*, 183 Mich App 558 (1990), in which the Court found the statutory definition of public police or fire department, which includes emergency medical service and emergency telephone operators employed by a police or fire department, was unambiguous, and the Legislature must have intended to exclude emergency medical personnel from eligibility for compulsory arbitration when they were organized as a separate department from police and fire departments. The Commission's decision is reported at 1997 MERC Lab Op 659.

Representation Issues - Supervisory Status - Act 312 Eligibility. *POAM v FOP and POAM v Montcalm County*, 235 Mich App 580 (May 21, 1999). Incumbent union FOP appealed, and the County of Montcalm cross-appealed, MERC's direction of election permitting Montcalm County Sheriff Department's Act 312-eligible and non-Act 312 employees represented by the FOB in a single bargaining unit to determine whether they wished to form separate bargaining units. The Court affirmed MERC's application of its longstanding policy that Act 312 employees should be in separate bargaining units from non-Act 312 employees, although it does not require existing mixed units to be separated.

In a case of first impression, the Court concluded that MERC did not err in determining that the different remedies available to Act 312 employees outweighed considerations which favored finding a community of interest with non-Act 312 employees. Additionally, the Court upheld MERC's finding that the sergeants and lieutenants were supervisors who should be segregated from the deputies in a new unit, while allowing supervisors and subordinates to be commingled in the old unit because MERC was not called upon to determine if the latter group should be separated. Finally, the Court agreed with MERC's conclusion that the County violated its bargaining duty by refusing to bargain while this matter was pending before the Court. Section 23(f) of the Labor mediation Act, MCL 423.23(f); MSA 17.454(25)(f) explicitly states that the commencement of an appeal shall not, unless specifically ordered by the Court, operate as a stay of MERC's order.

MERC's opinions are reported at 1997 MERC Lab Op 157 and 1988 MERC Lab Op 63.

Duty to Provide Information - Internal Affairs Records - Freedom of Information and Employee Right to Know Acts. *Kent County Deputy Sheriffs Ass'n* v *Kent County Sheriff and Kent County*, 1999 Mich App Lexis 323 (October 26, 1999). In an earlier MERC proceeding between the same parties, 1991 MERC Lab Op 374, the Association sought the release of internal affairs files, i.e., records and witness statements relating to the employer investigation of deputy sheriffs disciplined for alleged misconduct. The Commission found that the files were exempt from disclosure under the PERA.

Several years later, when two different deputies were disciplined for alleged misconduct, in an apparent attempt to avoid a similar result, the Association filed a lawsuit in circuit court under the Freedom of Information (FOI) and the Employee Right to Know (ERK) Acts to compel the defendant to release the deputies' internal affairs files. The County, relying on the 1991 MERC ruling,

argued that the MERC had exclusive jurisdiction over the matter and if the FOIA or ERKA were to be interpreted to require disclosure, then these statutes would be in conflict with the PERA which protects internal affairs records from disclosure and takes precedence over the FOIA. Defendant also contended that the investigatory files are not subject to disclosure under either the FOIA or the ERKA. The Court of Appeals agreed and reversed the trial court, which ordered the release of the documents.

In *City of Battle Creek*, 1998 MERC Lab Op 684, which involved the POAM's attempt to obtain internal affair records, the MERC reiterated its position that copies of internal affairs records fall within a confidentiality exception to an employer's obligation to provide information that is relevant and necessary to the performance of a union's duty as a collective bargaining representative.

Procedure and Evidence - Late Filed Exceptions - Abuse of Discretion. *UAW* v *Frenchtown Charter Township*, Docket No. 211639, November 2, 1999, unpublished. In a 2-1 decision, the Court held that MERC did not abuse its discretion in denying the employer's motion for retroactive extension of time to file exceptions to the ALJ's decision finding that it violated PERA Section 10 by discriminating against three employees in connection with a union organizing drive. The Court emphasized that the employer had been granted not one, but two extensions, and still missed the deadline. In addition, the Court noted that in its first motion for retroactive extension, the employer set forth no new ground for its failure to timely file the exceptions and it was not until a month and a half later that any explanation for the delay was proffered. The Court observed that the employer's attorney claimed to represent the employer in labor law matters and must, therefore, be assumed to know that exceptions must be *received* by MERC by the close of business on the last day of the period granted for filing, not simply mailed on that date. The Court concluded that although there was no indication that the union would be prejudiced by the late filing, MERC's refusal to allow accept the exceptions could not be properly characterized as an abuse of discretion.

Judge Hilda Gage dissented. She favored applying the doctrine of substantial compliance, utilized by the Court in workers' compensation cases, for the view that the MERC abused its discretion by dismissing the employer's appeal for a minor procedural infraction. The Commission's decisions are reported at 1998 MERC Lab Op 106 and 1998 MERC Lab Op 271.

Unit Clarification - Substitute Bus Drivers - Community of Interest. *Coldwater Community Schools v Coldwater Educational Support Personnel Ass'n*, Docket No. 214020, November 16, 1999, Unpublished. The Court affirmed MERC's finding that the Employer's on-call, per diem substitute bus drivers were casual employees who did not share a sufficient community of interest with regularly scheduled drivers to be included in their bargaining unit. The substitutes' assignments were irregular, with no guarantee or commitment to work from one day to the next, and they were permitted, within reason, to decline assignments without penalty and hold other jobs. The Commission distinguished this case from *Southfield Public Schools*, 1984 MERC Lab Op 162, aff'd 148 Mich App 714 (1985), in which a group of substitute, on-call custodians were found to be regular employees because they were called virtually every day and had essentially committed themselves to working every day. MERC's opinion is reported at 1998 MERC Lab Op 471. ■

LABOR AND EMPLOYMENT LAW SECTION DISTINGUISHED SERVICE AWARD NOMINATIONS

The State Bar of Michigan Labor and Employment Law Section presents its Distinguished Service Award to recognize individuals who have made outstanding contributions to the practice of labor and/or employment law. Award recipients are recognized at the Section's mid-winter meetings. Each recipient may designate a $1,000 scholarship at a Michigan law school.

The Award is presented to individuals who:

1. have made major contributions to the practice of labor and/or employment law;
2. reflect the highest ethical principles;
3. have advanced the development of labor and/or employment law;
4. have a long-established commitment to excellence; and
5. are recognized and respected by all constituencies in the Section.

Nominations should be submitted to LELS Distinguished Service Award c/o David E. Khorey at Varnum, Riddering, Schmidt & Howlett LLP, Bridgewater Place, P.O. Box 352, Grand Rapids, Michigan 49501-0352, Fax: (616) 336-7000, E-mail: dekhorey@vrsh.com.

Nominations should address the five award criteria. Nominations for 2001 must be received by June 1, 2000.

U.S. SUPREME COURT PROHIBITS ADEA SUITS AGAINST STATES

Andrew M. Mudryk
The Law Offices of Andrew M. Mudryk

The Supreme Court recently concluded that Congress exceeded its authority in including States as employers under the Age Discrimination in Employment Act (ADEA), 29 USC 621 et seq. Although the Court held that the ADEA contains a clear congressional intent to abrogate the States' immunity, it decided that Congress did not act pursuant to a valid grant of constitutional authority in enacting the statute.

In *Kimel v Florida Board of Regents*,[1] two sets of plaintiffs brought suit against their state employers alleging age discrimination under the ADEA. The Supreme Court granted certiorari[2] to resolve a conflict among the federal circuits on the question of whether the ADEA validly abrogated the States' Eleventh Amendment immunity.[3]

The Court began its analysis with a two-part test: (1) whether Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity and, if so, (2) whether Congress acted pursuant to a valid grant of constitutional authority.

To determine whether the statute properly subjects States to suit, the Court applied a "simple but stringent test: Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."[4] Looking at the plain language of the statute,[5] the Court determined that there was clear congressional intent to subject the States to suit.

The second part of the test presented a more difficult question. The Court first noted that, pursuant to Supreme Court precedent,[6] Congress lacks power under the Commerce Clause[7] to abrogate the States' sovereign immunity. However, Section 5, the enforcement provision of the Fourteenth Amendment,[8] grants Congress the authority to abrogate the States' sovereign immunity as long as it acts with appropriate legislation.

Although congressional authority is not limited to enacting legislation that is the exact wording of the Fourteenth Amendment, it must rely on judicial interpretation in determining what constitutes a constitutional violation. To ensure that Congress is acting with appropriate remedial legislation and not a substantive redefinition of the Fourteenth Amendment, the Court reiterated the following test: "'There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[9]

Applying that standard, the Court concluded that the ADEA was not appropriate legislation under Section 5 of the Fourteenth Amendment. The Court looked to previous Supreme Court cases which held that the age classifications at issue did not violate the Equal Protection Clause.[10] The Court noted that age is not a suspect classification since "all persons, if they live out their normal life spans, will experience [old age]."[11] Therefore, States may discriminate on the basis of age if the classification is rationally related to a legitimate state interest.

The ADEA fails the rational basis test because it prohibits "all 'discriminat[ion] against any individual . . . because of such individual's age,'"[12] while the rational basis standard allows the state to use age as a determining factor in employment in appropriate situations. The Court also noted that the congressional record was void of any pattern of age discrimination by the States.

Kimel raises interesting questions about whether States will be proper defendants in suits under other federal civil rights statutes. The Court has already held that the Religious Freedom Restoration Act of 1993[13] is not appropriate legislation under Section 5, in large part because there was no evidence in the congressional record of a "widespread pattern of religious discrimination in this country."[14] It is unlikely that the Court would reach the same conclusion in race and gender cases under Title VII[15] based on its recognition that those classifications demand a higher level of judicial scrutiny.[16] The Supreme Court has announced that it will hear an appeal in two consolidated Americans with Disabilities Act[17] cases against state defendants.[18] The viability of suing state defendants under other federal statutes, such as the Family and Medical Leave Act of 1993,[19] remains to be seen.

— END NOTES —

[1]Nos 98-791, 98-796, 2000 US Lexis 498 (Jan 11, 2000). The opinion can also be found on the Cornell Legal Information Institute web site at http://supct.law.cornell.edu/supct/html/98-791.ZS.html.

[2]525 US 1121 (1999).

[3]The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court has interpreted the amendment to prohibit federal courts from exercising jurisdiction over suits against non-consenting states. *See, e.g. College Savings Bank v Florida Prepaid Postsecondary Ed Expense Bd*, 119 S Ct 2219 (1999).

[4]*Kimel*, slip op at 21 (quoting *Dellmuth v Muth*, 491 US 223, 228 (1989)).

[5]29 USC 626(b)(ADEA is to be enforced according to 29 USC 612(b)); 612(b)(individuals may maintain actions against public agencies in state or federal court); 203(x)(*public agency* includes States, their political subdivisions, and their agencies)

[6]*Seminole Tribe of Fla v Florida*, 517 US 44 (1996).

[7]US Const Art I, §8, cl 3.

[8]The Fourteenth Amendment states: "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[9]*Kimel*, slip op at 36 (quoting *City of Boerne v Flores*, 521 US 507, 520 (1997).

[10]*Gregory v Ashcroft*, 501 US 452 (1991); *Vance v Bradley*, 440 US 93 (1979); *Massachusetts Bd Of Retirement v Murgia*, 427 US 307 (1976).

[11]*Kimel*, slip op at 39.

[12]*Id*. at 44 (quoting 29 USC 623(a)(1)).

[13]42 USC 2000bb et seq.

[14]*City of Boerne v Flores*, 521 US 507, 531 (1997)

[15]42 USC 2000e et seq.

[16]*Kimel*, slip op at 40.

[17]42 USC 12101 et seq.

[18]*Alsbrook v Arkansas*, 2000 US Lexis 996 (Jan 25, 2000).

[19]29 USC 2601 et seq. ■

PROFESSOR THEODORE J. ST. ANTOINE, DISTINGUISHED SERVICE AWARD RECIPIENT

Robert M. Vercruysse
Vercruysse Metz & Murray, P.C.

Professor Theodore J. St. Antoine was named the first recipient of the Labor and Employment Law Section's Distinguished Service Award in the new millennium. Before the largest assembled group of Section members, family and friends, I had the honor and pleasure, on behalf of the Section, to introduce Professor St. Antoine at the January 28, 2000 Mid-Winter dinner and talk about his lifelong record of distinguished service.

The award is presented to individuals who: (1) have made major contributions to the practice of labor and employment law; (2) reflect the highest ethical principles; (3) have advanced the development of labor and employment law; (4) have a long-established commitment to excellence; and (5) are recognized and respected by all constituents in the labor and employment community.

Professor St. Antoine easily met and exceeded all of these criteria. He is the James E. & Sarah A. Degan Professor Emeritus of Law at the University of Michigan, and the current president of the National Academy of Arbitrators. He is a graduate of Fordham College and Michigan Law School, where he was editor of the *Michigan Law Review.* He did postgraduate work in law and economics at the London School of Economics on a Fulbright Grant. He practiced labor law with Woll, Mayer & St. Antoine in Washington, D.C. During his practice, on behalf of the AFL-CIO, he argued two cases before the United States Supreme Court: *Amalgamated Meat Cutters & Butchers Workmen Local 189 v. Jewel Tea Co*., 381 US 676 (1965) (unions can negotiate wages, benefits & working conditions) and *United Mine Workers v. Pennington*, 381 US 657 (1965)(unions are not exempt from Sherman Act). Both involved the application of the Sherman Anti-Trust Act to the activities of labor unions. His firm also appeared on briefs on many of the important issues in labor law.

Professor St. Antoine joined the Michigan law faculty in 1965 and was dean from 1971 to 1978. He is a past secretary and council member of the ABA Labor and Employment Law Section and past chairperson of our Section. From 1983 to 1995, he was chair of the UAW-GM Legal Services Plan, and from 1987 to 1992, he was a reporter for the Uniform Law Commissioners. Professor St. Antoine has been a member of the UAW Public Review Board since 1973, and a member of the U.S. Executive Board of the International Society for Labor Law and Social Security since 1984. He is a member of the College of Labor and Employment Lawyers, co-editor of the widely used casebook, *Labor Relations Law*, now in its tenth edition, and editor of *The Common Law of the Workplace: The Views of Arbitrators.* He has been a visiting professor at Cambridge, Duke, George Washington, and Tokyo.

For someone to succeed and provide the distinguished service that Ted St. Antoine has, one needs a special partner. Lloyd St. Antoine, Ted's wife and partner in life, has raised four wonderful children — by Ted's statement — almost by herself. She is almost as well known as her distinguished husband. She entertained many of the assembled guests as struggling students in her home and has put on dinner parties for Supreme Court Justices from New Zealand, past-Presidents of the National Academy of Arbitrators, and United States Supreme Court Justices, all the while working with musical groups and Arbor Hospices.

Their children, like their parents, have done well. Arthur, the former managing editor of *Car & Driver*, is now an adventure journalist who writes about rides in F-14s, racecars and on ice floes. Claire is a psychotherapist in Santa Barbara. Paul is a partner in Drinker Biddle & Reath LLP, in Philadelphia, litigating anti-trust cases. Sara is at Cambridge with her spouse, who is getting a Ph.D. in art history after giving up the practice of law. She is an environmental journalist and also writes children's novels.

Lloyd and sons, Arthur and Paul, were present for the event. Also present were Sally and Bill Frier, Ted's sister and Lloyd's brother from Colorado Springs (married to each other - so it's a dual brother-sister relationship); Norman and Marie Callery, a Canadian cousin and spouse from Windsor; Rev. Charles Irvin, a former parish priest and also a law school graduate; Marvin Krislov, vice president and general counsel of U of M; Jeff Lehman, U of M Law School dean; and Deborah Malamud and Neal Plotkin, U of M Law School faculty colleagues.

Many of us now senior in our Section remember the practical education we received from the "Three Pillars" of our practice in past CLE Saturday seminars. At these meetings, Ted Sachs would talk about practice from the union lawyer's point of view. Bill Saxton would talk about the art of practicing management labor law. Ted St. Antoine would review recent developments before the NLRB and the courts and put them in perspective so that we would understand how the law evolved. Over time Ted has been the person who has spoken to us most often and eloquently, teaching about service and civility.

Through his teachings, writings, arbitration decisions, Section seminars, and public service, Professor Theodore J. St. Antoine has made immeasurable contributions to the development of labor and employment law, and has significantly influenced those of us who practice in this area. In his remarks to the Section, he was, as usual, self-effacing and eloquent as he spoke of Robert W. Howlett, one of his personal heroes, because, as a management lawyer, Bob Howlett believed all workers should be discharged only for just cause. Ted St. Antoine believes that all good lawyers should take the high road.

With characteristic wisdom and grace, Professor St. Antoine said that he was honored and humbled to have joined the exclusive group of Distinguished Service Award Recipients. We are honored that he is one of us and continues to serve.

SIXTH CIRCUIT RECOGNIZES RETALIATORY HARASSMENT

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

From November, 1999 through January, 2000, the Sixth Circuit published approximately 12 cases dealing with a wide variety of labor and employment issues. The full text of Sixth Circuit decisions are available on the Internet at: "http://pacer.ca6.uscourts.gov/opinions/main.php".

RETALIATORY HARASSMENT CLAIM RECOGNIZED. In *Morris v. Oldham County Fiscal Court*, Docket No. 98-6117(January 20, 2000), the Sixth Circuit recognized claims for retaliatory harassment under Title VII. The Plaintiff claimed she was subjected to severe and pervasive harassment by a supervisor because she filed a sexual harassment complaint. The court modified the test for proving a prima facie case of retaliation under Title VII: A plaintiff now must prove that (1) he or she exercised rights protected by Title VII, (2) the exercise of protected rights was known by the defendant and (3) an adverse employment action was taken against the plaintiff by the defendant or that the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor. The court also held that a downgraded performance evaluation does not automatically constitute a tangible employment action under *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). The court held that at a "minimum the plaintiff must point to a tangible employment action that she alleges she suffered, or is in jeopardy of suffering, because of the downgraded evaluation."

WARN ACT: DEFINITION OF MASS LAYOFF. In *Oil, Chemical and Atomic Workers Int'l Union, Local* 7-629 *v. RMI Titanium Co.*, Docket No. 98-4336 (January 12, 2000), the Sixth Circuit held that the employer did not engage in a "mass layoff" as defined by the WARN Act. The court held that the employer was two layoffs shy of a mass layoff, which is defined as a layoff of 33% of the workforce within a 90 day period. The court held that the layoffs of three non-union employees laid off because of the termination of a project are not to be counted because their layoffs constituted "separate and distinct" employment actions from the laying off of unionized workers because of financial difficulties. The court also held that employees who were returned to layoff after being recalled are not to be counted in the calculation.

RAILWAY LABOR ACT: DEFINITION OF SUBORDINATE OFFICIAL. A pilot who held the positions of "flight training supervisor" and "assistant chief pilot" constituted a subordinate official under the Railway Labor Act (RLA) and thus his union organizing activities were protected by the RLA. The plaintiff was a protected subordinate official because he lacked the authority to hire, fire, establish pay or benefit levels, establish written company policies, spend company funds above a minimal amount or affect corporate organization. *Dorsey v. United Parcel Service*, 195 F.3d 814 (6th Cir. 1999).

TITLE VII: COURT HAS JURISDICTION OVER RETALIATION CLAIM DESPITE PLAINTIFF'S FAILURE TO CLAIM RETALIATION IN HER EEOC CHARGE. In *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828 (6th Cir. 1999), the Sixth Circuit reversed the district court's grant of summary judgment in favor of defendants, holding that plaintiff's failure to check the box marked "retaliation" on her EEOC charge did not preclude the court from considering her retaliation claim. The court based its decision on the fact that the plaintiff was not represented by a lawyer when she filed her EEOC charge and clearly alleged facts in her charge that supported a retaliation claim.

NLRA: POST-IMPLEMENTATION BARGAINING DOES NOT SATISFY DUTY TO BARGAIN. In *Loral Defense Systems v. N.L.R.B.*, Docket Nos. 97-5223/5224 (December 8, 1999), the Sixth Circuit held that the employer violated its duty to bargain by unilaterally implementing a health care plan that was substantially different from the final pre-impasse proposal. The employer violated Section 8(a)(5) by failing to bargain in good faith even though it bargained with the union over the right to amend coverage *after* its unilateral decision to implement the new plan. Section 8(a)(5) requires the employer to bargain *prior* to making changes to terms and conditions of employment.

ADA: SIMILARLY-SITUATED INDIVIDUAL WAS NOT TREATED DIFFERENT THAN PLAINTIFF. In a reduction in force case, the Sixth Circuit held that the plaintiff failed to prove a prima facie case of disability discrimination since he did not show that he was either (1) replaced by a person outside his protected class or (2) treated different than other similarly-situated employees. The court held that the plaintiff and another displaced employee received substantially the same treatment after they were terminated. The mere fact that another laid off employee who does not suffer from a disability uses his connections within the company to procure another job does not constitute differential treatment. The court held that since neither employee received any outplacement services or access to an internal job data base, they were treated the same. *Hopkins v. Electronic Data Systems Corp.*, 196 F.3d 655 (6th Cir. 1999).

ADA: REQUEST FOR MEDICAL EXAMINATION DOES NOT PROVE PERCEPTION OF A DISABILITY. In *Sullivan v. River Valley School District*, 197 F.3d 804 (6th Cir. 1999), the court held that a request to take a medical examination does not, by itself, prove that the employer perceives the plaintiff as an individual with an impairment that substantially limits a major life activity. Accordingly, the court upheld a grant of summary judgment to the defendant which maintained an honest belief in the need to assess the plaintiff's fitness for duty after he engaged in odd behavior.

STATE LAW MISREPRESENTATION CLAIMS PREEMPTED BY ERISA. When a state law misrepresentation claim requires the court to calculate the benefits owed under an ERISA plan in order to fashion a remedy, the subject matter of the lawsuit "related to" the subject matter regulated by ERISA and is preempted. *Lion's Volunteer Blind Industries, Inc. v. Automated Group Admin., Inc.*, 195 F.3d 803 (6th Cir. 1999).

SIXTH CIRCUIT REFUSES TO SET ASIDE "BRIEF AND CONCLUSORY" ARBITRATION AWARD. In *Green v. Ameritech Corp.*, Docket No. 98-2176 (January 6, 2000), the Sixth Circuit reinstated an arbitration award vacated by the district court even though the opinion was brief and conclusory. The parties had agreed that the arbitration award "shall be accompanied by an opinion which explains the arbitrator's decision with respect to each theory advanced . . ." The Sixth Circuit determined that given the vagueness of the term "explain," the arbitrator was not required to fully set forth the facts and his conclusions. The arbitrator satisfied his duty under the contract by explaining that the plaintiff's discrimination and retaliation claims were dismissed for failing to meet his burden of proof. In dicta, the court also stated that if the arbitrator had not fulfilled his contractual duty to explain the award, the proper remedy would have been to remand the case to the arbitrator for clarification. ■

NLRB PRACTICE AND PROCEDURE

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

This certainly isn't "new" news, but just in case you missed it, the new General Counsel of the National Labor Relations Board is Leonard Page, former Associate General Counsel for the UAW. Many of you attended a ceremony held at the Detroit regional office in late November 1999, where I had hoped to administer the oath of office to Leonard in front of his family, many friends, colleagues, and co-workers from the Detroit area. However, because of procedural problems, the oath could not be administered at that time. The turnout, however, was wonderful and I know Leonard appreciated as much as I did the outpouring of support, and we certainly all enjoyed the opportunity to hear and tell a few war stories. I was finally able to officially administer the oath of office to Leonard on November 29, l999. Some of you may be wondering why there was such a rush to administer the oath and why it could not have been put off to a later date. The necessity for prompt action was due to the fact *inter alia* that Regional Directors are not authorized to issue unfair labor practice complaints unless there is a sitting General Counsel. Therefore, for several days after former General Counsel Fred Feinstein's appointment expired and before Leonard was sworn in, no complaints issued from any regional office. While that may have been good news for some of you, it obviously was a situation that could not go on indefinitely. I know we all wish Leonard the best in his new position.

While many important decisions have issued in the last few months including *Boston Medical Center*, 330 NLRB No. 30, (11-26-99), (The Board found interns, residents and fellows to be employees, overruling earlier Board decisions to the contrary), one procedural case that may have escaped your attention is the *Detroit Newspaper Agency, et al*, 330 NLRB No. 81 (1/21/00). In this case the Board, ruling on the Employer's pre-trial motion to dismiss an unfair labor practice complaint, concluded that Section 10(b) did not bar issuance of a separate complaint based on new charges that were closely related to timely-filed charges already being litigated. The Board noted that even though the judge who had heard the original case had refused the General Counsel's effort to consolidate the newly filed charges with those being litigated, and the Board had affirmed his ruling, this did not preclude the General Counsel from issuing a new complaint and setting it for a separate hearing. The Board indicated that by so doing the General Counsel had not "engaged in inpermissible piece meal litigation by litigating these discharges in two separate proceedings. The Board does not require that an unfair labor practice charge filed during the pendency of another unfair labor practice proceeding concerning the same Respondent be consolidated into that proceeding." While the General Counsel's discretion in this regard is not unlimited, the Board concluded that under the circumstances presented herein (the General Counsel tried previously to consolidate these additional discharges with the earlier cases, Respondent opposed consolidation, the judge denied it and the Board affirmed) the General Counsel was "free to litigate the rejected allegations" separate from the earlier proceeding.

Finally, as many of you know I am currently waging a battle with lymphatic cancer which has required that I be away from the office for periods of time for treatment and general recovery. I truly appreciate all of the calls, cards well wishes and positive thoughts that have been sent from so many of you. I apologize for not being able to respond individually, but neither my energy or condition permit that luxury at this time. Hopefully in the future I will have the opportunity to communicate with each of you individually and express my sincere appreciation for the many kind acts and thoughts.

The next meeting of Region Seven's Local Practice and Procedure Committee will be held at the same time as the State Bar's annual meeting. If you have any questions or issues that you want the Committee to address, please feel free to submit them to me or any Committee member. ■

JUDGE ROY ROULHAC WRITES HISTORY OF JACKSON COUNTY, FLORIDA

Roy L. Roulhac, in addition to being a MERC Administrative Law Judge and Secretary of the Labor and Employment Law Section, is president of the Gilmore Academy-Jackson County Training School Alumni Association, Inc., and editor of *Jackson County Florida.* This new 128-page book, with 220 black-and-white photographs and accompanying text, documents the lives of African-Americans in Jackson County from the antebellum period through the difficult and violent Reconstruction and Jim Crow eras, to the increasing tolerance of the last century. The rare images, accompanied by a detailed introduction and informative captions, allow the reader to see how much, and how little, has changed in this rural southern community.

Jackson County, bordered by Georgia and Alabama in Florida's panhandle, developed a reputation during Reconstruction as the place "where Satan has his seat." Racial tensions, strained by the Civil War, were heightened by the election of former slaves as delegates to Florida's 1868 constitutional convention and to a majority Jackson County's seats in the state house. Between 1869 and 1871, over 170 African-Americans and their Republican supporters were murdered, and a number of officeholders, including the sheriff and state representative Emanuel Fortune, were forced to leave Jackson County. Fortune's son, T. Thomas Fortune, born during slavery in Jackson County, became one of the country's most noted journalists. Credited with coining the term, "Afro-American," T. Thomas Fortune established the first post-Reconstruction protest organization in America, the Afro-American League; edited *The Globe,* a daily; was chief editorial writer for *The Negro World;* founded *The New York Age* in 1883; and in 1884 wrote, *Black and White: Land, Labor and Politics in the South.*

Jackson County Florida, edited and introduced by Judge Roulhac, has ten chapters: (1) Slavery, Reconstruction and Jim Crow; (2) Marianna Area Scenes; (3) Family Life; (4) Religion; (5) Places of Work; (6) Black Businesses; (7) Pre-Schools; (8) Jackson County Training School; (9) Union Grove and Other County Schools; and (10) Clubs and Organizations. The book is part of Arcadia Publishing Company's Black America Series.

THE TUNE CHANGES IN THE WESTERN DISTRICT AS PLAINTIFFS SURVIVE SUMMARY JUDGMENT

John T. Below and Danielle N. Mammel
Kotz, Sangster, Wysocki and Berg, P.C.

DEFENDANT FALLS SHORT ON MOTION POST-VERDICT MOTION IN RETALIATION AND DISCRIMINATION CASE.

Mayes v. Henderson, Postmaster General of the United States Postal Service, Case No. 5:97-CV-236 (November 23, 1999). Judge David W. McKeague denied defendant's motion for a new trial, judgment as a matter of law, or for remittitur after the jury found defendant liable for intentional discrimination and retaliation and awarded plaintiff $200,000.00. Employing the strict standards of review for both new trials or, alternatively, for judgment as a matter of law, post verdict, the court ruled the evidence, viewed most favorable to plaintiff, supported an inference of a "causal relationship: between plaintiff's complaints to the EEOC and defendant's failure to select him for a supervisory position. The jury was entitled to view defendant's contrary evidence, no matter how adamantly presented, as credible or not. Additionally, the defendant's challenge to the jury award of $200,000.00 as being "clearly excessive" was deflated because defendant stipulated to a general verdict form, which did not require the jury to distinguish the elements comprising the total damages award. Citing that defendant *agreed* to an "undifferentiated 'lump-sum' damages" verdict form, the court observed "defendant now complains of the result, occasioned by his acquiescence to a verdict form that permitted the jury to simplify its reasoning." The court also denied plaintiff's request for remittitur, finding that support existed in the record for the various damage components sought by plaintiff.

RACE AND AGE BASED REMARKS TOGETHER WITH LACK OF EVIDENCE SHOWING POOR JOB PERFORMANCE SUPPORT DENIAL OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Saboury v. Michigan State University, Case No. 4:98-CV-150 and Case No. 1:98-CV-578 (December 8, 1999). Chief Judge Richard Alan Enslen denied defendant's motion for summary judgment because plaintiffs presented genuine issues of material fact regarding their discrimination claims. Plaintiffs, Dr. Saed Sam Saboury and Dennis Ross, sued Michigan State University alleging violations of the Age Discrimination in Employment Act ("ADEA"); the Civil Rights Act of 1964 ("Title VII"); and retaliation. Ross and Saboury were Student Advisors for athletes until the athletic director informed their contracts would not be extended. While defendant claimed poor job performance as the legitimate nondiscriminatory reason for his decision, plaintiffs' rebuttal evidence revealed this as a pretext. First, there was no evidence the director knew of criticisms about Ross and Saboury' performance before making his decision. Second, the director made numerous racist and racist comments. For example, he routinely asked about Saboury's retirement account; referred to Saboury as "over-the-hill;" said Saboury should retire; joked about diversity training for non-Caucasian staff, mocked Saboury's accent and referred to the plaintiffs as "you people." Discriminatory remarks can be sufficient to demonstrate pretext if the "sheer weight of the circumstantial evidence of discrimination makes it 'more likely than not' that employer's explanation is a pretext, or coverup." *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). The court so found in this case and denied defendant's summary judgment motion. The court also denied summary judgment with respect to the retaliation claims because shortly before the negative employment actions were taken, plaintiffs told a union representative about their allegations of discrimination, so, a jury could find defendant retaliated against plaintiffs for protected activity.

SUMMARY JUDGMENT GRANTED FOR DEFENDANTS WHERE PLAINTIFF WAITED 2½ YEARS AFTER RECEIVING A RIGHT TO SUE LETTER TO FILE HER LAWSUIT

Moore v. Penn Corp., et. al., Case No. 4-98-CV-170 (October 19, 1999). Senior Judge Wendell A. Miles granted defendants' summary judgment motions and dismissed the complaint with prejudice. Plaintiff filed this action after Beach Products terminated her employment due to excessive absences in violation of the parties' collective bargaining agreement. The court dismissed plaintiff's wrongful discharge claim and her claim that the union breached its duty of fair representation because such claims are governed by the collective bargaining agreement and were preempted under §301 of the Labor Management Relations Act. Also, the statute of limitations barred the hybrid §301 claims and the gender discrimination claim against the union because Moore waited two and a half years after she received the right-to-sue letter to file her action.

PLAINTIFF'S FAILURE TO TIMELY REPUDIATE RELEASE OF HIS TITLE VII CLAIMS WARRANTED SUMMARY JUDGMENT FOR DEFENDANT

Fortuna v. United Parcel Service, Case No. 1:99-CV-296 (November 16, 1999). Senior Judge Miles granted defendants, summary judgment motion because plaintiff did not attempt to repudiate his release in a timely manner. Fortuna, an Hispanic-American male, opted to voluntarily resign by executing a separation agreement rather than being fired and thereby release UPS from any and all claims, including Title VII claims, and as consideration received over $25,000. Fortuna challenged the validity of the release by alleging he signed it under duress and argued federal law dis not require him to return the consideration before suing for gender, race and/or national origin discrimination in violation of Title VII. While the Sixth Circuit allows parties to negotiate Title VII claims, courts determining the validity of waivers apply ordinary contract principles while "remaining alert to ensure that employers do not defeat the policies of the ADEA and Title VII by taking advantage of their superior bargaining position or by overreaching." *Adams v. Phillip Morris, Inc.* 67 F.3d 580, 583 (6th Cir. 1995). Although plaintiff claims he signed the release under duress, he did not act promptly to repudiate it. Instead, he merely asked a human resources manager about the consequences of retracting the agreement the day after he signed it. Absent evidence that plaintiff timely sought to avoid or repudiate the release, the court granted summary judgment in favor of UPS. ■

EASTERN DISTRICT UPDATE

Jeffrey A. Steele
Brady, Hathaway, Brady & Bretz

A Preemption Defense Does Not Automatically Support Removal.

Alexander v. UDV North America Inc., (1999 WL 1272962, Dec. 16, 1999). Plaintiffs claimed in state court that their employer breached or was about to breach an employment contract. Plaintiffs supported their case with a flier promising secure, just cause employment, which the employer's predecessor released during a union organizational drive. The employer removed to federal court, claiming complete diversity and that "complete preemption" applied because the dispute required construction of the collective bargaining agreement. Relying on *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), Judge Rosen ruled that complete preemption did not apply. Noting that individual contracts executed before ratification of a collective bargaining agreement are not inevitably superseded by subsequent collective bargaining agreements, Judge Rosen ruled that the plaintiffs could pursue their claims in state court. Moreover, because a defensive application of a collective bargaining agreement cannot support removal under the complete preemption doctrine, removal was not justified by the possibility that the individual contracts were executed after the collective bargaining agreement. Nevertheless, where the individually named defendants were fraudulently joined to destroy diversity, Judge Rosen denied the plaintiffs' motion to remand the case to state court.

Experience, Positive Performance Reviews And Bonuses Do Not Automatically Undermine An Employer's Claim Of Poor Work Performance.

Cicero v. Borg-Warner Automotive, Inc., 75 F. Supp.2d 695 (1999). In 1994, defendant's predecessor hired plaintiff, a man with considerable human resources experience, as Human Resources Manager. When defendant bought the company, it hired plaintiff and directed him to integrate the predecessor's policies into defendant's corporate structure. Defendant ultimately terminated plaintiff because plaintiff resisted defendant's policies, refused to work toward integration and was not a team player. Judge Cleland granted defendant's motion for summary judgment, ruling that plaintiff failed to either prove he was "qualified" for his position or that the employer's legitimate, nondiscriminatory explanation was pretextual. Citing to, *inter alia*, poor performance evaluations; plaintiff's admissions that managers thought the plaintiff was working against the new corporation; and the plaintiff's admission that managers told him he had to improve, Judge Cleland ruled that no reasonable juror could conclude that the plaintiff was qualified for the position. In so ruling, Judge Cleland rejected plaintiff's attorney's attempts to second-guess the employer's performance expectations and the timing of its evaluations, stating "it is the employer, not the employee or his attorneys, who gets to decide what those expectations will be [and] it is the employer's unquestioned prerogative to evaluate its employees at the time of its choosing, in whatever manner it pleases, without being second-guessed by counsel or the courts." Finally, Judge Cleland ruled that defendant's explanation that plaintiff was not performing to defendant's satisfaction was not rendered pretextual by evidence that defendant gave plaintiff bonuses, positive performance evaluations, and where all three of the individuals who were terminated were over 50 years old.

Economic Pressure Does Not Nullify Release.

Parker v. Key Plastics, Inc., 68 F. Supp.2d 818 (1999). Plaintiff claimed that his employer discriminated against him in violation of the ADA and retaliated against him in violation of Title VII. In granting the employer's motion for summary judgment, Judge Rosen ruled that plaintiff was bound by a release he signed as a condition to his returning to work after an earlier discharge. Even though plaintiff noted on the agreement that he signed the agreement "under duress," Judge Rosen ruled that the "duress" cited by plaintiff was "nothing more an economic pressure" of the sort that the Sixth Circuit has found insufficient to demonstrate unlawful coercion. Thus, and where the record showed that plaintiff understood the release he signed, the release barred any claim plaintiff had at the time he signed the release. Judge Rosen went on to dismiss plaintiff's surviving ADA and retaliation claims. Although plaintiff claimed he did not threaten a coworker as the employer claimed, Judge Rosen ruled that plaintiff produced no evidence to show that the employer lacked a genuine, good faith belief that plaintiff committed the misconduct. Further, Judge Rosen ruled that plaintiff could not sustain a *prima facie* case of retaliation because plaintiff failed to produce evidence that the decisionmaker knew about four EEOC complaints plaintiff filed. However, Judge Rosen ruled that plaintiff presented a triable discriminatory working conditions claim. To support this, Judge Rosen cited to plaintiff's testimony that his supervisor unfairly changed his job assignments, monitored his breaks, required him to produce his disability restriction papers every day, and said that he did not "need no man here with no one God damn hand, anyway."

Failure To Timely Demand Arbitration Could Support A Hybrid Claim.

Watson v. Riverside Osteopathic Hosp., (1999 WL 1273072). Plaintiff was discharged as a registered nurse for sleeping or "assuming the position of sleep" on the job. After challenging the discharge through the first four steps of the five-step grievance procedure, plaintiff's union concluded that the grievance lacked sufficient merit to warrant arbitration. The union subsequently reconsidered its position and took the case to arbitration. However, the arbitrator dismissed the grievance because the union's demand for arbitration was untimely. Subsequently, plaintiff brought a hybrid claim, arguing that her employer discharged her without just cause and that her union breached its duty of fair representation by failing to timely seek arbitration. Judge Rosen ruled that an issue of fact existed as to whether the union's failure to file a timely arbitration demand was "so far outside a wide range of reasonableness as to be irrational." Judge Rosen thus rejected the union's argument that the union acted reasonably because, consistent with standard procedure, its counsel directed a subordinate to send the demand letter on time. Judge Rosen ruled that accepting the defense would put an inappropriate, impossible burden on plaintiff of disproving the union attorney's testimony that she directed the letter to be sent on time. In addition, Judge Rosen ruled that the argument would unfairly "discharge a union's liability for a missed deadline in all cases where the union is able to offer the testimony of an official stating that she initiated the processing of a grievance in accordance with standard practice, and then reasonably assumed that the process would continue to completion." However, because the employer's discharge decision comported with the plain language of the collective bargaining agreement, Judge Rosen dismissed the plaintiff's case because the breach of contract element could not be proved.

Retaliation Before An EEOC Charge Must Be Contained Within The Charge.

Strouss v. Mich. Dept. of Corrections, 75 F.Supp.2d 711 (1999). In 1994, plaintiff filed an EEOC charge alleging she had been retaliated against for relaying a sexual harassment complaint. In 1997, the plaintiff filed a second EEOC charge, this time alleging she had been given an unfavorable transfer after complaining about a doctor's inappropriate comments. Plaintiff then filed suit, alleging she was retaliated against for both the 1994 and the 1997 activity. Judge Rosen recognized that retaliation claims are usually exempt from the requirement that the claim be within the reasonable scope of the EEOC charge. However, Judge Rosen ruled that this general principle is inapplicable where plaintiff files

(Continued on page 18

EASTERN DISTRICT UPDATE

(Continued from page 17)

a second EEOC charge that does not mention the prior retaliation. Thus, where the text of plaintiff's 1997 charge did not mention the 1994 retaliation, the 1994 retaliation must be considered outside the scope of the 1997 charge. Plaintiff's decision not to check the box on the EEOC charge form which asks whether this is a continuing violation is further evidence that the 1994 incident cannot be included. In addition, Judge Rosen ruled that plaintiff's time to file a retaliation claim stemming from the 1994 incident was time-barred. As to plaintiff's retaliation claim concerning the 1997 charge, Judge Rosen ruled that plaintiff failed to present evidence of a causal nexus between the protected activity and the allegedly adverse employment action.

Discrimination Plaintiffs Must Present Evidence That Comparables Were Treated Differently.

Krietemeyer v. Unisys, Corp., MLW 37055. Plaintiff claimed her employer violated the ADA by terminating her on the basis of her "major depression." Judge O'Meara granted the employer's motion for summary disposition because plaintiff failed to present documentary evidence to sustain her *prima facie* burden of proving she was qualified for the position. Although plaintiff and defendant held "differing opinions as to the quality of [plaintiff's] performance," plaintiff failed to introduce evidence to counteract the employer's showing that plaintiff missed several meetings and appointments, had a long-standing history of sub-standard sales performance and was the target of complaints by coworkers and supervisors. Plaintiff also failed to present evidence that any similarly situated employee with a similar performance record was treated differently.

Leader v. Venture Industries Corp., MLW 37058. Plaintiff claimed she was discharged for exercising her FMLA rights. Judge Hood ruled that the required causal link was established through evidence that plaintiff was discharged on the day she returned from FMLA leave. However, plaintiff failed to establish that the employer's legitimate, nondiscriminatory explanation was a pretext. Although plaintiff disagreed with the employer's claim that she was performing poorly, plaintiff had more negative reports than any other employee and failed to identify any similarly situated employee who was treated more favorably after engaging in conduct of "comparable seriousness."

Utilizing Employer's Preventative Opportunities Creates A Triable Harassment Claim.

Allen v. State of Mich., MLW 37723. Although the employer satisfied the first prong of its two- prong duty under *Faragher* and *Ellerth* by "exercis[ing] reasonable care to prevent and correct promptly any racially harassing behavior," because plaintiff utilized all of defendant-employer's preventative or corrective opportunities, Judge Zatkoff ruled that the employer failed to establish the second prong, *i.e.*, that the "plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities...."

Arbitrator Decides Whether Dispute Falls Within Arbitration Clause.

UAW Local No. 504 v. Lefere Forge and Mach Co., MLW 37715. Judge Borman ruled that the arbitrator must resolve the parties' disagreement concerning whether the dispute fell within the scope of the parties' arbitration agreement. The collective bargaining agreement exempted "health and safety issues" from arbitration. A union member was suspended and later discharged for what the employer characterized as a health and safety issue. The union disagreed, arguing that concerns over the employee's fitness to work is not necessarily a health and safety issue. Judge Borman ruled that where the parties dispute whether an issue falls within the scope of an arbitration agreement, the arbitrator must be given the chance to determine whether the issue is arbitrable. ■

MERC UPDATE

Alexandra S. Matish
White, Przybylowicz, Schneider & Baird, P.C.

Since the previous issue of *Lawnotes*, the Michigan Employment Relations Commission has issued 20 decisions and orders in a variety of cases. A brief summary of some of those cases follows. Recent decisions can be reviewed at www.cis.state.mi.us/ber.

DUTY TO BARGAIN

***City of Springfield,* Case No. C 98 D-109 (October 27, 1999).** The Commission affirmed the ALJ's finding that the employer bargained in bad faith when it failed to set forth any justification for its refusal to approve and execute the tentative agreements negotiated by its agent. The employer also failed to set forth any reasonable justification for making regressive bargaining proposals. The employer rejected three successive tentative agreements negotiated by its bargaining agent. After rejecting the first two, the employer's agent told the union the specific provisions in dispute. Although the union made concessions on those provisions, the employer still rejected them. ***See City of Grandville,* Case Nos. C 98 G-153 and CU 98 G-27 (December 22, 1999)** (The Commission ruled neither party committed an unfair labor practice by failing to execute a negotiated and ratified collective bargaining agreement); ***County of Ionia* and 64A Dist Court, Case No. C 98 J-206 (December 28, 1999)** (The Commission found the employer committed an unfair labor practice when it failed to accurately reduce to writing a tentative agreement negotiated between the employer and the union); ***School Dist of the City of Flint,* Case No. C98 J-205** (The Commission concluded that the decision whether to provide a particular school with security aides is within the scope of the employer's managerial prerogative and, as such, the employer had no duty to bargain with the union over its decision.)

DUTY OF FAIR REPRESENTATION

***Michigan Education Ass'n,* Case No. CU 99 A-2 (October 27, 1999).** A union member filed unfair labor practice charges alleging the union wrongfully failed to file a grievance on her behalf. The member asked the local union president to file a grievance regarding her daily assignment which required her to work four hours in one job and four hours in another. The union filed a group grievance, claiming several positions had been eroded because they were reduced to half-time positions which did not allow employees a sufficient amount of hours to perform their necessary job assignments. The charging party's position was among those specifically mentioned. The Commission adopted the ALJ's decision, which found that although the group grievance only mentioned one of her assignments, it requested that all split positions be restored to full-time and consequently addressed her specific grievance. Thus, the member failed to show the union's conduct was arbitrary, discriminatory, or in bad faith.

***Service Employees International Union Local 502,* Case No. CU98 K-54 (October 20, 1999).** The Commission adopted the ALJ's finding that the union did not breach its duty of fair representation toward one of its members, a deputy sheriff. The deputy was interrogated by the Internal Affairs Department regarding the forging of passes that permit attorneys, parole officers, police officers, and other professionals to make contact visits with inmates. The employer offered the deputy the option of resigning or being terminated. The member then asked his union steward what he should do, to which the steward responded that he would rather see him resign than be terminated. The union steward denied the member's version of events and stated he told him he should resign

rather than put his family through this process again. (The deputy had prior charges brought against him for being responsible for an attack on an inmate.) The ALJ found there was no evidence presented by the deputy that his union steward's actions were in bad faith and, therefore, the union did not violate any duty it may have owed the deputy sheriff. (No exceptions.)

***Mt. Clemens Public Schools,* Case No. C 98 K-239 (December 1, 1999).** The ALJ found the public employer did not engage in any activities that violated PERA, nor did the labor organization breach its duty of fair representation to the member when the union refused to arbitrate a grievance challenging the employer's right to subcontract. The Commission granted a request to extend the time for filing exceptions; however, the exceptions were postmarked on the deadline date and not received on that date. The Commission concluded exceptions must be received at a Commission office by the close of business on the specified date. Therefore, the Commission adopted the ALJ's decision as the final order.

***City of Detroit (Finance Dep't, Income Tax Division),* Case Nos. C98 I-190 and CU98 I-47 (October 29, 1999).** A union member filed an unfair labor practice charge alleging the union violated its duty of fair representation by failing to process a grievance alleging the member's supervisor engaged in abusive conduct, by failing to assist the member in collecting out-of-class pay, by failing to help the member after she was removed from an overtime assignment, and by failing to assist the member in obtaining a promotion. The member also alleged the employer unlawfully retaliated when it refused to pay the member out-of-class pay, when it reassigned her, and when it did not to promote her. After hearing motions for summary disposition, the ALJ concluded the member failed to state a valid claim. The ALJ found the union, when advised of the member's complaints, arranged meetings with the employer to address the complaints and had no reason to think those issues were not resolved through those meetings. Finally, the member did not ask the union to file a grievance on her behalf on the promotion issue. The ALJ also concluded the member did not allege facts which would support a finding that the employer was hostile to her protected activity, or that a causal connection existed between her protected activity and the actions which she alleges were retaliatory.

***Detroit Bd of Ed, Dep't of Public Safety,* Case No. C 98 I-193-and-*Teamsters State, County & Municipal Employees, Local 214,* Case No. CU 98 I-48 (January 19, 2000).** The Commission adopted the ALJ's decision that charging party failed to present any evidence to support a violation of PERA either by the employer or by the union. The employee had a continuing problem with absenteeism and tardiness, for which she was disciplined and repeatedly counseled, and for which the employer changed her work hours and location in an attempt to alleviate the problem. When the employee was terminated, her union representative processed her grievance in good faith and submitted the grievance to the Grievance Panel. The Panel subsequently determined the grievance was without merit. The member was given the opportunity to appeal the decision to the union Appeals Board, but failed to do so. The Appeals Board affirmed the Panel's decision to withdraw the grievance. The union representatives did not act in any way that was arbitrary, discriminatory, or in bad faith. (No exceptions)

***Mass Transportation Authority,* Case Nos. C 99 D-72 and CU 99 B-4 (January 13, 2000).** The Commission adopted the order of the ALJ, who found the employee did not allege discrimination for engaging in a protected activity, but only that the employer disciplined him unfairly. Moreover the ALJ found the claim was barred by the statute of limitations. The ALJ also determined the union did not breach its duty to fairly represent the member. Although there was no evidence that the union intentionally neglected the member's grievance or that it acted in a discriminatory manner, the record showed the union negligently failed to exercise its discretion within the time limit provided by the contract. The ALJ concluded that a breach of the duty of fair representation cannot be based on mere as opposed to gross negligence. Because the union's failure to file the grievance in a timely manner was based in part on the union's doubts about whether the grievance had merit, the ALJ concluded that the union did not breach its duty of fair representation. (No exceptions.)

***Wayne County (Sheriff Dep't),* MERC Case No. C 98 H-179 -and-*American Federation of State, County & Municipal Employees (ASFCME), Local 3317,* MERC Case No. CU 98 H-43 (December 28, 1999).** The employee alleged that the employer demoted him in violation of the collective bargaining agreement and that the union refused to represent him. A civil service exam was required before an employee could be placed on a promotional list. During the year in question, a cheating scandal had arisen, prohibiting the employer from using the promotional list. The employer decided not to wait for the next exam, but to fill certain vacancies using an old promotional list. These promotions, however, were provisional. The employee received a promotion using the old promotional list. The employee argued that he was assured his position was permanent and not provisional. The union filed a grievance over these provisional promotions. The union sent a letter to the employees that were promoted and stated the union would represent them in all matters with the exception of assisting them in obtaining regular status with respect to their promotion. Because the union was successful in its grievance, the provisional employees were to be returned to the regular bargaining unit. The provisional employees asked that a grievance be filed by the union to maintain their rank and seniority in their new promoted positions. The union responded that it would not file their grievance. The ALJ found that there was nothing that demonstrated a breach of contract by the employer or breach of the duty of fair representation by the union. The ALJ further found that to acquire a union to accept and process this grievance when it initially took a position that the promotion was violative of its contract would be useless. The union acted upon its contract, past practices, and in accord with union procedures and thus did not act arbitrarily, discriminatorily, or in bad faith. (No exceptions.)

OBJECTIONS TO DECERTIFICATION ELECTION

***Branch Intermediate School Dist,* Case No. R 98 J-128 (January 19, 2000).** A representative of the Mackinac Center filed a decertification petition on behalf of certain employees of the Branch Intermediate School District represented by the MEA. A consent election was held on December 8, 1998, at which time the membership voted against decertification. The Commission found the petitioner failed to demonstrate the conduct complained of interfered with the employee's freedom of choice in the election. The petitioner alleged union representatives held a pre-election meeting at the same location where the petitioner was holding a pre-election meeting. The Commission found the union representatives had a right to conduct their own pre-election meeting and behaved in a professional manner at the meeting. The Commission further determined there was no evidence that the union representatives deliberately spied on employees or interfered in any way with the employees attending the meeting scheduled by the decertification petitioner, and even if the union representatives had, such conduct would not necessarily be objectionable. The mere presence of union representatives at the location did not create an atmosphere of intimidation that would warrant overturning the election. ■

MICHIGAN COURT OF APPEALS UPDATE

Rosemary G. Schikora
Dykema Gossett, P.L.L.C.

1. Failure to exhaust administrative remedies under Wage and Fringe Benefits Act bars claim - *Cork v. Applebee's of Michigan, 2000 Mich App LEXIS 5 (Jan. 7, 2000).* Plaintiffs, servers in defendant's restaurant, claimed that under defendant's mandatory "tip-sharing" policy, they were required to make cash payments to bartenders and other employees at the end of each shift. Plaintiffs claimed this violated theWage and Fringe Benefits Act, MCL 408.471 *et seq.* in that it permitted defendant to pay bartenders and other employees less by shifting defendant's burden of paying wages. The Court affirmed the dismissal of plaintiffs' Wage and Fringe Benefits Act claim, but reversed the dismissal of their common law claims of violation of public policy, conversion, unjust enrichment, and breach of contract.

The Court first determined that tips are included in the statutory definition of wages ("all earnings of an employee whether determined on the basis of time, task, piece, commission, or other method of calculation for labor or services except those defined as fringe benefits under subdivision (e) above," MCL 408.471(f)). The Court then looked at whether the language of the statute regarding administrative remedies is permissive or mandatory, specifically MCL 408.481(1) which states in pertinent part:

> An employee who believes that his or her employer has violated this act may file a written complaint with the department [of Labor] within 12 months after the alleged violation.

Plaintiffs did not file any complaint with the Department of Labor. Thus, the Court found, their Wage and Fringe Benefits Act claim was properly dismissed, citing *Cockels v Int'l Business Expositions, Inc*, 159 Mich App 30, 35 (1987). As for plaintiffs' common law claims of conversion, unjust enrichment, and breach of contract, the Court found that the statutory remedy was cumulative, not exclusive, citing *Murphy v Sears, Roebuck & Co*, 190 Mich App 384 (1991). Thus, these claims were not barred and the trial court improperly dismissed them.

2. In case of first impression, Court applies "dual persona" doctrine and decides that WDCA exclusive remedy precludes employee from suing employer in tort - *Herbolsheimer v SMS Holding Co*, 2000 Mich App LEXIS 2 (Jan. 4, 2000). Defendant employer was the succesor in liability to the corporation which originally purchased and modified a high-speed turning machine which allegedly malfunctioned and caused plaintiff's decedent's death. Plaintiff sued the employer, claiming that the "dual capacity" doctrine overcame the exclusive remedy bar of the Workers' Disability Compensation Act, MCL 418.131, which states:

> "The right to recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort."

The trial court denied defendant's motion for summary disposition, and the Court of Appeals granted leave to appeal.

The exclusive remedy provision does not bar third-party suits. MCL 418.827. The question presented was under what circumstances may an *employer* be deemed a "third party," thus allowing the employee to avoid the preclusive effect of the exclusive remedy. Plaintiff invoked the judicially created "dual capacity" exception, previously recognized in some form by the Michigan Supreme Court (*Howard v White*, 447 Mich 395, 398 (1994) and *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 653 (1984)), whereby a separate relationship from the employer-employee relationship may provide grounds for a suit against an employer. Citing *Howard*, where the Supreme Court "jettisoned" the term "dual capacity" in favor of the more literal language of the typical third-party statute, "dual persona," the Court of Appeals proceeded to define the heretofore "vague and largely undefined" limits of the exception, and concluded that an employee may not sue his employer in tort, even where the emloyer is the successor to the corporation which allegedly negligently modified the injury-causing machine. The Court undoubtedly reached the correct result.

First, the Court noted that under *Howard*, the judicial exception to the exclusive remedy provision is intended to apply only in exceptional circumstances, i.e. "Only where there is a genuine case of a separate legal personality and the relationship between the cause of action and plaintiff's employment is no more than incidental." After a lengthy analysis of defendant employer's corporate pedigree, the Court rejected plaintiff's contention that the "dual persona" exception applies where the employer was the *successor* to the company that allegedly negligently modified the subject machine alleged to have caused injury. (Plaintiff overlooked the fact that, under *Wells*, when the corporation is both employer and manufacturer, no "dual persona" exist.) Observing that this judicially created exception is arguably inconsistent with the plain language of the exclusive remedy provision, the Court adopted the narrowest possible interpretation of the exception and chose not to enlarge it where it would undermine the purposes of the WDCA.

3. Award vacated where arbitrator exceeded his authority by dispensing his own form of industrial justice - *Sheriff of Lenawee County v Police Officers Labor Council*, 1999 Mich App LEXIS 334 (Dec. 14, 1999). After the discharge of a deputy sheriff corrections officer for falsifying official records to conceal the fact that he knowingly entered into a bigamous relationship by marrying a woman in Las Vegas while still married to another woman, the officer grieved his discharge under the collective bargaining agreement. Amazingly, the arbitrator found the officer's discharge wrongful and ordered reinstatement with back pay, benefits, and seniority. The trial court vacated the award on the grounds that the arbitrator had exceeded his authority, by impermissibly engaging in his own form of "industrial justice."

The Court wholeheartedly agreed. The Court found that the arbitrator's authority, as circumscribed by the parties' collective bargaining agreement, required him to determine whether the officer was discharged for just cause. The Court cited the U.S. Supreme Court for the proposition that the arbitrator's award is legitimate "only so long as it draws its essence" from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. *United Steelworkers v Enterprise Wheel & Car Corp*, 363 US 593 (1960). In this case, the arbitrator showed appalling disregard for the plain meaning of the sheriff department's rules and regulations, as well as the collective bargaining agreement. Although he found that the officer had made "untruths" on official documents (a dischargeable breach), he excused this behavior by creating a fiction. In effect, he determined that when the officer took a second oath of office, years after his dischargeable conduct occurred, a new contract arose and eradicated any culpability for previous wrongdoing. The arbitrator found that the officer had committed bigamy (although a "milder form," since he did not cohab-

itate with both women), yet exonerated this dischargeable, felonious behavior by relying on the fact that when the bigamy came to light, the statute of limitations for criminal prosecution of this felony had expired. The Court of Appeals correctly concluded that the arbitrator's abuse of authority was egregious. Vacation of the arbitrator's decision was affirmed.

Despite the settled rule that judicial review of an arbitrator's decision is limited and does not encompass the arbitrator's findings of fact or decision on the merits, this case illustrates the importance of carefully analyzing the award to determine whether the arbitrator exceeded his authority. This analysis needs to be made promptly, however, as the time for seeking judicial relief is in most circumstances only 21 days.

4. "Disability" under PWDCRA requires permanent impairment - *Chiles v Machine Shop, 1999 Mich App LEXIS 301 (Nov. 5, 1999).* After suffering a work-related back injury, plaintiff collected workers' compensation benefits for four months, then returned with restrictions to "favored" work at a reduced hourly rate. Informed that his regular rate would resume once his restrictions were lifted, plaintiff pursued this course and eventually succeeded in having his restrictions lifted. Three days later, he was laid off and informed he would not be rehired. Plaintiff sued, claiming that his his lay-off was in retaliation for filing a workers' compensation claim. He prevailed before a jury and withstood defendant's post-trial motions, which the Court of Appeals affirmed.

Plaintiff also maintained that defendant violated the Persons With Disabilities Civil Rights Act, MCL 37.1101 *et seq*. ("PWDCRA"), claiming that defendant regarded him as disabled. After a thoughtful discussion of the PWDCRA, aided by case law developed under the ADA and relevant EEOC regulations, the Court of Appeals concluded that plaintiff was not "disabled" within the statutory definition of "disability." Essentially, the Court found that a *temporary* back injury did not warrant protection under the PWDCRA (or ADA).

The Court first observed that not every impairment rises to the level of a disability under the PWDCRA. "The mere assertion of a diminished capacity does not constitute a disability within the meaning of the [ADA]." *Hilburn v Murata Electronics North America, Inc*, 17 F Supp 2d 1377 (ND Ga, 1998). Rather, the impairment must (1) *substantially* limit (2) one or more *major life activities* and (3) be unrelated to the person's ability to perform the duties of a particular job or the person's qualifications for employment or promotion. *See, e.g., Bragdon v Abbott*, 524 US 624 (1998). The EEOC's non-exclusive list of major life activities includes caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *Stevens v Inland Waters*, 220 Mich App 212, 217 (1996).

Chiles did not involve a claim of actual disability; rather, plaintiff claimed that defendant "regarded him" as disabled, thus implicating the second part of the statutory definition, MCL 37.1103(e)(iii). The Court clarified that to establish this, plaintiff must prove that defendant regarded him as actually "disabled," within the meaning of the statute. In short, plaintiff must prove that defendant regarded him as having an impairment that *substantially* limited a *major life activity.* The same three-part analysis utilized in *Bragdon,* therefore applies, regardless whether plaintiff claims he was actually disabled or simply "regarded as" disabled.

Significantly, the Court stated that the potentially expansive reach of the PWDCRA is primarily limited by two factors: (1) requiring that the major life activity be substantially limited and (2) adhering to the overall purposes of the act. In this regard, the Court observed that the employer's failure to recall the employee is "not sufficient as a matter of law to support a claim of discrimination based upon the employer's perception that plaintiff was disabled."

The Court concluded that an impairment cannot be "substantial" if it is of a merely temporary nature. This holding dovetails with the overall purposes of the act:

> The ADA simply was not designed to protect the public from all adverse effects of ill-health and misfortune. Rather the ADA was designed to "assure[ ] that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps." (citation omitted) Extending the statutory protections available under the ADA to individuals with broken bones, sprained joints, sore muscles, infectious diseases, or other ailments that temporarily limit an individual's ability to work would trivialize this lofty objective (citing Halperin v Abacus Technology Corp, 128 F3d 191, 200 (CA 4, 1997).

The Court concluded that the *Halperin* rationale applies equally to the PWDCRA, which the Court previously determined had a similar purpose and language as that of the ADA. *Stevens*, 220 Mich App at 216-17. The statutory definition of "disability" under the PWDCRA connotes some sense of *permanency*. Thus, where an impairment is temporary and relatively easily remedied, such as a temporary back injury, such an ailment is *not* a substantial limitation on any major life activity.

The lesson *Chiles* has for counsel, whether asserting or defending against a PWDCRA claim, is to focus on the impairment, not only its nature and severity but, more importantly, its duration and the anticipated permanence. Do not simply accept any alleged impairment as a disability without first determining whether the impairment satisfies the strict statutory definition. ■

EXPERT WITNESSES ON THE INTERNET

Scott G. Hornby
Esordi, Hornby & Sawicki, P.L.L.C.

In the realm of expert witnesses, one can always find someone willing to testify or support virtually any position. The Internet has innumerable WebPages of consultants and experts on everything from jury selection to dog bites. An excellent first source when searching for an expert witness is Findlaw, at **www.findlaw.com.**

There are experts with some unique and innovative approaches. **Www.millergroupexperts.com** takes a novel look at the damage mitigation issue in employment disputes. This WebPage represents that it is a source for "employability" experts, who can review a case to either support or defeat an employment litigant's position that he/she has mitigated his/her damages. The WebPage also squares this concept of employability with the expert witness requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), through publishing (on the WebPage) a federal court decision ruling against a party who attempted to have the employability expert disqualified.

THE NLRB FINALLY TAKES A BREATHER

George M. Mesrey and Jack VanHoorelbeke
Clark Hill PLC

Has the Y2K bug hit the Board? At a time when the Board was issuing decisions at a record pace, the number of decisions between November 1999 and January 2000 has decreased dramatically. 15 new cases are discussed below.

ELECTION OBJECTIONS

1. Bro-Tech Corp. t/a Purolite, 330 NLRB No. 7. The Board held that election day broadcast of pro- union songs from a sound truck violated the *Peerless Plywood* rule.

EMPLOYEE STATUS

2. Boston Medical Center, 330 NLRB No. 30. The Board overruled *Cedars-Sinai Medical Center*, 223 NLRB 251 (1979) and *St. Clare's Hospital & Health Center*, 229 NLRB 1000 (1977), and held that interns, residents and fellows employed by The Boston Medical Center are employees within the meaning of Section 2(3) of the Act and thus, have the right to organize.

EMPLOYER DISCRIMINATION

3. Produce Warehouse of Coram, Inc., 329 NLRB No. 80. The Board held that the employer did not violate the Act when it discharged an employee for being out of uniform at work (wearing a union hat and refusing to replace it with a company hat) in violation of company policy requiring employees to wear company-supplied clothing.

EMPLOYER INTERFERENCE

4. The Hertz Corporation, 329 NLRB No. 78. The Board dismissed a complaint alleging that the employer threatened employees with loss of retroactive pay if they chose to participate in strike.

5. Ansul Inc., 329 NLRB No. 84. The Board found the employer did not violate the Act by telling employees eight days before a scheduled Board-conducted election that it had completed job evaluations and decided to postpone distributing them until after election results were finalized.

6. Petrochem Insulation, Inc., 330 NLRB No. 10. The Board held that the employer violated the Act by filing and maintaining a civil lawsuit against Charging Party unions in federal district court to recover damages from them and to enjoin employees from engaging in protected concerted activity.

7. Super K-Mart and K Mart, et al., 330 NLRB No. 29. The Board, relying upon *Lafayette Park*

Hotel, 326 NLRB No. 69 (1998) concluded that the confidentiality provision in its employee handbook did not violate the Act.

INFORMATION REQUESTS

8. Metropolitan Edison Co., 330 NLRB No. 21. The Board found that the employer violated the Act by refusing the union's request for the names of two informants who provided information to the employer which led to the discharge of an employee for theft.

PROCEDURES IN UNFAIR LABOR PRACTICE CASES

9. Eckert Fire Protection Co., 329 NLRB No. 79. The Board granted summary judgment and held that a one-page memorandum did not constitute a proper answer to the complaint under Section 102.20 of the Board's Rules and Regulations because it failed to address any of the factual or legal allegations of the complaint.

PROTECTED CONCERTED ACTIVITY

10. Yale University, 330 NLRB No. 28. The Board found that a "grade strike" by about 200 university students was not protected concerted activity under the Act because it was a partial strike and because the strikers had misappropriated university property (withheld papers and test materials).

REFUSAL TO BARGAIN

11. Demolition Workers Union Local 95, 330 NLRB No. 49. The Board found that the union violated the Act by failing to execute collective bargaining agreements and by picketing the employer's jobsite in order to force it to renegotiate contract terms.

VOTER ELIGIBILITY

12. Erman Corp., 330 NLRB No. 26. The Board determined that former strikers (who were not permanently replaced) were not barred from voting under Section 9(c)(3) of the Act, even though the election was held more than twelve months after the strike began.

REMEDIES/BARGAINING ORDERS

13. Overnite Transportation Co., 329 NLRB No. 91. The Board found that the employer committed numerous "hallmark" unfair labor practices during their organizing campaign and issued a *Gissel* bargaining order at four facilities, notwithstanding election losses by the union.

14. Hospital Shared Services, 330 NLRB No. 40. The Board found that the employer violated the Act by committing "hallmark violations" by threatening employees with job loss when it learned of the union's petition seeking to represent the security officers. The Board declined to issue a bargaining order, however, and found that an election was the most appropriate method for determining your employees' wishes regarding representation.

UNION RESTRAINT AND COERCION

15. USF Red Star, Inc., a U.S. Freightways Co. and Teamsters Local 118, 330 NLRB No. 15.

The Board found that the union violated the Act by demanding that the employer discharge an employee because of his internal union activities, and that the employer violated the Act by discharging the employee and by discharging the terminal manager for refusing to discharge the employee. ■

LOOKING FOR *Lawnotes* Contributors!

Lawnotes is looking for contributions of interest to Labor and Employment Law Section members.

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

For information, contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., 1400 North Park Plaza, 17117 West Nine Mile Road, Southfield, Michigan 48075. (248) 559-2110.

THE FALLIBLE COURT: *H.K. PORTER V. NLRB*

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

The Supreme Court ruled in 1970 that the National Labor Relations Board (NLRB) did not have the remedial power to impose a contract term — a union security clause — upon an employer that bargained in bad faith. *H. K. Porter v. NLRB*, 397 U. S. 99 (1970). *H. K. Porter* stands for the proposition that while the NLRA requires parties to negotiate in good faith, the NLRB cannot compel a company or a union to agree to any substantive contractual provision, even if the party refused in bad faith to agree to the proposal. Justice Hugo Black, writing for the 5 to 2 majority, held that "implicit" in the NLRA was a prohibition against imposing contract terms, even though he acknowledged that as a "matter of strict, literal interpretation" the Act does not prohibit such remedies. 397 U.S. 107. Justices White and Marshall did not participate, for reasons not stated, but both justices were likely votes for the NLRB; the vote could have been 5 to 4.

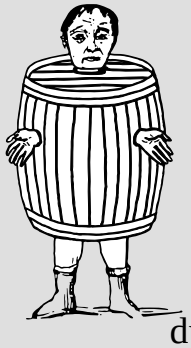
As practicing lawyers, we often take for granted that earlier Supreme Court decisions are correct, or figure there is nothing that can be done about them, so we don't give the principles they establish much thought. This can be called "[h]indsight bias," to quote Chief Judge Richard Posner's excellent book, *An Affair of State: The Investigation, Impeachment and Trial of President Clinton* (Harvard Press, 1999). As Judge Posner puts it: "Outcome exerts an irresistible hydraulic pressure on interpretation." As I grow older, or better yet, more experienced, I am no longer satisfied with knowing the Court's precedent; I want to know if it is supportable. I am reminded of what Justice Robert Jackson said of the Court: "We are not final because we are infallible but infallible because we are final."

Rereading *H.K. Porter* convinces me that the decision was wrong, and result-driven, even though written by a former New Deal Democratic senator. Justice Black relied on Section 8(d) of the Act, which states that the duty to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." 29 U. S.C. 158(d). He also relied upon a House Committee report on the Taft-Hartley amendments which states that the NLRB is "setting itself as judge of what concessions an employer must make. ... and may attempt to carry this process still further and seek to control more of collective-bargaining agreements." 397 U.S. at 105-6. Justice Black may have been influenced by the fact that the NLRB had not exercised such remedial powers except when directed to do so by the court of appeals. Neither Section 8(d) nor the House report, however, persuades me that the Court was correct in limiting the NLRB's remedial power. Justice Black's opinion, just over five pages in the Lawyer's Edition volume, is result-driven. Justice Douglas' five-paragraph dissenting opinion, joined by Justice Stewart, makes this basic point, but is too short and should have been more forceful.

The glaring problem with the decision is that Section 8(d) does *not* address the NLRB's remedial powers. Section 8(d) does *not* state that the NLRB is precluded from imposing a contract term where the employer's only reason for refusing to agree to it was an illegal one. The NLRB clearly has the power to restore terms and conditions of employment and require the employer to maintain the status quo until impasse, so it is reasonable to permit the imposition of a contract term as a remedy, where circumstances warrant. The NLRB has the power, or at least it thinks it does, to compel an employer to reinstate a contract proposal illegally reneged and permit the union to accept the proposal. *TNT Skypak, Inc*., 328 NLRB No. 68 (1999). While not controlling, it is hard to reconcile the *Steelworker's Trilogy*, which granted arbitrators broad remedial powers, with the narrow reading of NLRB remedial powers in *H. K. Porter*. See *United Steelworkers of America v. Enterprise Wheel & Car Corp*., 363 U.S.593 (1960). In short, Section 8(d) cannot fairly be read as a restriction on the NLRB's remedial powers.

Read 30 years after it was written, the Court's reasoning is unpersuasive and shallow. The majority ignores Section 10(c), 29 U.S.C. 160(c), which grants the NLRB the power to compel a party "to take such affirmative action ... which will effectuate the policies of the Act." The majority reads a restriction into the NLRB's remedial powers from a section of the Act that does not address the NLRB's powers and ignores the section of the Act that expresses the NLRB's broad powers. It is illogical, and contrary to the plain text of the NLRA, for the Court to limit remedial power simply because neither party can force the other party to agree to a contract term during good faith bargaining. While the NLRA encourages collective bargaining, it is far from being a *lassiez faire* statute, and it contemplates effective remedies.

One can only imagine how labor law would be different had the Court affirmed the NLRB. If the court confirmed meaningful remedial powers, perhaps we would have less labor strife. By reading into the NLRA such a restriction, however, the Court rewards illegal conduct, or at least, renders consequences of illegal conduct so modest as to encourage it. *H. K. Porter* is only one in a series of Court decisions that have eroded the NLRA's effectiveness and undermined the rights of labor unions. ■



THE JOY OF LABOR LAW

Due to a dearth of joy during the last quarter, this column will resume in the next issue.

– the editors

INSIDE *LAWNOTES*

- Alison Paton takes the Michigan Court of Appeals to task for its decision limiting public sector unions' information rights.
- Judge Mimi Gendreau reviews federal sector employment discrimination claims procedures.
- Judge Roy Roulhac chronicles 1999 appellate review of MERC decisions.
- Stuart Israel writes on some of our "many grave deficiencies."
- Bob Vercruysse honors 2000 LELS Distinguished Service Award recipient Professor Ted St. Antoine.
- Information on upcoming events and LELS business: Distinguished Service Award nominations for 2001; the 2000 LELS-MERC public sector labor law conference on June 6 and 7 in East Lansing; the 2000 LELS annual meeting, seminar and dinner on September 20 in Detroit; and more.
- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC; websites to visit; and more.
- Authors John G. Adam; John T. Below; Gary S. Fealk; Mimi M. Gendreau; Scott G. Hornby; Stuart M. Israel; Danielle N. Mammel; Alexandra S. Matish; George M. Mesrey; Andrew M. Mudryk; Alison L. Paton; Roy L. Roulhac; William C. Schaub, Jr.; Rosemary G. Schikora; Jeffrey A. Steele; Jack VanHoorelbeke; Robert M. Vercruysse and more.

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

BULK RATE
U.S. Postage
PAID
Permit No. 2217
Detroit, MI

Printed on Recycled Paper