LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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WHITE v. BURLINGTON NORTHERN RR – DE MINIMIS RETALIATION?

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Introduction

Can an employer engage in conduct which retaliates against an employee who exercises rights protected under Title VII and get away with it because the action is considered simply too trivial or minor to warrant judicial scrutiny? A majority of the courts of appeals have assumed so; and now the United States Supreme Court is poised to answer the question. The court will review the Sixth Circuit's en banc decision in *White v. Burlington Northern RR,* 364 F.3d 789 (6th Cir. 2004).

In its petition for review, Burlington Northern invited the Court to review the three different existing standards applied by the courts of appeals in determining whether an employer may be liable for retaliatory discrimination and to choose one. These standards are: (1) a showing of a "materially adverse" change in the terms and conditions of employment; (2) a showing of an "ultimate employment decision;" and (3) action based on a retaliatory motive which is "reasonably likely to deter" any employee from engaging in protected activity.[1]

The current focus is on whether or not there has been an "adverse employment action" and the significance and substance of such action. The search for and review of adverse employment actions has led to a de facto judicially created checklist of employment conduct considered significant enough to establish a violation of Section 704 (a) of Title VII.[2]

The Facts

Sheila White was hired by Burlington Northern in its Maintenance of Way department and operated a forklift. She was the only black female in the department and had no difficulty performing her job. She complained about sexual harassment by her supervisor who was suspended for ten days and was required to attend training. When the company met with her to tell her of the action it had taken on her complaint, it also informed her that, during the investigation, the company had learned of complaints from other employees with greater seniority about her working on the forklift. She was told that she would be assigned to a standard track laborer position because of her coworker's complaints; a position more arduous and "dirtier" than her forklift position.

White filed two charges of discrimination with the EEOC alleging sex discrimination and retaliation. She was suspended for insubordination seven days after she filed her second EEOC charge and three days after the charge was mailed to her supervisor. White filed a grievance protesting her suspension. The suspension was immediate and without pay. After an investigation and a hearing, the hearing officer who was a Burlington Northern manager, found that White had not been insubordinate and should not have been suspended. She was reinstated to her position with full back pay for the thirty-seven days she missed. Subsequently, White filed her action alleging sex discrimination and retaliation in violation of Title VII.

Bad Facts Make Bad . . .

Perhaps the most challenging aspect of the case from the company's position arose in the area of pretext and the fact that its witnesses created a record which, to say the least, provides a shaky foundation for review. With respect to the reason for transfer, one reason was given in the company's interrogatory answers. The official who made the decision, however, asserted a different, contrary reason at trial. In its interrogatory answer, the railroad stated it removed White because a more senior employee claimed the job in accordance with the collective bargaining agreement. At the trial, the supervisor testified that the forklift job was not covered by the agreement and that he could appoint anyone he wanted regardless of seniority. The only other employee who was qualified to operate the forklift testified he did not complain about White and that he did not request to go back to the position. No other qualified workers senior to White were available to operate the forklift. The union representative denied at trial that any complaints were made about White holding the forklift position.

With respect to White's suspension for insubordination, two supervisors each testified that the other had made the decision. In a letter to the EEOC, the railroad identified one of the two supervisors as having made the decision, but that supervisor testified at trial that the letter was incorrect. The jury was left to consider that no one from the company was acknowledging responsibility for the suspension decision. The supposed insubordination was reviewed by another manager of the railroad who found no insubordination and an improper suspension. Another white male, who engaged in similar conduct which led to White's suspension, received no discipline.[3]

The Sixth Circuit Panel's Decision

In a 2-1 decision, the Sixth Circuit overturned the district court's decision.[4] The district court had found that White has presented sufficient evidence that her transfer from the forklift operator position to the track position was an adverse employment action relying upon the "indices that might be unique to a particular situation."[5] The district court found that the temporary suspension was an adverse employment action and distinguished the company's reliance upon *Dobbs-Weinstein v. Vanderbelt University,*[6] because

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STATEMENT OF EDITORIAL POLICY

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

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

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that case involved a tenure decision. The district court also held that jurors received conflicting evidence so that they could properly resolve the issue of pretext in White's favor.[7] The district court denied the company's motion for a new trial holding that White had presented sufficient evidence for the jurors to determine that she was suspended because of her EEOC charge, and that the verdict was not against the clear weight of evidence.

In reversing the district court, the panel majority found that there was no adverse employment action sufficient to sustain a Title VII retaliation claim rejecting the argument that the transfer to a different duty within the same job classification with a same salary title and seniority constituted a violation and finding that a temporary suspension was not sufficiently adverse to support a Title VII claim.[8] The panel referred to the Court's prior decision in *Kocsis v. Multi-Care Management, Inc.,*[9] as requiring that a change in employment conditions be more disruptive than a mere inconvenience or alteration of job responsibilities. The fact that the forklift work was less physically demanding that track maintenance did not mean that the reassignment was an adverse employment action. The panel failed to see how an employee can suffer an adverse employment action being directed to do the job for which the employee was hired. The fact that the new responsibilities involved heavy lifting and more physically demanding tasks did not equal a demotion.

With respect to the suspension, the panel majority held that the Sixth Circuit's decision in *Dobbs-Weinstein* applied, and that a suspension was not an adverse employment action, since reinstatement puts the employee in the position she would have been, and thereby negating the potentially adverse intermediate employment action. White's appeal of her suspension prevented an interim decision from becoming final.

The dissent recognized that the court has required a materially adverse employment action for plaintiff to be able to state a *prima facie* case under Title VII retaliation. In light of the facts and circumstances in this case, the dissent found that White had effectively demonstrated that her demotion and subsequent suspension constituted the requisite materially adverse employment action. The reassignment from the forklift position to a track laborer position involved material alterations of job responsibilities constituting an adverse employment action. With respect to the suspension, the dissent noted that it was immediate and that pay and benefits were immediately terminated without warning. White had no income with which to pay her bills and was left in limbo waiting a determination of her future with the railroad. Her reinstatement might have mitigated her damages but was not dispositive of whether or not an adverse employment action had occurred. In any event, the dissent stated that the railroads conduct in the aggregate created a situation that constituted a materially adverse employment action, and that the two actions, taken together were more than *de minimus.*[10]

The *En Banc* Decision

All thirteen judges agreed that the railroad had violated the non-retaliation provision of Title VII. Eight judges believed that the "materially adverse" standard should apply. Five judges believed that the "reasonably likely to deter" standard should be adopted.[11]

In its *en banc* decision, the majority affirmed the district court's denial of the company's motion for judgment as a matter of law, and the district court's award of attorney's fees. The majority concluded, however, that the district court erred in instructing the jury on the issue of punitive damages and remanded the case for further proceedings consistent with its opinion.

The majority stated that *Kocsis* is the defining case for adverse employment action. Under that decision, the plaintiff must show a materially adverse change in the terms of her employment. Mere inconvenience or a bruised ego are not enough. The majority stated that its definition accomplished the goal while counterbalancing the need to prevent lawsuits based on trivialities. Instead of requiring a case by case determination of what actions are reasonably likely to deter an employee, the court has over the last twenty years given some shape to the definition by defining the kinds of material adverse action that rise above the level of trivial. The majority stated that while it was impossible to list every possible action that would fall within the definition, a court must consider "indices" that might be unique to a particular situation. This definition applies equally to all Title VII claims; not merely retaliation claims.

In reaching its decision, the majority rejected the "ultimate employment decision" standard which it said was contrary to the plain language of the statute. The suspension at issue without pay for thirty-seven days is not the type of action which is to be filtered out; taking away a paycheck for over a month is not trivial, and if motivated by discriminatory intent, the suspension violates Title VII.

The majority also rejected the standard proposed by White and the EEOC[12] to adopt an interpretation set forth in the EEOC guidelines — any adverse treatment that is based on retaliatory motive and is reasonably likely to deter a charging party or others from engaging a protected activity constitutes a violation. The EEOC acknowledged that its definition excludes "petty slights and trivial annoyances" and anything else that is not likely to deter employees from engaging in protective activity.

Five judges dissented with respect to this adverse action standard adopted by the majority and favored the approach urged by White and the EEOC. The materially adverse rule announced by the majority allows many types of retaliatory actions to go unaddressed and unpunished. The dissent noted that the Ninth Circuit's "reasonably likely to deter" standard addresses the variety of forms of retaliation while safeguarding against the "slippery slope" effect by preventing employees from litigating trivial annoyances. The inquiry is whether, as a matter of law, the adverse action would deter a reasonable employee from engaging in protected activity, not whether any adverse action has been taken.[13] The dissent also questioned the continuing validity of the court's application of the standards in Section 703(a)[14] to claims under the retaliation definition found in Section 704.[15] The dissent concluded that the utilization of 703(a) definition of an adverse employment action in a Section 704(a) action was improper and stated that the actions of the company constituted adverse employment actions because they were reasonably likely to deter an employee from engaging in protective activity. Section 703 refers specifically to discrimination with respect to compensation, terms, conditions and privileges of employment. Section 704 prohibits unconditionally retaliation with no reference to the four criteria set forth in Section 703.

EEOC v. EEAC

The Equal Employment Opportunity Commission ("EEOC") and the Equal Employment Advisory Council ("EEAC") filed briefs with the court, and staked out the positions that will be argued at the Supreme Court with respect to two of the three possible standards.[16.] In its brief, the EEOC stated that it was not arguing that every action that an employer takes could form the basis of a claim. Minor acts of a supervisor such as facial expressions and displeasure and petty slights and trivial annoyances are not likely to deter an employee from protected activity. The degree of harm goes to the issue of damages and not employer liability. The standard adopted by the panel allows employers to retaliate without concern in an entire class of acts such as using the thread of retaliatory transfer or temporary suspension. Such forms of retaliation could effectively deter individuals from engaging in conduct protected by Section 704.

The EEAC argued in its brief that under the EEOC's theory, once an employee has complained, every subsequent change in job duties is a potential basis for retaliation claim. Employees will effectively be able to pick and choose assignments backing up the rejection of other assignments with threats of retaliatory suits. The EEOC standard interferes with the proper use of suspensions. An employer would be forced to make a choice between allowing a dangerous and/or disruptive individual to remain in the workplace or to suspend them in risk of a retaliation claim. A suspension does not adversely affect an employee if it is found to later be without basis. The employer can rescind the suspension and restore pay. The only consequence as here is that an employee receives an extra period of time off with full pay.

What will the Supreme Court do? — the "Goldilocks" Standard

The Court has been presented with three different standards. The question is which one of those standards, if any, is considered to be "just right." The EEOC and plaintiffs are concerned that the standard not be "too hard," while employers are concerned that the standard will be "too soft" and every workplace complaint will literally become a federal case.

Given the factual record, it will be interesting to see if the employer will continue to press the argument that the White suspension was not an adverse employment action because she was reinstated. The entire Sixth Circuit disagreed with its position. In its petition, the employer even asserted that although there may be "some hardship" when an employee is suspended without pay, an employee who is returned to work will wind up receiving full pay for the periods in which the employee did not have to work. The implication is that a suspension without pay and subsequent reinstatement amounts to an unexpected vacation. The record does not suggest that Ms. White viewed it as such.

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It would seem that the focus will be on the language of the statute, and the issues raised in the *en banc* decision and the dissent as to the application of the Section 703 language and the adverse employment action criteria to a Section 704 retaliation claim. The dissent in the *en banc* decision may very well have posed the issue which the Court will answer: the focus should be whether, as a matter of law, the adverse action would deter a reasonably employee from engaging in protected activity; not on the degree or severity of the adverse action taken.[17]

The fact that the Ninth Circuit is the only court which has adopted the EEOC position does not mean that its position will not be upheld and adopted by the Supreme Court. After the Civil Rights Act of 1991 was enacted, the vast majority of circuit courts held that in order to avail oneself to the "mixed motive" method of proving a disparate treatment case, the plaintiff must present direct evidence of an unlawful motive. The Ninth Circuit disagreed and held that direct evidence was not required. The Supreme Court granted certiorari and adopted the Ninth Circuit's position.[18] It may well be that employment attorneys in the Sixth Circuit should become familiar with the Ninth Circuit's decision in *Ray v. Henderson,* which adopts and applies the EEOC position.[19] Burlington Northern has posed the question to the Supreme Court of what is the proper standard, a question which employers in every Circuit but the Ninth may wish had not been asked.

— END NOTES —

[1]The company also included a question for review dealing with the issue of the appropriate standard of proof for a plaintiff who seeks punitive damages under Title VII. Review was not granted as to this issue.

[2]The company stated in its petition that the federal courts of appeals are badly divided over the proper standard and that the chaos is such that the court's commentators disagree about how to characterize the various courts of appeals positions within the circuit's split.

[3]364 F.3d at 793.

[4]The district court's decision denying the company's motion was not officially reported and is referenced in footnotes of the panel's decision.

[5]*Hollins v. Atlantic Co.,* 188 F.3d 652, 662 (6th Cir. 1999).

[6]185 F.3d 542 (6th Cir.).

[7]310 F.3d at 446.

[8]310 F.3d at 445.

[9]97 F.3d 876, 885 (6th Cir. 1996).

[10]310 F.3d at 459.

[11]The majority decision of the panel was written by District Judge Gwin, sitting by designation.

[12]The EEOC filed a brief in support of the request for an *en banc* hearing.

[13]364 F.3d at 814.

[14]It shall be an unlawful employment proactive for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminated against any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

[15]It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the subchapter.

[16]The Equal Employment Advisory Council is a nationwide association of over three hundred of the largest private sector corporations.

[17]364 F.3d at 813.

[18]*Desert Palace v. Costa,* 299 F.3d 838 (9th cir. 2002) (*Aff'd* 539 U.S. 90 (2003).

[19]217 F.3d 1234 (9th Cir. 2000). ■

A "FAIR SHAKE" FROM A FAIR JUDGE – JUSTICE ALITO'S BALANCED APPROACH TO EMPLOYMENT LAW CASES

Jeremy Chisholm
Butzel Long

Newly-confirmed Associate Justice Samuel Alito's employment law decisions during his long tenure on the federal bench reveal a thoughtful, meticulous lawyer who takes judging seriously. This should be welcome news to employment law practitioners and their clients alike, whether they plead or defend employment discrimination lawsuits.

It's hardly surprising that this observation may be news to most of the bar, especially to those members who paid much attention to Justice Alito's confirmation. In a process that at times threatened to redefine the word "contentious," Justice Alito's confirmation was characterized by some of the harshest public rhetoric directed at a judge in recent memory.

Though most of these criticisms largely issued from issue-advocacy groups bent on raising money from their constituents, various bar organizations got in on the act as well. The National Employment Lawyers Association, for example, stated that Justice Alito is committed to positions that "dramatically circumscribe employee rights," and "strongly urge[d] the Senate to defeat his confirmation."[1] Senator Edward Kennedy (D-Mass.), who sits on the Senate Judiciary Committee, stated during the hearings that "average Americans have had a hard time getting a fair shake in his courtroom."[2]

Widely known to the bar is that these denunciations came from both private sources (mainly various plaintiffs' bars) and from public sources — our elected representatives, including both Senators from Michigan. What may not be as widely known is that these allegations of bias are principally untrue. Justice Alito's record as a Judge on the Third Circuit Court of Appeals in employment law cases demonstrates that his commitment is to sound interpretation and application of precedent, not to predetermined outcomes based on ideology. Of 24 majority opinions written by Judge Alito in employment law cases, 11 times the court found for the employee plaintiffs, and 13 times for employer defendants. Below is a survey of some of those decisions.

ADEA Cases

Parker v. Royal Oak Enterprises, 85 Fed. Appx. 292, (3rd Cir. 2003). Parker was a 65 year old salesman who had been an employee of Royal Oak for over 23 years. Following the hiring of another salesman only 31 years of age, Parker was advised by his supervisor in either May or June of 1999 that he would have to retire by the end of that year. He retired in December 1999.

In May 2000, Parker filed suit in federal district court alleging age discrimination. The district court dismissed his claim because it was filed over 300 days from the accrual of his EEOC claim, which the court dated at the latest as June 30, 1999.

On appeal, Parker asked the Third Circuit to order equitable tolling of the 300 day period, arguing that he had been dissuaded from filing the EEOC claim by false offers of a consulting position with Royal Oak. In an opinion by Judge Alito, the court applied the Supreme Court's direction that such tolling should be applied sparingly to determine that Parker had not been in any "extraordinary" way prevented from asserting his rights. The court noted that "the most that Parker claim[ed]" was that his supervisor implied he might be offered a consulting position, and that Parker therefore decided not to file his claim in the hope of securing that position. The court found that this decision did not constitute an "extraordinary" prevention of Parker's exercise of his right to file a claim on time, and therefore upheld the dismissal of his suit.

Showalter v. University of Pittsburgh Medical Center, 190 F.3d 231 (3rd Cir. 1999). The plaintiff sued for violation of the ADEA after he was fired following a "reduction-in-force" (RIF). The central issue on appeal was whether the fourth element of a prima facie case of age discrimination in a RIF case requires the plaintiff to show that the employer retained workers outside of the protected class. The lower court had applied Third Circuit precedent to hold that a plaintiff *did* have to show that workers outside the protected class were not terminated. Reversing the lower court, Judge Alito wrote that despite this Third Circuit precedent, the decision of the Supreme Court in *O'Connor v. Consolidated Coin Caterers Corp.*[3] required that plaintiffs only meet the lower standard of demonstrating that employees "sufficiently younger" were retained. The court then found that age differences of eight and 16 years between the plaintiff and two retained co-workers demonstrated that "sufficiently younger" employees were retained, and that therefore the plaintiff had met his burden.

ADA Cases

Shapiro v. Township of Lakewood, 292 F.3d 356 (3rd Cir. 2002). During the course of his employment with the defendant, the plaintiff became disabled. The defendant refused to transfer the plaintiff to another position that would accommodate his disability, unless he complied with the defendant's policy that he travel to the municipal building to view job openings posted on a bulletin board therein. Noting that the Supreme Court has held that disability-neutral policies do not always take precedence over a request for transfer,[4] Judge Alito wrote that where an employee requests a reasonable accommodation, and identifies several transfer positions that would be reasonable accommodations of his disability, the employer cannot rely on its standard policy of requiring visits to the municipal building to justify a failure to transfer.

Donahue v. Consolidated Rail Corp., 224 F.3d 226 (3rd Cir. 2000). The plaintiff developed a heart condition while an employee of the defendant, that caused him to occasionally lose consciousness, and made it impossible for him to continue working as a railroad engineer and conductor. He was turned down in his applications for alternative positions with the company, and was terminated with full benefits. At the time he left his job, there were vacancies available in the train dispatcher position.

The plaintiff sued, claiming that the defendant had failed to reasonably accommodate him by offering him a position he could perform, namely as a train dispatcher. The plaintiff argued that he could have performed this job because it did not involve the physical strains involved in his former position. Judge Alito wrote for the court that had this "accommodation" been granted, it would not have eliminated the "significant risk" that Donahue's employment would have posed, because a train dispatcher must be "conscious and alert" in order to avoid potential disaster in train coordination. Because of his condition, the plaintiff could not reasonably perform this job, and therefore the defendant had not failed to reasonably accommodate him.

FMLA Cases

Chittister v. Department of Community and Economic Development, 226 F.3d 223 (3rd Cir. 2000). Chittister sued his employer claiming a violation of the FMLA when he was fired while on sick leave. Finding first that the employer (a state government agency) was "an arm of the Commonwealth" and therefore "within the protection of the Eleventh Amendment," and that Pennsylvania had not consented to suit, the court considered whether the FMLA was an effective abrogation of the state's Eleventh Amendment immunity.

Applying Supreme Court precedent that Congress must make its intention to abrogate that immunity "unmistakably clear in the language of the statute,"[5] Judge Alito found the intent to abrogate manifest in the FMLA's grant of a private right of action against "any employer." Then, noting that this abrogation was predicated on "the potential for employment discrimination on the basis of sex," in violation of the equal protection clause of the 14th Amendment, Judge Alito found that in Supreme Court requirement of "congruence and proportionality"[6] between the potential violation and the statute's purported remedy had not been met.

He based this holding on the fact that the statute was not based on any finding that the sick leave policies the FMLA was meant to supplant were fraught with intentional gender discrimination. Finding that "the FMLA does much more than require nondiscriminatory sick leave practices; It creates a substantive entitlement to sick leave," disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act," the court held that the FMLA was invalid insofar as it attempted to abrogate the Eleventh Amendment immunity of states.

Sexual Harassment Cases

Jensen v. Potter, 2006 U.S. App. LEXIS 2316 (3rd Cir. January 31, 2006). The plaintiff claimed that she was sexually harassed by her supervisor in the form of graphic comments and requests for sexual favors; she also claimed that she was retaliated against when she complained of that harassment; and that her employer, the US Postal Service, was liable for this harassment. The lower court granted summary judgment for the defendant on both claims, on the grounds that retaliation claims based on a hostile work environment are not cognizable under 42 U.S.C. § 2000(e)-(3)(a). Noting a split in the circuits, Judge Alito wrote that this statute "prohibits a quantum of discrimination coterminous with that prohibited by § 2000(e)-(2)(a), and that therefore claims for retaliation predicated on hostile work environment were cognizable under the former statute. The court reversed the grand of summary judgment.

First Amendment Cases

Aziz v. Newark, 170 F.3d 359 (3rd Cir. 1999). Muslim police officers sued claiming that the Newark Police Department's "no-beards" policy violated their First Amendment rights to freedom

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FOURTEEN THINGS ARBITRATION ADVOCATES WANT ARBITRATORS TO KNOW

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I. Keep An Open Mind.

You have extensive experience. You're smart. You're a quick study. These are strengths. They're some of the reasons we selected you from among all those arbitrators and former judges shmoozing at the bar meetings. But these characteristics can be weaknesses, too. They can cause you to jump to conclusions, to pigeonhole, to prejudge, to stop listening.

Cases have infinite variations. You've seen a lot, but you haven't seen it all. Even if it seems you know all you need to know early on in the case, things are not always what they seem. As Mark Twain reportedly warned, what gets you in trouble is "what you know for sure that just ain't so." Keep an open mind until all the evidence is in, and let both sides have their "day in court."

II. Let Me Put On My Case, My Way.

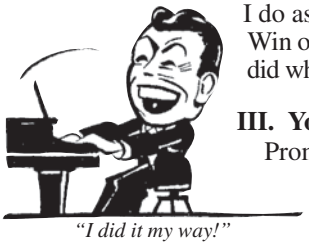
If you let me put on my case my way, I just might persuade you that your initial impressions need adjustment. Or, I might confirm your initial impressions. Either way, give me enough rope — to ascend to victory or to hang myself.

In addition, letting me put on my case my way recognizes that there are multiple objectives to be served at arbitration. The core objective, and your principal concern, is dispute resolution, getting to a clear, final and binding decision. There are, however, other important objectives that arise out of the parties' needs and the complexities of the parties' relationships.

The integrity of the process, and the parties' satisfaction with the process, are dependent on more than outcome. Justice must satisfy the appearance of justice. If you are too restrictive in letting me put on my case my way, you plant the seeds of dissatisfaction with the process, and undermine the parties' confidence that justice was done. Winners prefer to win in a fair process. Losers more readily accept loss — and comply with awards, rather than challenge them in court or with passive-aggressive obstruction — if they believe the process was fair.

Union-management arbitrations — like other arbitrations between parties with ongoing relationships — often have implications beyond resolution of the narrow disputes at issue. Union-management arbitrations may involve ongoing beneath-the-surface struggles between the union and management, between plant management and company headquarters, between local and international union officials, between competing managers, between internal union factions, between the grievant and the grievant's immediate supervisor, and so on.

Lucky for you, you don't have to master the nuances of byzantine relationship dynamics roiling beneath the surface of the contract or discipline issue presented for your resolution. But I do. So please be sensitive to the fact that the way I present my case may be dictated by a universe of factors — very important factors — that are beyond your ken. Understand that I need to accommodate these factors, and that they may affect my witness selection, the content and style of my argument, and anything and everything else



"I did it my way!"

I do as an advocate. So, let me do my job. Win or lose, I want to sing with Sinatra: "I did what I had to do ... [and] did it my way."

III. Your Time Is Our Time.

Prominent arbitrators at a recent ICLE seminar were asked to advise advocates on effective arbitral advocacy. As is typical at such events, many included admonitions on efficiency: The parties should come early to discuss stipulations. The parties should come early to mark joint exhibits. The parties should come early to discuss settlement. Start the hearing on time. Don't interrupt the hearing to confer with clients or witnesses or the other side. Keep things moving. Don't keep the arbitrator waiting.

To these arbitrators I respond with a line from a 1924 song made famous by Rudy Vallee: "Your time is my time." Or, more to the point, the arbitrator's time is the parties' time. The parties retained you for the day. Be prepared to spend the day.

It is inevitable that sometimes you will be called on to wait. Sometimes this is because the parties are dilatory or disorganized or slothful. Most often, however, it is because of the immutable principle that things must unfold in their own time. As it is written: "To everything there is a season, and a time to every purpose under heaven." (Ecclesiastes 3:1). There is a time to mark exhibits, and a time to discuss settlement. Often these times don't arrive until all the necessary parties are in one place, focused on the dispute at hand. Often it is necessary to seize that time, even if it means that you are left to twiddle your arbitral thumbs.

Being an arbitrator is like being in the Army: hurry-up-and-wait. Of course, being an arbitrator is safer than being in the Army, and brings in the big bucks. So, be ready to sit around while the parties do what they gotta do. Work on another decision, or read the newspaper, or check out Ecclesiastes, but stop kvetching.

IV. Don't Be a Clock Watcher.

Arbitration hearings are art, not science. They don't run on the clock. If it makes sense to keep going to accommodate the parties, do what makes sense.

Arbitrations are expensive. They consume the parties' staff time. The parties pay for lawyers, and some lawyers charge lots. Witnesses — particularly union witnesses — are likely to be missing work without compensation, or they may be using up their hard-earned days off or vacation time. Everybody involved is investing heavy resources when a dispute comes to hearing. So, it almost always saves expense to avoid an extra hearing day, even if this requires going beyond "regular business hours." The parties don't want to come back another day if it can be avoided, even if you have to work after 5:00 p.m., or after 6:00 p.m., or until 7:30 p.m., or even if it means that you will have to lean on one unreasonable party or the other to continue past "normal" quitting time.

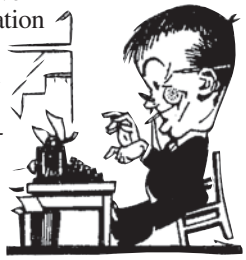
I'm not saying that anybody should abuse anybody else's schedule, but the arbitrator should not be the reason why an extra hearing day is necessary. There will be occasions when you can't go past a certain time because you have other important commitments. If you have time restrictions, however, you should let the parties know well in advance, when the hearing date is scheduled or, in extenuating circumstances, later, but as soon as you know about your time restriction. Otherwise, let the parties continue until they're done, and don't watch the clock.

V. Opinion Writing: "Attention Must Be Paid."

I'm speaking here for all arbitration advocates, borrowing from *Death of A Salesman*: "Attention, attention must finally be paid to such a person."

We put on our case. We presented witnesses and evidence. We wrote a brief. We presented logic, authority, and common sense in impassioned argument. We did our job. Now it's your turn. Attention must be paid. Your job is to address and analyze our arguments, and make a clear and reasoned and responsive decision.

Some arbitrators write decisions that are, let's say, disappointing. It's not just the outcome. Parties can live more easily with an adverse decision if they believe they got their "day in court." They believe this when they perceive that their arguments were heard, understood, and fairly considered, even if their arguments were rejected. Some arbitration decisions don't foster this perception. It is not necessary for your decision to be a *magnum opus* in every case. It's fine to be succinct. But your decision ought to *demonstrate* that you heard, understood, and fairly considered our arguments.



"Writing the opinion."

The worst sort of decision in union-management cases goes through the motions. It begins with lengthy quoted passages from the collective bargaining agreement. The quotes go on for pages. They include not just the key language — that requiring interpretation and application, which will be the subject of later analysis — but a lot more. Too much more, like the four-page grievance arbitration procedure, although the sole issue is whether discipline was supported by "just cause." Who needs re-typed contract language? After all, the collective bargaining agreement is stipulated exhibit 1. Next, this sort of decision lists the parties' "contentions." It offers no analysis, just rote lists. Finally, in the shortest section, this sort of decision presents its conclusions, abruptly.

I want more. I also want less. I made arguments for a reason. Usually my reason is that I think my arguments might persuade you to decide the case in my client's favor. Sometimes, however, I make arguments because my client or the grievant believes they are important and insisted that I make them, even though I counseled against making those arguments. Whatever their purpose, my arguments deserve more than placement on a list. They may not warrant exhaustive exegesis, but they deserve respect. You show respect by stating your reasons for adopting or rejecting those arguments. If I have to give up quotation of contract language and summary lists of "contentions" to get more analysis, sign me up.

I'm sure there are parties who are content with the Gary Cooper school of arbitral decision writing: "yup" or "nope." Some expedited procedures mandate one-paragraph or even one-sentence decisions. Such decisions have their place, but most of the time most parties want their *full* "day in court." This means they want their arguments analyzed and addressed. Most parties also want their money's worth. Many accept the common billing ratio — two days "study" and decision writing for each hearing day — but expect two days' worth of analysis and judgment. There may be many reasons to keep decisions lean — economy, clarity, diplomacy, etc. — but the "day in court" principle should your guide decision writing. Here is a form:

> The union/company argues that _____. The argument is based on Article _____ of the collective bargaining agreement and the testimony of _____. This argument does not control/controls because _____.

Using this form will show that you listened. We may not win, but attention will have been paid, and that's what getting a "day in court" is all about.

VI. Issue Subpoenas On Request, And Don't Become Prematurely Involved In Subpoena Disputes.

Arbitrators have the right and responsibility to issue subpoenas. Parties have the right to the issuance of subpoenas. These principles are addressed by arbitrator Thomas L. Gravelle in "Subpoenas In Labor Arbitration" Vol. 9, No. 1 *Labor and Employment Lawnotes* 5 (Spring 1999).

Arbitrators should sign subpoenas in blank, upon a party's request, without involving the opposing party. Arbitral subpoenas should be available to parties in the same way that judicial subpoenas are available to parties in court litigation. If, after subpoenas are served, recipients or opposing parties have objections, they can bring them to the arbitrator as appropriate, prehearing or at the hearing. If necessary, aggrieved parties and subpoena recipients can seek court enforcement or protection.

Some arbitrators believe that both parties must be consulted before a subpoena is issued, and that the content of subpoenas must be subject to pre-issuance debate. This is wrong. Such a process forces the requesting party to identify witnesses prematurely, revealing strategy and, in some cases, putting potential witnesses in difficult positions. Such a process embroils the arbitrator in disputes over the substance of the case before the arbitrator has adequate information about the substance. Such a process prematurely gives attention to potential problems that may be obviated by settlement, or by strategy changes, or by the identification of alternative witness, or by the fact that the witness moved to North Dakota.

Arbitrators should not require a requesting party to do any more than make the request. There is no reason for the arbitrator to become involved in the content of subpoenas, or to invite debate among parties about subpoenas, unless and until there is a dispute with practical consequences, which will not be the case until *after* subpoenas are served and contested.

If you — as arbitrator — are tempted to make subpoena requests adversarial, fuggeddabouddit. Issue subpoenas on request. Address disputes if and when the subpoenas are served *and* the disputes are real.

VII. No Big Surprises, Please.

Beware if you are tempted to write a decision that goes like this:

> The union argues that _____. This argument is based on Article ___ of the collective bargaining agreement and the testimony of _____. This argument does not control because _____.
>
> The company argues that _____. This argument is based on Article ____ of the collective bargaining agreement, the grievant's signed confession, and the videotape evidence. This argument does not control because ___ .
>
> What controls is Article ____ of the collective bargaining agreement. Subsection (A)(1)(c)(iii) contains the governing language. Although neither party and none of the witnesses mentioned this subsection at the two-day hearing or in the collective 67 pages of the parties' briefs,

(Continued on page 8)

FOURTEEN THINGS ARBITRATION ADVOCATES WANT ARBITRATORS TO KNOW

(Continued from page 7)

> I found this subsection during my four days of study. Whoa, I thought, I can base my decision on this obscure little subsection.
>
> I have no idea why neither party and no witness mentioned this subsection. I have no idea what either party might say about subsection (A)(1)(c)(iii). Still, I am relying on it to seal their fate.

If there was a good reason why subsection (A)(1)(c)(iii) wasn't mentioned by either side, you don't know it. Why presume that you have some unique insight? Why presume that you have superior contract-reading skills? Why presume that one of the witnesses didn't explain why the subsection is inapposite at the moment your mind wandered, or when the train rumbled by outside the hearing room window and you maybe missed a few sentences of testimony?

If you are inclined to give determinative weight to something not addressed by either party, make sure that you're fully informed. Ask for supplemental briefs. Or convene a telephone conference. If the parties' arguments and the basis for your decision pass like ships in the night, there is a substantial risk that your ship is in the Twilight Zone.

VIII. Number Exhibits From One To Whatever.

When it comes to exhibits, linear is the way to go. Start with one, go to two, move on to three, and so on. This is more efficient than having three consecutively-numbered sets, one set of joint exhibits, and one set each for the two parties. What matters, after all, is whether an exhibit is admitted, whether by stipulation or by arbitral ruling. Once the exhibit is admitted, anyone can use it. Anyone can argue the exhibit is definitive proof of something or other, or that it is insignificant. With one set of exhibits, post-hearing briefs are briefer. There is no need to differentiate between "Joint Exhibit 1" and "Union Exhibit 1" and "Employer Exhibit 1." There is only one Exhibit 1. To paraphrase Aristotle's Law of Identity, one is one. That's the way it's supposed to be.

IX. Don't Give The Employer Credit For The Grievant's Unemployment Compensation.

Before you decide to address the grievant's unemployment benefits in a back pay award, read John G. Adam's article, "Deduction of Unemployment Compensation Benefits from Back Pay Awards" Vol. 7, No. 4 *Labor and Employment Lawnotes* 8 (Winter 1997). You may decide — in the august company of the United States Supreme Court and the National Labor Relations Board — that you need not concern yourself with such "collateral" matters.

If, however, you decide to address unemployment benefits, your back pay award should direct the employer to reimburse the state agency for unemployment benefits paid to the grievant, with the back pay balance paid by the employer directly to the grievant. This ensures that the grievant's unemployment credits are restored, the employer's unemployment experience is accurately recorded by the state, and all meet their tax withholding and payroll tax obligations. This provides a true "make whole" remedy and brings the world back into balance.

Or, keeping arithmetic to a minimum, your award might direct the employer to pay the full back pay amount to the grievant, leaving the responsibility for reimbursement of the unemployment agency to the grievant. This is less preferable, but at least sets the stage for everybody to do the right thing.

What your award should *not* do is give the employer offset credit for unemployment benefits against the back pay award. This leaves the grievant with diminished unemployment credits, and is not a true "make whole" remedy. The offset method's apparent simplicity, and its favorable tax consequences for the employer, make it a typical feature of arbitration awards, well-intended but erroneous.

X. Don't Ask If The Grievant Has Anything To Add.

In labor arbitration, the grievance almost always is the union's grievance, not the grievant's. The attorney prosecuting the grievance almost always represents the union, not the grievant. These are meaningful distinctions. The union and the grievant may not always be in full alignment on how a case should best be presented, and labor law gives the union broad discretion to decide whether and how to prosecute grievances. So, while the grievant may have lots to add, it likely is irrelevant, and may be profane, self-destructive, and otherwise inappropriate.

Indeed, there are cases where the grievant would like to squeeze a manager's neck until the manager's head pops. Grievants are not entitled to an unfettered forum to say or do all that they might want to say or do, however. There are cans of worms that should not be opened, and certainly not by an arbitrator's innocent but reckless invitation to add "anything."

Who does such a question serve? Nobody. If the union suppresses what the grievant would like to add (and get off of his or her chest) *and* suppression harms the case (i.e., is outcome-determinative and injurious), the grievant has various legal remedies against the union. If what is harbored in the dark recesses of the grievant's soul remains there due to the wise counsel of the union *and* its suppression does not harm the case, all is good. The arbitrator should not open Pandora's Box.

XI. Don't Ask If The Grievant Is Satisfied With The Union's Representation.

The grievant's satisfaction or dissatisfaction with the union's representation is irrelevant to the arbitration. It also may be uninformed or misguided. The grievant who'd like to squeeze the manager's neck, for example, may think the union is full of pacifist sissies. In the words of Miles Davis: So what? You, as arbitrator, can't do anything about the grievant's dissatisfaction — except grant the grievance.

If the grievant is justifiably dissatisfied *and* the union's conduct is improper, outcome-determinative and injurious, the grievant has legal remedies. If the grievant's dissatisfaction is unwarranted or harmless, allowing its expression is distracting and superfluous. And the grievant's satisfaction or dissatisfaction with the union is not within the arbitrator's ambit. It is not for the arbitrator to represent or advise the grievant. It is not for the arbitrator to inquire into, much less evaluate and critique, internal union differences, particularly in front of the company. Nor is it for the arbitrator to appease, or mollify, or champion the grievant. If you want to represent grievants, be an advocate, not an arbitrator (if you're prepared to take the pay cut).

XII. If You Want The Grievant's Feedback, Ask The Grievant To Assess *Your* Performance.

If you really want the grievant's innermost thoughts, don't ask about adding information or the grievant's satisfaction with the union. Instead, ask the grievant to assess *you*. Do it twice, once at the end of the hearing and again after your decision.

I'm using a bit of *reductio ad absurdum* here. I don't really expect you to survey grievants about your performance. Nor do I think it is a particularly good idea. Getting you to think about being rated by the grievant, however, will create empathy for advocates. It ought to cure you of any further desire to ask grievants to add their two cents or to issue seat-of-the-pants report cards assessing their unions' advocacy.

XIII. Cut The Baby In Half Only When Absolutely Necessary.

Solomon, son of David and Bathsheba and king of Israel for 40 years, was one of the most highly-regarded arbitrators of all time. One influential source reports that Solomon was "wiser than all men." (1 Kings 5:11).

Solomon also was prolific. He "spoke three thousand proverbs; and his songs were a thousand and five." (1 Kings 5:12). And he had quite an international reputation: "... there came of all peoples to hear the wisdom of Solomon, from all kings of the earth, who had heard of his wisdom." (1 Kings 5:14).

Solomon made his reputation with one of history's first arbitration decisions. That decision is the source of the phrase "cutting the baby in half." This phrase often is used to characterize arbitration decisions today, so it makes sense to review the original "cutting the baby in half" decision. It is reported at 1 Kings 3:16-28.

The parties were two women who — for reasons that don't concern us here — "dwell[ed] in one house." Each recently "was delivered of a child." One of the babies died. The two women disputed which of them was the mother of the surviving infant. They brought their dispute to Solomon. Solomon held a hearing. He listened to testimony from the two women. He then started an arbitral tradition, summarizing parties' "contentions":

> The one sayeth: This is my son that liveth, and thy son is the dead; and the other sayeth: Nay; but thy son is the dead, and my son is the living.

It was a credibility dispute; a "she-said, she-said" case.

Solomon didn't ask for briefs. He didn't spend two days studying the record and writing an opinion. Rather, he said, "Fetch me a sword." He commanded: "Divide the living child in two, and give half to the one, and half to the other." That added a new dimension to the concept of "final and binding."

One of the women acquiesced: "It shall be neither mine nor thine; divide it." The other, however, protested. Her "heart yearned upon her son." She said: "Oh, my lord, give her the living child, and in no wise slay it." Solomon then issued his real decision, finding for the second woman. "Give her the living child and in no wise slay it: she is the mother thereof."

This made the news: "And all Israel heard of the judgment which the King had judged ... [and] they saw that the wisdom of God was in him, to do justice." There is something for arbitrators to learn from this early precedent.

The key is that Solomon did *not* cut the baby in half. The baby-cutting thing was just adept cross-examination. Solomon never even thought of actually cutting the baby. Cutting the baby would have been very bad. Solomon had his faults — he reportedly had 700 wives and 300 concubines (1 Kings 11:3), which displayed a certain lack of judgment — but baby-cutting wasn't one of them. If Solomon really had cut the baby, we wouldn't be talking about his wisdom 3,000 years later. If we talked about him at all, he'd have the mixed reputation of, say, Vlad the Impaler.

So, if cutting the baby in half is a bad thing, why do some arbitrators do it with regularity? I'll tell you: they're misguided. Arbitration advocates like a baby-cutting arbitrator *only* when the advocates have *bad* cases. The thought process goes like this: If I have a bad case and choose a baby-cutting arbitrator, at least I'll end up with *something*.

Advocates who have good cases *don't* want baby-cutting arbitrators. Rather, they want wise arbitrators like Solomon, who *refuse* to cut the baby in half because doing so does *not* do justice.

Don't get me wrong. I'm not against moderation and measured, even-handed decisions. Sometimes reinstatement without back pay is appropriate. But when the grievant ought to get reinstatement with full back pay, plus interest, that's just what the arbitrator should award.

XIV. If You're Going To Cut The Baby In Half, Cut The Baby *In Half*.

In union-management arbitration of discipline cases, a typical resolution is reinstatement with no back pay. This often *seems* right. Management was wrong, but not all wrong. The grievant didn't deserve to be fired, but wasn't exactly employee-of-the-month material. So each side is partly wrong and partly right. The arbitrator "cuts the baby in half." The grievant returns to work, but doesn't get back pay. The employer must give the grievant her job back, but doesn't end up paying double, once for the employee who replaced the grievant and again for the grievant. The world is back in equipoise, right? Not always.

The reality is that the time between the grievant's last work day and the arbitrator-directed reinstatement is likely to be a considerable period — months, a year, or even more. Arbitration may be quicker than court litigation, but the wheels of justice still grind slowly. So, reinstatement without back pay truly may mean reinstatement subject to an eight-month unpaid suspension. Or a year-long unpaid suspension. Or a 27-month unpaid suspension. If the partly-wrong employer had done the right thing in the first place, there would have been no more than a 30 day unpaid suspension, without a gap in benefits. More often than not, a reinstatement without back pay arbitration award results in an unpaid suspension far longer than the "just cause" suspension that should have been imposed by a partly-right employer on a partly-wrong employee.

So, if you're thinking about cutting the baby in half, think about cutting the baby *in half*, not dividing the baby into 90-10 or 85-15 ratios. ■

A "FAIR SHAKE" FROM A FAIR JUDGE – JUSTICE ALITO'S BALANCED APPROACH TO EMPLOYMENT LAW CASES

(Continued from page 5)

of expression and free exercise of their religion. Their Sunni Muslim faith obligated them to remain unshaven. The policy did make exceptions for "medical" reasons, and the defendant relied on this distinction to argue that its exceptions were merely in place to comply with the ADA requirements of reasonable accommodation for medical conditions.

Noting that Title VII of Civil Rights Act of 1964 imposed an identical obligation of accommodation on employers with respect to accommodation of religion, Judge Alito wrote that though the rule was ostensibly religiously neutral and generally applicable, the decision to provide medical exemptions while refusing religious exemption suggested discriminatory intent so as to trigger heightened scrutiny. Holding that the defendant's proferred justification for refusing exemption — a desire for a "monolithic" image of its police force — was undermined by the medical exemptions, which destroyed that monolithic image by allowing some unshaven officers, the court held that the rule could not withstand scrutiny, and was a violation of the First Amendment rights of the Muslim officers.

— END NOTES —

[1]NELA Press Release, January 5, 2006. Available online at www.nela.org.

[2]The official transcript of Justice Alito's confirmation hearing before the Senate Committee on the Judiciary is available online at http://www.washingtonpost.com/wp- dyn/content/article/2006/01/09/AR2006010900755.html.

[3]517 U.S. 308, 134 L.Ed. 2d 433, 116 S. Ct. 1307 (1996).

[4]*US Airways, Inc. v. Barnett,* 535 U.S. 391, 152 L.Ed. 2d 589, 122 S.Ct. 1516 (2009).

[5]*Kimel v. Florida Board of Regents,* 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).

[6]*City of Boerne v. Flores,* 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). ■

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For information, contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, Klass, Legghio & Israel, P.C., Suite 600, 306 South Washington, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@martensice.com.

UNEMPLOYMENT COMPENSATION NONCONTEST PROVISIONS IN SETTLEMENT AGREEMENTS

Lee Hornberger

This article discusses the issue of whether a provision in an employment settlement agreement providing that the employer will not contest the employee's unemployment compensation claim violates the Michigan Employment Security Act. MCL 421.1 *et seq*.

Employment settlement agreements commonly provide, in effect, that the "Employer will provide accurate information regarding the employee's earnings, but will not do anything, directly or indirectly, to dispute or contest any unemployment compensation claims that the employee might file."

It has been indicated that:

> "The settlement agreement should address issues of unemployment compensation. Unemployment benefits are controlled by a state agency; however, management can agree ... not to contest unemployment benefits. It is rare that the Michigan Unemployment Insurance Agency will deny the plaintiff benefits if there is no objection by the employer." *Calzone, Bogas, and Kopka, eds., Employment Litigation in Michigan*, Section 13.19.

Furthermore, "If [the] employer agrees not to contest ... receipt of unemployment insurance, this should be recorded in the severance agreement." womenemployed.org. It has been suggested that a severance agreement should "[i]nclude a provision that states that the employer will not object/oppose the employee's claim for unemployment benefits." Eisenberg, *Negotiating Executive Severance Packages* (ICLE 2004).

An employer is sometimes willing to agree to such a provision for a number of reasons. The employer's decision to oppose the employee's unemployment compensation claim can be largely subjective. "Agreeing not to contest unemployment compensation can be a bargaining tool with [a] difficult termination." hr2u.com. It can depend on a number of factors such as:

1. the employer's approach to unemployment compensation claims in the absence of gross misconduct,
2. the attitude towards the employee and the employer's subjective desire that the employee not get benefits,
3. whether contesting the unemployment compensation claim might drive the employee into seeing an attorney where the separation might be problematic,
4. whether the employer wants to spend time and resources to contest the claim,
5. whether the employer wants to let sleeping dogs lie,
6. whether the employer was going to contest the claim in the first place with the settlement agreement merely being the *status quo ante*, and

7. whether the wrongful discharge case being settled was, in whole or in part, a motivating reason for the employer having opposed the unemployment compensation claim in the first place.

In addition, even where the employer decides to actively oppose the claim, the results of the administrative and litigation process can, at best, be unpredictable. It is not unknown for the Administrative Law Judge to rule one way, the Board of Review to reverse the Administrative Law Judge, the Circuit Court to reverse the Board of Review, and the Court of Appeals or the Supreme Court to reverse the Circuit Court. In short, there might not be any predictable answer to a "just cause" issue.

In *Miller v FW Woolworth Co*, 359 Mich 342 (1960), the Administrative Law Judge found for the employer, the Board of Review for the employer, the Circuit Court for the employee, and the Supreme Court for the employer. In *Renown Stove Co v Unemployment Compensation Comm'n*, 328 Mich 436 (1950), a vacation pay issue case, the Administrative Law Judge found for the employee, the Board of Review for the employee, the Circuit Court for the employee, and the Supreme Court rendered a split decision. In *Johnides v St Lawrence Hosp*, 184 Mich App 172 (1990), the Administrative Law Judge found for the employer, the Board of Review for the employer, the Circuit Court for the employee, and the Court of Appeals for the employee. In *Salenius v Employment Sec Comm*, 33 Mich App 228 (1971), a lock-out issue case, the Administrative Law Judge found for the employer, the Board of Review for the employer, the Circuit Court for the employer, and the Court of Appeals reversed in favor of the employees.

This is a situation where all the decision-makers act in good faith and reach inconsistent results on the "just cause" or other unemployment compensation issues. So, if the government decision-makers cannot be consistent in their decisions on whether there was "just cause," how can the employer determine whether it is obligated to argue there was just cause for the separation?

It is sometimes the viewpoint that:

> It may be smarter not to contest unemployment if you think that there is going to be a more serious charge in the future. The unemployment hearing happens so quickly that most employers have probably not even talked to their attorneys, and they may say something that will set the stage for future legal difficulties, or they may simply say something that angers the ex-employee to the point of suing. "Should You Contest Unemployment Compensation?" *HR Manager's Legal Reporter* (July 2002) at 5.

When an employee files a claim for benefits, the Commission will request of the employer whether it agrees with the wage and separation information given by the employee. MCL 421.32(a); R 421.205; *Seryak, Ellmann, and Kopka, eds., Employment Law in Michigan: An Employer's Guide*, Section 16.15. The Commission rules provide that employer "shall respond . . . *if it questions* the individual's eligibility or qualification." R 421.205(2) (emphasis added). Any employer or any other person failing to submit required employment reports lawfully prescribed and required by the Commission is subject to penalties. MCL 421.54(c)(1). The rules further provide that, if the employer fails to respond, then the Commission shall determine benefits rights based upon available information. R 421.205(5).

Based upon a literal textual reading of R 421.205(2), it would appear that the employer only has to provide information contesting the claim "if [the employer] questions" the claim. If the rule required the employer to provide potentially adverse information to the claim, the rule would not contain the language "if it questions." Accord *Wayne Co v Hathcock*, 471 Mich 445, 468-69 (2004) and *Bureau of Unempl Comp v Detroit Medical* Ctr, 267 Mich App 500 (2005). An individual cannot waive or release rights to benefits under the Act. MCL 421.31. There is no provision that an employer cannot waive its rights.

A person who willfully violates or intentionally fails to comply with any of the provisions of the Act or a regulation promulgated under the Act is subject to criminal penalties. MCL 421.54(a).

Any employer, employee or other person who makes a false statement or knowingly and willfully with intent to defraud, fails to disclose a material fact to obtain, increase, prevent or reduce the payment of unemployment compensation benefits is subject to criminal sanctions. MCL 421.54(b). Section 54 is directed at the making of a false statement with an intent to defraud to obtain or increase a benefit by a person charged with violating the Act. Section 54(b) is discussed in other contexts at *Jones v Unemployment Compensation Comm*, 332 Mich 691 (1952); and *People v Robinson*, 97 Mich App 542, 547 (1980).

In conclusion, based on the Commission's rules, an employer only has to oppose an unemployment compensation claim "if it questions" the claim. R 421.205 (2). There is no requirement that the employer question a claim. Even where the employer exercises its option to question the claim, one cannot predict whether the claim will be granted or not. On the other hand, the employer is not free to submit false information to the Commission. MCL 421.54(b). This means that, in order to comply with a settlement agreement provision concerning not contesting a claim, the employer, consistent with R 421.205 (2), would simply exercise its option of not "question[ing]" the claim. ■

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ROBERT J. BATTISTA – DISTINGUISHED SERVICE AWARD RECIPIENT

William M. Saxton

Forty years ago, I was a young partner in the law firm then known as Butzel, Eaman, Long, Gust and Kennedy. I was a one person labor law practice. Inundated with work and having logged some 3,000 billable hours in the most recent 12 months, I petitioned the then managing partner to get me some help.

Since the firm had hired only one new associate lawyer in the previous ten years and the principal managing partner held to the view that 25 lawyers was the optimal size for a law firm, I had scant hope that my petition would be granted.

But to my surprise in June 1965, the managing partner submitted three candidates for me to interview and select one to work with me. Bob Battista was one of those candidates.

After interviewing the three candidates, I chose Bob. During the interviews, I asked each person to tell me how they perceived labor unions and their commission in representing the employer. The two candidates competing with Bob were very doctrinaire. They regarded labor unions as a destructive force and their mission as the employer's lawyer was to join the union in battle and defeat the foe.

Bob, in stark contrast, viewed the union not as a hostile combatant but an integral component of the employer's business whose oft times adversarial positions should not be cavalierly discounted. He viewed the role of the employer's lawyer as seeking to achieve accord and foster a mutually accommodating relationship.

So, on July 26, 1965, I chose Bob Battista to be my colleague. One of the wisest decisions I ever made. A decision that benefitted and rewarded me, my law firm, the many clients Bob represented, and even the labor organizations with whom Bob dealt for the ensuing 37 years.

Over the course of the next 37½ years, Bob earned a reputation as one of the preeminent labor lawyers in Michigan and, indeed, the entire country. He became a director, or managing partner, of the Butzel Long law firm and a significant measure of the firm's growth and success is attributable to Bob's contributions in shaping the policies of the firm and his mentoring of younger lawyers. He has been an active and constructive contributor to the Labor and Employment Law Section of the State Bar and served as chairperson of the Section.

Bob is an accomplished communicator and a great salesman, which no doubt accounts in part for his success as a negotiator. One of the union reps that Bob jousted with over the years once remarked that Bob was such a good salesman he could probably sell Father's Day cards in a home for unwed mothers.

Like all of us though, Bob has a few flaws. He is a procrastinator of the first order. Nothing becomes a problem to him until it reaches crisis proportion with most people. It took God seven days to create the universe. Had Bob been given the job, he would have waited 'til the weekend. In fact, at a meeting of the Procrastinators' Society, Bob was elected "past" president.

Except for the game of golf, Bob has mastered every endeavor on which he embarked. But golf is another matter. Bob's speed-of-light, left-handed swing launches the golf ball in all directions. Playing with him one day his caddie spent more time in the woods than the local squirrel population. When the caddie failed to find Bob's golf ball in the forest, an exasperated Bob said, "Young man, you must be the world's worst caddie." The equally exasperated caddie retorted, "No sir, that would be too big a coincidence."

One of the salutary things attendant to being asked to present the Distinguished Service Award to Bob is the occasion to reflect on the qualities Bob displayed over the 37 plus years we worked together. When you work closely with someone for such a long period, you tend to take a lot of things for granted.

But as I pondered my years working with Bob, the qualities that made him an outstanding lawyer came to the fore. He is intelligent, resourceful, practical and attentive and respectful to the views of others. He treats everyone with respect and dignity, a character trait that inspires friendship from everyone.

In December 2002, President Bush nominated Bob to be Chairperson of the NLRB, an honor coveted by many but attained by very few. Bob's appointment as Chairperson of the NLRB is a ringing attestation to his record and reputation as a labor lawyer.

In many, if not most, cases a political appointment to such high office is a reward for political fealty. But, Bob had no record of political servitude or financial contribution. He was selected on the basis of demonstrated erudition and accomplishment. In today's political environment, that is both remarkable and refreshing.

Bob has been a leader of the Butzel Long law firm and the State Bar Labor and Employment Law Section and will assuredly leave a stellar record as Chairperson of the NLRB. He is a leader who leads by example rather than authoritative edict. His commitment to professional ethics standards, devotion to duty and respect and concern for colleagues sets a standard that is contagious.

The words "Distinguished" and "Service" epitomize Bob's career and he is a most deserving recipient of the State Bar of Michigan Labor and Employment Law Section Distinguished Service Award.

APPELLATE REVIEW OF MERC CASES (MARCH 2005-FEBRUARY 2006)

Roy L. Roulhac
Administrative Law Judge
State Office of Administrative Hearings and Rules

American Association of University Professors, Northern Michigan University Chapter v Joseph Sabol, 18 MPER 9 (2004), (unpublished, July 12, 2005, Court of Appeals No. 260751)

The Court affirmed MERC's summary dismissal of a duty of fair representation claim alleging the labor organization did not violate PERA by refusing to file a grievance protesting Northern University's refusal to re-appoint Charging Party to one-year teaching position. In 2002, NMU initiated a search to fill an analytical tenured chemistry professor vacancy for the 2002-2003 school year. Plaintiff applied and was one of the semifinalists. However, NMU terminated its search for a tenured faculty member, converted the vacancy to a 2002-2003 term position and hired an outside candidate. The union refused to file a grievance alleging a violation of the contract's "first consideration" provision. The union explained to Charging Party that "first consideration" meant that if all things were equal, a present term appointee would get a renewal before an outsider. The union found no grounds for filing a grievance because Charging Party's low student evaluations were sufficient grounds for the University's decision not to rehire him. The Court agreed with MERC's conclusion that the union's interpretation of the Master Agreement was "neither irrational nor unreasoned." Moreover, it found that the contract provision relied on by Charging Party did not even apply to him because it governed procedures for two-year appointments and was silent on one-year appointees seeking additional one-year terms. The Court of Appeals denied Charging Party's motion for reconsideration on September 2, 2005. The matter is pending in the Supreme Court.

Michigan Education Association v Christian Brothers Institute of Michigan, d/b/a Brother Rice High School, 104 LRP 28130 (2004), (unpublished, August 16, 2005, Court of Appeals No. 256256)

The Court of Appeals vacated and dismissed MERC's order directing an election among teachers employed by Christian Brothers, a parochial school owned by the Archdiocese of Detroit. Relying on *NLRB v Catholic Bishop of Chicago*, 440 US 490 (1979), the Court stated that MERC's exercise of jurisdiction over Christian Brothers would create a significant risk that the First Amendment's religion clauses would be infringed upon, especially regarding the possibility of excessive government entanglement. Because of this risk, the Court reasoned, it would not apply the Labor Mediation Act (LMA), MCL 423.1 *et seq*., to Christian Brothers unless the legislature articulated a clear intent that MERC exercise jurisdiction over religious institutions. It held that the US Supreme Court's analysis in *Catholic Bishop* was appropriate because of the "nearly identical" provisions of the LMA and the National Labor Relations Act, 29 USC 151 *et seq.* In ordering an election, the Commission, relying on the expansive jurisdictional interpretation the Michigan Supreme Court had given the LMA, held that *Catholic Bishop* did not prohibit it from exercising jurisdiction over Christian Brothers.

Amy Moore v Detroit Public Schools and *Detroit Federation of Teachers,* 17 MPER 26 (2004), (unpublished, December 29, 2005, Court of Appeals No. 256220)

The Court of Appeal affirmed the Commission's dismissal, on statute of limitations grounds, of Charging Party's charge that Respondents Detroit Public Schools and the Detroit Federation of Teachers conspired to terminate her employment. Because Charging Party's termination occurred on January 30, 2001, any conspiracy to bring about that result necessarily occurred before that time, the Court found. Therefore, the statute of limitations period began to run when Respondent terminated Charging Party, and ended six months later, on July 30, 2001. The Court agreed with Charging Party's assertion that her claim against the union for breach of its duty of fair representation was timely. The union refused to seek arbitration of petitioner's grievance in May 2001, within the six-month period. However, the MERC dismissed this aspect of Charging Party's claim for want of proof, not because it was untimely, and petitioner did not appeal the decision. Charging Party also contended that MERC erred in denying her motion to amend her charge to claim a violation of Section 24 of the Labor Mediation Act, MCL 423.24. Section 24 makes it a misdemeanor for one or more persons to conspire to violate any of the act's provisions. The Court disagreed. The issue was not raised before MERC, and, thus was not preserved for appeal, only violations of Sections 16, 17a and 22(a) of the LMA are deemed "unfair labor practices remediable by the" MERC. ■

FROM THE EDITOR

ANOTHER HARD-HITTING *LAWNOTES* EDITORIAL

Yes. As difficult as it is to believe, there were several typographical errors in the Winter 2006 issue of *Lawnotes.* There were even typos in *my* article. In keeping with the highest traditions of journalism, as *Lawnotes* editor I must act without fear or favor and speak truth to power. Accordingly, I do not shy from placing fault where it belongs: (1) on the printer; (2) on the flawed computerized spell check; (3) on the shameful failure of university-level schools of education; and (4) on the insensitivity of the *Jyllends-Posten* editorial board.

My journalistic courage aside, I must recognize those readers kind enough to bring the typos to my attention. For such vigilance, I strongly believe you should get what's coming to you. So, I have arranged with an e-mail contact of mine, who prefers anonymity, for you to share in $150 million (U.S.) currently on deposit in the Northern Nigerian Savings & Loan. In conformity with international banking regulations, you will need to send me certain confirming information (a declaration that you reported the typos, your social security number, bank account and credit card information, a $100 bill, your mother's middle name, etc.). You will be getting an e-mail with details.

When you get the e-mail, please act quickly. For certain complicated banking and political reasons that you shouldn't worry about, time is of the essence. Heed the lesson offered in *Cogburn Health Center, Inc. v. NLRB,* 437 F.3d 1266, 1275 (D.C. Cir. 2006): ". . . it is the height of *chutzpah* for the Board to pronounce that the passage of time is irrelevant." And thanks again for so promptly letting me know about those typos. – Stuart M. Israel

MICHIGANS COURT OF APPEALS UPDATE

John W. Smith
Office of Wayne County Corporation Counsel

Court of Appeals Revisits Respondeat Superior: *Cawood v Rainbow Rehabilitation Centers, Inc*, Case No. 263146, December 1, 2005 (Smolenski, P.J.)

Plaintiffs' daughter was a resident of a Rainbow Rehabilitation Centers, Inc. ("Rainbow") homes for brain-injured individuals. Rainbow's employee, Harry Erkins, Jr., had a sexual encounter with the daughter one night when he was the only staff member working. Erkins claimed that the encounter was consensual, which Plaintiffs denied. The trial court found that there were questions of fact as to whether the daughter was capable of consenting to sexual relations.

After the parents learned of the sexual encounter, they filed suit against Rainbow alleging both direct and vicarious liability. The trial court granted Rainbow summary disposition and the Plaintiffs appealed.

The Court of Appeals first dealt with the issue of vicarious liability. The Court restated the point that an employer is generally not responsible for an intentional tort "committed by its employee acting outside the scope of employment." Plaintiffs did not contend on appeal that Erkins was acting within the scope of his employment with Rainbow when he had sexual relations with the daughter. Instead, Plaintiffs argued that Rainbow may still be held vicariously liable for the actions of Erkins under the exception set forth in 1 Restatement of Agency, 2d, § 219(2)(d) because, even though he acted outside the scope of his authority, he was aided in accomplishing the tort "by the existence of the agency relationship" (the "aided by" exception).

The Court of Appeals responded that it was unclear whether the "aided by" exception has been adopted in the State of Michigan. The Court of Appeals distinguished *Salinas v Genesys Health Sys*, 263 Mich App 315; 318-320; 688 NW2d 112 (2004) and *Champion v Nation Wide Security, Inc*, 450 Mich 702; 545 NW2d 596 (1996). In *Champion*, the victim of a sexual assault had been an employee and the perpetrator was a supervisor. In that case, under Elliott-Larsen, the Supreme Court has imposed strict vicarious liability. The Court of Appeals in *Salinas* noted that "aided by" exception was, therefore, not expressly adopted for general tort cases.

In *Cawood*, the Court of Appeals again declined to decide whether the "aided by" exception applies in Michigan because, under the facts of this case, it held that the defendant would still be entitled to summary disposition. The Court of Appeals found that an employee is not aided in accomplishing a tort simply by the existence of the agency relation that may offer an opportunity for tortious activity. Rather, the Court held, the "aided by" exception will only apply where the employment itself empowers the employee to commit the tortious conduct. The Court found that Erkins was not empowered to engage in the sexual conduct by the existence of his employment because he did not use his authority or any instrumentality entrusted to him in order to facilitate the inappropriate encounter. Instead, the existence of the employment relationship merely provided Erkins with *the opportunity* to engage in the inappropriate conduct.

The Court of Appeals also affirmed dismissal of the direct liability claims against Rainbow. The Court held that, based upon the undisputed facts, Rainbow met all of the standards required for the adult foster care industry, the group home was appropriately staffed for the number of residents it served and that the licensing rules allow a staff member of the opposite sex to provide personal care with the consent of the resident. The Court held that it was immaterial that two employees were originally scheduled to work the night shift because such an allocation was not required by the staffing regulations. The Court also held that Rainbow's awareness of the daughter's compulsive sexual behavior did not give rise to any liability where there was no evidence that Rainbow knew or should have known that Erkins would take advantage of the daughter's condition.

Justice Borrello filed a separate opinion concurring in part and dissenting in part opining that this "ruling therefore perpetuates the unacceptable practice of allowing long-term care facilities such as defendant to escape liability and avoid responsibility for torts committed by their employees against incapacitated patients whose health and safety has been entrusted to them." Justice Borrello favored a heightened legal duty for caregivers of incapacitated persons.

Public Officials Salaries Are Not A Vested Property Right: *Attorney General v Flint City Council,* Case No. 263618, December 13, 2005 (Davis, J.)

Edward Kurtz was appointed on July 8, 2002 as the City of Flint's Emergency Financial Manager ("EFM"). During his term as EFM, Kurtz reduced the Flint City Council's pay on two separate occasions. The day after Kurtz's appointment as EFM ended, the City Council voted to award itself more than $235,000 in back salary. The State of Michigan Attorney General's Office filed this lawsuit arguing that the payment constituted an impermissible retroactive payment in violation of Cons 1963, Art 11, §3. The trial court agreed and granted the State summary disposition.

On appeal, the City Council first argued that it did not receive a retroactive payment because it was only paying a predetermined amount already approved by the Local Officer's Compensation Committee ("LOCC"). The Court of Appeals disagreed finding that the plain language of the Local Government Fiscal Responsibility Act, MCL 141.1221 *et seq*. provided for the EFM's authority to discontinue or reduce salaries irrespective of the LOCC.

The City Council next argued that the Local Government Fiscal Responsibility Act was an unconstitutional deprivation of vested property rights. The Court of Appeals again disagreed holding that a public official's salary stems from a statutory right to have the LOCC set salaries as set out in the Home Rule Act, MCL 117.5c *et seq*. The Court of Appeals held that a benefit that the Legislature gives, it may also take away. The City Council had only an *expectation* of their continued salary, not a vested claim of entitlement.

Act 312 Award Does Not Give City Carte Blanche With Other Unions: *Detroit Chief Financial Officer, et al v City of Detroit Policemen and Firemen Retirement System, et al*, Case No. 254516, January 12, 2006 (Fort Hood, J.)

The City of Detroit and the Detroit Police Officers Association ("DPOA") submitted to binding arbitration pursuant to 1969

PA 312 (Act 312), MCL 423.231 *et seq*. One of the issues submitted to the Arbitrator was the composition of the pension board, which the City alleged had been structured in favor of the City's unions. The Act 312 Arbitrator concluded that the composition of the pension board would be altered in favor of the City. The same pension board, however, acted on behalf of *four* different unions. One of the remaining three unions, the Detroit Police Lieutenants and Sergeants Association ("DPLSA"), expressly adopted the conditions of the DPOA agreement in its collective bargaining agreement. The remaining two unions, the Detroit Fire Fighters Association ("DFFA") and the Detroit Police Command Officers Association ("DPCOA"), however, did not have the same language in their collective bargaining agreements.

The City, and various officers within the City who were to fill the newly created pension board positions ("Plaintiffs"), filed suit alleging that the two remaining unions were also bound by the Act 312 arbitration award under the labor principle of "parity." The trial court granted defendants' motion for summary disposition concluding that violations of due process of law would occur by requiring defendant unions to be bound by an arbitration proceeding in which they did not participate. The City appealed.

The Court of Appeals agreed with the trial court that the unions would be deprived due process of law by having the Act 312 award imposed against them. Plaintiffs alleged that the application of the principle of parity to the unions that did not participate in the arbitration was appropriate because, for years, the unions had filed suit to obtain "parity of benefits" given to other members. The Court noted, however, that the Plaintiffs went to great lengths in their complaint to allege that the pension board composition was merely an instrumentality of the unions because a majority of the membership was slanted in favor of the unions. In this case, the Court ruled, the change in composition to the pension board would *not* be an economic benefit to the unions. Thus, the Court held, application of the new pension board to defendants DFFA and DPCOA would result in a deprivation of due process of law because benefits will be taken from the unions without benefit of any hearing or presentation of evidence before the arbitration panel.

The Court of Appeals further held that the trial court properly granted the defense motion for summary disposition for lack of jurisdiction because plaintiffs did not seek mere enforcement of an arbitration award *upon the parties*. *See* MCL 423.240. The Plaintiffs sought to have the trial court, or the Court of Appeals, review contractual language in the first instance and hold that the language makes the Act 312 Award binding on the unions who were not present. The Court of Appeals held that this fell outside their jurisdiction under MCL 423.342.

Finally, the Court of Appeals remanded to the Circuit Court the narrow issue of whether its written order comported with its verbal ruling since the written order purported to permanently restrain any changes to the pension board until all four unions reached agreement.

Justice Cooper wrote a separate concurring opinion stating that she would have simply affirmed on the basis that the Court lacks jurisdiction and remanded the case for arbitration. ■

MERC UPDATE

Jeffrey S. Donahue
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Since the previous issue of *Lawnotes,* the Michigan Employment Relations Commission has issued 27 Decisions and Orders in a variety of cases. A brief summary of five of those cases follows. Of the 27 cases, 22 were unfair labor practice hearings and/or duty of fair representation hearings, three were unit clarification hearings and/or representation hearings, and there were two decisions on motions. Recent decisions of the commission can be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/cis.

Unfair Labor Practices

Orion Township (Dep't of Public Works) - and - Teamsters Local 241, 18 MPER ¶72, Case No. C03 E-121 (November 3, 2005).

The ALJ found that the employer violated its duty to bargain in good faith when it unilaterally implemented changes in existing employment conditions in the absence of impasse and refused to meet with the union for additional bargaining after fact finding.

After the parties bargained three or four times, the parties requested mediation. Shortly after mediation, the union requested fact finding. The parties agreed to limit the issues to wages, pensions, and retiree health care. The fact finder issued his report, recommending that the parties adopt the employer's wage proposal, maintain the existing pension plan, and adopt the employer's proposal to create a voluntary employee beneficiary association for employees to be used for health care upon retirement.

One month later, the parties met for the last time. The meeting only lasted 30 minutes and the parties merely stated their positions about the fact finder's recommendations. They did not negotiate. Afterwards, the employer was admittedly unwilling to negotiate. The union believed future bargaining was needed. The union subsequently tried to schedule mediation, but the employer refused to meet and declared impasse.

MERC affirmed the ALJ's findings. It noted that a single meeting after fact finding does not fulfill the requirement of good faith bargaining. The employer's refusal to meet again or to utilize the assistance of a mediator, based on its unilateral conclusion that compromise was unlikely, was contrary to the obligation to bargain in good faith. MERC stated:

> "We have consistently stated the importance of mediation and fact finding, indicating that the failure of the parties to utilize these services to the maximum extent necessary may be viewed as indicating a lack of good faith, and contrary to the intent and policies of PERA."

City of Detroit - and - Ass'n of Municipal Engineers, 18 MPER ¶73, Case No. C03 D-092 (November 3, 2005)

MERC reversed the ALJ's summary dismissal of the union charge which claimed that the city violated PERA when it failed to respond to several grievances regarding the underpayment of the union's members and also refused to arbitrate the matter. The charge was filed after the city acknowledged an issue regarding payments to members, but continued to ask for additional time to investigate the matter on multiple occasions.

MERC recognized that absent conduct that closes the door to the entire grievance procedure, it will not involve itself in procedural matters relating to grievance processing. However, it also

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noted that an employer violates its bargaining obligation by refusing to submit an arguably arbitrable grievance to arbitration. In this matter, the employer had not expressly refused to arbitrate the grievances, but it had failed to complete an investigation over 12 back pay claims within two years. MERC then noted that absent compelling reasons to justify such a lengthy delay, it may have no choice but to find that by declining the union's request to proceed to arbitration, the city has acted in bad faith and violated PERA. The case was remanded to the ALJ for hearing.

Ingham County and Ingham County Sheriff - and - Michigan Ass'n of Police - and - FOP, Lodge No. 141, 18 MPER ¶68, Case Nos. C05 C-060 and R05 B-034 (November 1, 1005) (no exceptions).

Until February 2004, FOP represented a unit of deputies, detectives, and corrections officers. In March 2003, MAP filed an election petition seeking to sever the deputies and detectives from the FOP's unit. In February 2004, MAP was certified as the exclusive representative for the deputies and detectives.

In May 2004, FOP and the employers began contract negotiations for its unit of correction officers. During bargaining, the parties reached a memo of understanding stating that if at any time in the future the law enforcement employees again became represented by FOP, the employers will reinstate contract language from the contract between FOP and the employers that expired in 2002.

In June 2004, MAP began negotiating its first contact with the employers. While the parties reached agreement on many issues, several issues remained unresolved, including transfers, grievance procedure, pension, and salary. MAP ultimately filed a petition for compulsory arbitration about one week before FOP filed its representation petition with MERC.

MAP filed a ULP charge against the employers claiming they violated their duty to bargain in good faith by engaging in a pattern of conduct indicating their intention not to enter into a new labor agreement and by negotiating future employment conditions of MAP's members with FOP.

The ALJ found that the employers violated their duty to bargain in good faith with MAP by entering into a memo of understanding with FOP which established future terms and conditions of employment for the law enforcement employees now represented by MAP. The employers were ordered to stop bargaining with FOP over future employment conditions of MAP's members, repudiate the memo of understanding with FOP, and post a notice.

The ALJ also found that the Act 312 petition filed before the MAP's certification year expired should not serve to bar a representation petition filed within a reasonable time after the certification year expires. MERC's Act 312 bar policy is that MERC will entertain representation petitions during the window period (150-90 days) even though an Act 312 arbitration has been initiated or is pending but, if the collective bargaining agreement has expired while an Act 312 proceeding is pending, the filing of such a petition would be barred by the arbitration proceeding. An Act 312 petition is considered as pending from the date the petition is filed with MERC. However, the ALJ noted that this policy does not address situations where the union filing the Act 312 petition has yet to obtain its first contract. The ALJ found the Act 312 petition filed here could not bear the FOP's representation petition.

Next, the ALJ considered dismissing the representation petition because of the employer's ULP. The ALJ noted that since the FOP's representation petition was filed within weeks of the employers' unlawful execution of the memo of understanding, the employers conveyed an impression of favoritism toward FOP which had a detrimental effect on the exercise of employee free choice. However, the ALJ concluded that the employers' ULP did not cause the employee dissatisfaction with MAP that led to the filing of the petition. As a result, the ALJ directed the election, but held it in abeyance until the employers complied with MERC's order in the ULP case.

Chippewa County - and - AFSCME Council 25, Local 946 and Susan Shunk, 18 MPER ¶83, Case Nos. C04 F-145 and R04 D-058 (December 27, 2005).

The parties reached a tentative agreement on a successor contract. The union's membership voted to ratify the agreement and, shortly thereafter, an employee filed a decertification petition with MERC. Thereafter, the employer voted to submit the tentative agreement (TA) to the full board of commissioners for a ratification vote. After the employer received notice of the decertification petition, the employer took no further action to ratify the TA.

The ALJ found the employer refused to bargain by not voting on the TA and recommended that the decertification petition be dismissed.

On exceptions, MERC reiterated its prior ruling that a TA will, for a period of up to 30 days thereafter, bar a rival union's election petition or decertification petition pending subsequent action on the TA by the employer's legislative body. A petition is dismissed if the legislative body approves the TA within the 30 days, and is not dismissed if the legislative body votes to reject the TA or takes no action within the 30-day period.

Thus, in the case, MERC held that the petition should not have been dismissed.

Finding no bad faith on the part of the employer, MERC held that the employer did not commit an unfair labor practice by taking no action within 30 days with respect to the ratification of the TA. MERC dismissed the unfair labor practice charge.

Unit Clarification/Representation

University of Michigan - and - University of Michigan's Skilled Trades Union, 18 MPER ¶82, Case No. R04 F-084 (December 27, 2005).

The union filed a petition to accrete a classification of technicians to its bargaining unit of skilled trades employees. The employer contended that the positions sought shared a community of interest with a residual unit of unrepresented technical employees and contended the union had to accrete all of these unrepresented employees and not a fragment of the residual unit.

The employer cited several cases where MERC held employees in the technical job family at U of M share a community of interest and that a petition seeking to organize a fragment of that job family was inappropriate. However, MERC held that since an earlier U of M decision in 1993, MERC has rejected U of M's assertion that a union seeking to represent some of the employees that the employer included in a group of unrepresented technical employees must seek to represent the entire organized group. MERC stated it has rejected the argument that technicians shared a community of interest merely because the employer chose to include them in its technical job grouping. Thus, MERC ordered an election. ■

EASTERN DISTRICT UPDATE

Jeffrey A. Steele
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Courts, Not Arbitrators, Decide Whether Arbitration Agreements Were Signed Under "Duress"

Judge Lawson refused to grant the employer's motion to compel arbitration in *Flannery v Tri-State Division,* 402 F Supp 2d 819 (ED Mich, 2005), because the plaintiff contended that she signed her severance agreement, which contained a mandatory arbitration clause, under duress. Unlike unconscionability claims, which go to the substance of a contract and can be resolved by an arbitrator, duress challenges "question[] whether the contract ever came into existence, and therefore whether the arbitrator could derive power from the clause contained in it."

Employers Needn't Promote the Most Educated Candidate

Judge Zatkoff ruled in *Doster v Harvey*, 2005 WL 3501410 (ED Mich), that evidence that the plaintiff had more education than the person who got the promotion cannot, by itself, prove pretext. "Employers are not required to select employees simply on the basis of their resumes, as there may be other factors that determine whether a candidate is suited for a position."

Employees Must Proffer FMLA-Qualifying Explanation For Absenteeism During Their Employment, Not After Termination

Judge Edmunds dismissed the plaintiff's FMLA interference claim on summary judgment in *McFall v BASF Corp,* ___ F Supp 2d ___; 2005 WL 3478357 (ED Mich), because the "generic excuses" she gave during her employment did not provide "reasonably adequate" notice that her absences were caused by a serious health condition. She did not attribute her absenteeism to a potentially serious health condition until after she was terminated.

"Plaintiff has pointed to no evidence that when she returned to work [after any of her absences] — or at *any* time during the course of her employment — she informed her supervisors of any specific reason for her thirteen health-related absences. Rather, she simply took these 'sick' days without any clear explanation as to why." "Plaintiff *now* claims that her 2003 absences 'generally relate[d] to asthma or bronchitis.' ... Plaintiff's explanation does not constitute notice under the FMLA. The use of the word 'employee' in the FMLA illuminates a significant limitation on the timing of the required notice: It must be provided *during* the employment relationship, not after the employee has been terminated. Thus, for purposes of FMLA notice, the Court must ignore Plaintiff's post-termination claims of health problems, including all of those made during her deposition and in her filings. What is relevant at this stage are Plaintiff's statements to Defendant during the course of her employment relationship."

Short-Term Symptoms That Do Not Inhibit an Employee's Usual Functioning are Not "Serious Health Conditions" Under the FMLA

In *Hornbuckle v Detroit Receiving Hospital and University Health Center,* ___ F Supp 2d ___; 2005 WL 2994352 (ED Mich), Judge Borman ruled at summary judgment that the plaintiff's "personality disintegration" disorder, which prompted a general surgeon to recommend total abstinence from work, was not a "serious health condition" under the FMLA. The plaintiff, who filed an FMLA interference claim after being fired for failing to return from leave on schedule, admitted that "many of the symptoms" inspiring her initial leave lasted for only a short time, and that she could perform "all of her usual functions" while on leave. The plaintiff was also unable to sustain the "continuing treatment" requirement because, at the time she sought to extend her FMLA leave, she had stopped seeing the general surgeon who recommended her initial leave, and had failed to pursue the surgeon's repeated recommendation that she see a mental health physician.

Filing A Second EEOC Charge Does Not Extend the 90-Day Limitations Period for the Original Charge

The plaintiff in *Williamson v Lear Corp,* 2005 WL 3555920 (ED Mich), could not "cancel" his first EEOC Charge, which had alleged age and disability discrimination, by filing a virtually identical charge at a later date. The plaintiff was therefore bound to file his age and disability discrimination lawsuit within 90 days after receiving the first right-to-sue letter. Judge Duggan reasoned that "the statutes' ninety day filing requirement would be rendered meaningless if a plaintiff could — as Williamson asserts — avoid the deadline simply by re-filing his or her claims in a later charge."

History of Warnings, Efforts to Correct the Plaintiff's Misbehavior, and a Thorough Investigation Belied Pretext

In *Hay v Shaw Industries, Inc,* 2006 WL 44257 (ED Mich), Judge Borman dismissed a Whistleblowers' claim on summary judgment because the record demonstrated that the plaintiff was discharged for an altercation with a co-worker, not for his decision to call the police and file a criminal complaint. "While 'an employer's true motivations are particularly difficult to ascertain' in retaliation cases, Defendant has demonstrated that Plaintiff was explicitly warned that a further altercation with Munir could result in his discharge, and also received training relating to workplace violence to that effect." Moreover, the plaintiff was not discharged immediately after he called the police, and the employer conducted a thorough investigation of the plaintiff's workplace misconduct before terminating him. A supervisor's alleged comment about the police report could not support an inference of retaliation because the supervisor did not say the plaintiff would be fired for making the call, recommended that the plaintiff not be fired, and did not participate in the discharge decision.

Difficulty Learning New Skills is not Substantially Limiting

Judge Edmunds ruled in *Kronner v McDowell & Associates,* 2005 WL 3478358 (ED Mich), that the need to "study very, very, very hard to do anything" does not constitute a substantial limitation on the major life activity of learning. "[M]any people have to study very hard to learn new skills ... it is the rare person who is talented enough to pick up new skills without difficulty." Regardless, the plaintiff described herself as a "very intelligent person," has a history of educational and professional achievement, and was able to acquire the skills needed to perform her job. Judge Edmunds also ruled that the "inconvenience" associated with the plaintiff's need to "sleep too much" does not qualify as a substantial limitation under the ADA.

Questions About Applicant's Knowledge of "Pop Culture" and Ability to "Relate To" Youthful Radio Hosts and Audience Helped Raise an Inference of Age Discrimination

Judge Rosen ruled in *Plegue v Clear Channel Broadcasting, Inc,* 97 FEP Cases 23 (ED Mich, 2005), that the following questions, put to an experienced 48-year-old radio producer seeking a job with a morning sports talk show, constituted circumstantial but

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EASTERN DISTRICT UPDATE

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not direct evidence of age discrimination: "Do you think you would have problems working with younger hosts?" and "If you were to get this job, you'd be working with two younger hosts. Would the age difference be a problem?" The remarks were not "isolated" because they were made during an employment interview, but a jury would have to infer that the "stigmatized attitude toward older workers" they reveal was factored into the decision to hire a younger, significantly less-experienced candidate. The evidence helped present a triable circumstantial case, where: (1) the employer's representation that the younger applicant was the "best candidate for the position" was undercut by the fact that the plaintiff had significantly more experience producing radio shows than the almost completely inexperienced 24-year-old candidate who got the job; (2) the station targets a younger audience; (3) every employee the decisionmaker ever hired was in their mid-20s to mid 30s; and (4) the decisionmaker testified that one of her principal reasons for rejecting the plaintiff was that he did not display a familiarity with "pop culture" and might not "relate to" the same kinds of things to which 30-year-olds relate.

Release Protected Coworkers, Despite Limited Exclusion of "Agents" Language

Judge Borman ruled in *Johnson v Flowers,* 2006 WL 212022 (ED Mich), that a release of all claims contained in the broadly-worded settlement agreement between the plaintiff and her employer barred the plaintiff's employment-related retaliation claims against two supervisors. Although the phrase "and its agents" was excluded from the paragraph outlining the specific scope of the release, the paragraph references and incorporates the "overarching initial paragraph of the" agreement which "encompasses all of the parties." Moreover, the agreement was clearly intended to be a "complete, final, and binding agreement" that would fully resolve all existing grievances between the plaintiff, her employer, and the employer's agents.

Employer Potentially Liable For Discriminating Against Employee Who Might Raise Company Health Care Costs

The diabetic plaintiff in *McCarty v Adrian Steel Co,* 2006 WL 212036 (ED Mich), proffered triable FMLA-retaliation and "perceived as" disability discrimination claims with evidence that his employer was biased against employees with "expensive medical conditions." The plaintiff was fired just two months after taking FMLA leave, and only a few hours after he responded to a human resource representative's inquiry about his health by stating that he may need further kidney testing and treatment. Moreover, the plaintiff alleged that the employer's president said during a meeting that he would find ways to terminate employees who cost the company money because of their high medical expenses and/or abuse of the insurance system.

Supervisor's Opinion That the Decisionmaker is Racist, and Evidence that the Decisionmaker Did Not Like the Plaintiff Cannot Sustain a Race Discrimination Claim

Judge Zatkoff ruled in *Burke-Johnson v Principi,* 2006 WL 13146 (ED Mich), that the plaintiff's supervisor's opinion that the decisionmaker is racist cannot constitute "direct evidence" of race discrimination. Comments must come from the decisionmakers themselves to be direct evidence. Coworker opinions concerning the alleged racial motivations of the decisionmakers can help show pretext in a circumstantial case, but "Plaintiff is incorrect in asserting that circumstance alone automatically precludes a grant of summary judgment. If that were true, any time multiple plaintiffs joined in a discrimination suit against an employer, summary judgment would be precluded. Regardless of the paucity of the plaintiffs' evidence, their combined opinion that the employer had engaged in discrimination would be sufficient to block a motion for summary judgment. This is clearly not the case." Judge Zatkoff added that: "The fact that an employer does not like a particular employee does not constitute direct evidence of racial discrimination."

Statements During a Grievance Negotiation Constituted Direct Evidence that the Decisionmaker Acted in Accordance With a Predisposition to Discriminate

In *Neason v General Motors Corp,* ___ F Supp 2d ___; 2005 WL 3671475 (ED Mich), a union committeeman testified that, while attempting to resolve the plaintiff's grievance concerning the denial of layoff work, a supervisor representing the employer called the plaintiff a "useless nigger" and responded affirmatively to the question whether he would pay the plaintiff's grievance if he were white. There was also evidence that the supervisor who made the comments either participated in the adverse decision or supervised the individual who did. Judge Fiekens ruled that this was "strong circumstantial evidence" that the employer acted in accordance with a predisposition to discriminate when it denied the plaintiff layoff work. This, by itself, created a material factual dispute for trial.

Imposing Tougher-Than-Needed Penalty Does Not Raise Retaliatory Inference

Judge Roberts ruled in *Norris v State of Michigan Dept of Corrections,* 2005 WL 3453306 (ED Mich), that the plaintiff cannot establish retaliatory animus simply by showing that the employer imposed more stringent discipline than its "disciplinary grid" requires.

Threat to "Go At It" Immediately Not Comparable to Threat to "Go At It" in Court

Judge Rosen ruled in *Pickett v Potter,* 2005 WL 3465723 (ED Mich), that a co-worker's threat to "go at it in a court of law" with a supervisor if the supervisor fired him was not comparable to the immediate "we are going to go at it" threat of physical assault the plaintiff directed toward a supervisor he was trying to keep from touching his property. The plaintiff thus failed to establish that he was treated differently than a similarly-situated employee. Judge Rosen also ruled that the plaintiff could not sustain a retaliation claim because (1) there was no evidence that the relevant decisionmakers knew about his repeated administrative complaints, and (2) the more than one year gap between most of the plaintiff's protected activity and his termination "is too attenuated a time period from which it might reasonably be inferred that Defendant took the complained of adverse employment action because Plaintiff had engaged in protected EEO activities."

Mild Stalking-Like Behavior Insufficient to Sustain Hostile Environment Claim

In *Powell-Lee v HCR Manor Care,* 2005 WL 3502187 (ED Mich), Judge Duggan ruled on summary judgment that the plaintiff could not sustain a hostile environment sexual harassment claim with evidence that, over a seven-month period, a co-worker stared at her, followed her, said he was attracted to her, liked watching her in a particular position and, once, exposed himself to her. Only the exposure incident could be characterized as "sufficiently severe to constitute sexual harassment," and the employer reasonably responded to that incident by immediately suspending,

investigating and then terminating the perpetrator. The incident was not "*quid pro quo*" harassment because the perpetrator had no supervisory authority over the plaintiff, and was not in a position to offer the plaintiff tangible job benefits in exchange for sexual favors.

Judge Duggan also dismissed the plaintiff's retaliation claim because the only evidence of retaliatory motive — a statement after the plaintiff called the police that the plaintiff "would be disciplined, leading up to, but not excluding termination for involving a third party" — came from a person with no apparent role in the alleged decision to terminate the plaintiff's employment.

Boys Club Evidence May Sustain Sex Discrimination Claim

Judge O'Meara ruled in *McCants v AT & T Corp*, 2005 WL 3071840 (ED Mich), that evidence that the plaintiff was not credited for all her sales, was the only female on the sales team, and was excluded from participating in a golf outing and a Red Wings game created a material question whether her sex played a role in the employer's decision to include her in a small RIF.

Instructing Employee to "Tone Down" Religious Avowals At Work Does Not Prove Religious Discrimination

The plaintiff in *Banks v Dow Chemical Co,* 2006 WL 148763 (ED Mich, 2006) — a devout Christian who practiced her faith openly, installed a "spiritual" screen saver on her computer, wore a cross necklace and religious t-shirts at work, and periodically reprimanded co-workers for inappropriate conduct such as directing profanity at their husbands — could not sustain a religious discrimination claim simply by showing that she was told (1) to "tone it down" with respect to her religious references, and (2) that an "extraordinary exhibition of religious beliefs" might offend or create a hostile work environment for some workers. There was no evidence that either comment led to disciplinary action; no evidence that the plaintiff continued her allegedly offensive conduct after being spoken to; no evidence that the plaintiff said that her religion compelled her to witness her faith in the workplace; no evidence that the plaintiff asked the employer to accommodate her religious beliefs; and no evidence of pretext.

Firing New Hire For Missing First Shift Might Have Been a Set Up

The plaintiff in *EEOC v International House of Pancakes,* 2006 WL 208786 (ED Mich), was allegedly hired but quickly terminated for missing her first shift. Judge Steeh rejected, as "form over substance," the employer's attempt to get the case dismissed because the plaintiff characterized her claim as a failure to hire, instead of a wrongful termination. Judge Steeh then ruled that the following evidence raised a triable age discrimination claim: (1) an assistant manager, who might have meaningfully influenced the adverse employment action, called the plaintiff an "old lady" and said she was "too old" to work there; (2) the manager who made the adverse employment decision abruptly left the plaintiff's orientation without returning, and then yelled at the plaintiff for leaving the orientation when the plaintiff called to determine when she was supposed to appear for work; and (3) nobody told the plaintiff when she should start. This evidence could support a conclusion that the employer conspired to not tell the plaintiff about her schedule, thereby setting up a pretextual basis for her termination. Whether the final decisionmaker had an "honest belief" that he was terminating the plaintiff for missing work would depend on whether he "made a reasonable inquiry whether [the plaintiff] actually knew she was to report to work on Tuesday at 10:00 a.m." ■

AT THE NATIONAL LABOR RELATIONS BOARD

Stephen M. Glasser, *Regional Director*
Region 7, NLRB

On January 4, 2006 President Bush made recess appointments of Ronald E. Meisburg to serve as General Counsel of the Board, and Peter N. Kirsanow to be a Member of the Board. At the same time, Acting General Counsel Arthur F. Rosenfeld was named Director of the Federal Mediation and Conciliation Services. On January 17, 2006 the President announced the recess appointment of Dennis P. Walsh to serve as a Member of the Board. All may serve until the sine die adjournment of Congress in 2007 unless the Senate confirms their pending nominations.

Mr. Meisburg previously served under a recess appointment by President Bush as a Member of the Board from January 12, 2004 to December 8, 2004. In July 2005 he was nominated by the President to be the NLRB General Counsel for a 4-year term. In the interim, he has served in the Office of the General Counsel and Division of Enforcement Litigation.

Mr. Kirsanow is currently a partner with the Cleveland – based law firm Benesch, Friedlander, Coplan & Aronoff, LLP, in the Labor and Employment Practice Group. He is also a Member of the United States Commission on Civil Rights, chair of the board of directors of the Center for New Black Leadership, and on the advisory board of the National Center for Public Policy Research. The President had announced in November 2005 his intent to nominate Mr. Kirsanow to be a Member of the Board for the remainder of a 5-year term expiring August 27, 2008. Mr. Walsh had been nominated by the President on April 27, 2005 for the remainder of a five-year term expiring December 16, 2009. Mr. Walsh previously served on the Board from December 30, 2000 to December 20, 2001 under a recess appointment by President Clinton, and then again from December 17, 2002 to December 16, 2004 after being nominated by President Bush and confirmed by the Senate. With Mr. Walsh's appointment, the Board is at its full five-member complement for the first time since December 2004.

At the Regional Office level, in 2005 we received 1,612 filings; 167 representation petitions and 1,445 unfair labor practice charges. Of these totals, 34 petitions and 338 charges were filed with our Grand Rapids Resident Office. Despite the decline in case intake, Region 7 remains the largest Regional Office in terms of staff size and case intake.

MERC CORNER

Ruthanne Okun, ***Director,***
Bureau of Employment Relations
and Brendan Canfield

We thought it would be helpful to print answers to questions frequently asked by persons calling the Bureau. This list of questions and answers will be continued in future issues. We hope that this information assists you.

1. *I need a 30-day extension of time to file my exceptions to an ALJ Decision and Recommended Order. Must my request be in writing and state a reason?*

   A request for an extension of time to file exceptions, cross exceptions, or briefs in support of an ALJ Decision and Recommended Order must be in writing and filed before the required filing date. At the same time, you must serve copies of the request on all parties. One extension of not more than 30 days will be granted to the moving party for any reason. Subsequent extensions will be granted by the Commission only upon a showing of good cause, which does not include inexcusable neglect by a party or its representative. (Rule 176(8)) Note: The Bureau Director does not have the authority to grant subsequent extensions or time or to determine good cause.

2. *When is a document considered filed with MERC? Is it on the postmark date or the date on which MERC actually receives it?*

   "Filing" with the Commission is the date on which a document is delivered to the Commission in either its Detroit or Lansing office and received and accepted by someone authorized by the Commission/Bureau. (Rule 181(1)) NOTE: A document is not considered filed on the date it is served on or mailed to the opposing party if it has not yet been received by MERC. The letter enclosing the ALJ decision indicates the date on which your exceptions must be *received* in our office.

3. *I intend to subpoena witnesses for next week's ALJ hearing. May I use a circuit court subpoena?*

   No, MERC has its own subpoena forms. Subpoenas to appear (and for documents) must be obtained from the ALJ, who is assigned to hear your case. They must include the Judge's original signature and a raised State of Michigan seal. Accordingly, they cannot be faxed.

4. *I filed an appeal of a MERC Decision to the Court of Appeals. The court says that a docket sheet must be filed, along with the MERC record. Will you do that for me?*

   When you file your appeal with the Court of Appeals, send us a letter enclosing a copy of your claim of appeal and requesting a docket sheet, which will be forwarded to the court with a copy to you. Sometime thereafter, the Court of Appeals will request the record in your case, which will be compiled and sent directly to the court. You will be notified when the record is sent to the court. NOTE: This same procedure applies to petitions for enforcement.

5. *An election was conducted last year on March 15, 2005 — about one year ago today — and the union was certified shortly thereafter. We've been bargaining, but do not have a contract. We received a petition indicating that another union is seeking to represent this same unit. Will another election be held?*

   PERA prohibits conducting an election within twelve months after a previous valid election has been held. Thus, when a labor organization wins the election and is certified as the representative, no petition from a rival organization or petition from employees to decertify will be accepted during the twelve-month period following the date of certification. If no labor organization was certified in the first election, the Commission will not accept a petition for the same unit until 60 days prior to the end of the twelve-month period following that election, and another election will not be conducted until the end of the twelve-month period.

6. *My client, a labor union, is trying to avoid the cost of grievance arbitration, if at all possible. I know MERC offers contract mediation, but what about grievance mediation? If arbitration is required, what services does MERC offer?*

   MERC provides grievance mediation to resolve grievances arising under a collective bargaining agreement, either as the final step in the grievance procedure or as a step prior to arbitration. Grievance mediation is offered without cost and has the advantage of allowing parties to fashion a remedy without being bound by contractual language. Contact MERC's mediation supervisors or the Bureau Director for further assistance.

   Should arbitration be necessary, MERC maintains a list of skilled arbitrators qualified to perform grievance arbitration in the field of labor relations. There is no charge for utilizing this service. Note that MERC's involvement is limited to the appointment of the arbitrator. The arbitrator will set his or her own daily rate and other fees/costs and will set the time for the hearing. The rules governing the arbitration are established by the parties' contract or by their mutual agreement. A Petition for Grievance Arbitration form is available under the "Forms" link on our website at www.michigan.gov/merc.

7. *My client, a labor union, is seeking to represent employees at two different employers: (1) a municipality and (2) a public school district. In both entities, the employees are represented by another union. Is there a time period in which they may file a petition for representation with MERC?*

   If another labor organization or a group of employees seeks to file a petition for election in a unit where a collective bargaining agreement is already in effect, it must file the petition during a "window period" prior to the termination of the collective bargaining agreement or after the contract's expiration. The window period varies with the type of employer involved. In most public sector cases, the petition must be filed no earlier than 150 days and no later than 90 days prior to the termination date of the contract. In cases involving a public school district in which the contract expiration date is between June 1 and September 30, the window period is from January 2 through March 31 of the year in which the contract expires. In private sector cases, the petition must be filed no earlier than 90 days

and no later than 60 days prior to the contract termination. A petition filed outside of the window period will ordinarily be dismissed. If a contract renewal has not been agreed upon during the insulated period, however, a petition may be filed after the expiration date of the agreement. (Rule 141(3)).

8. *After the ALJ issued a Decision and Recommended Order and I filed exceptions, my client and the union resolved their dispute. I want to withdraw the unfair labor practice charge before the Commission issues its decision, and I don't want the ALJ decision published. Can you make that happen?*

   The charging party may withdraw charges at any time prior to the issuance of a proposed Decision and Recommended Order with the approval of the ALJ, subject to review by the Commission. A charge may be withdrawn by the charging party following the issuance of a proposed Decision and Recommended Order only with Commission approval. (Rule 154) The ALJ's Decision and Recommended Order will be published.

9. *My opposing party has made false allegations in their response to my exceptions. I intend to file a reply brief and request oral argument. Will either/both be allowed?*

   The rule for filing exceptions to an ALJ's Decision and Recommended Order, cross exceptions, or a brief in support does not provide for the filing of a reply brief, and replies and/or other subsequent filings will not be considered by the Commission, except in extraordinary circumstances. While oral argument may be requested, it is granted only in exceptional circumstances.

10. *How many copies of the exhibits do I need for my hearing before the ALJ, and how many should I file with my exceptions?*

    At an ALJ hearing, a party should bring all relevant documents to support his/her claim, along with a copy of each document for the ALJ, the opposing party or parties, and a witness who may testify. When filing exceptions, the appealing party must file two additional copies of each exhibit submitted at hearing by *either* party. (Rule 176(1)) ■

KELMAN'S CARTOON

"Let the record show the witness's pants are on fire."

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Everybody complains about bad lawyers. I want to complain about good lawyers.

The lawyers I'm talking about are smart, experienced and well-trained attorneys from good firms. That's not the problem. The problem is that when they find themselves in a labor arbitration they lose sight of where they are and what they're doing. Labor arbitration is alternative dispute resolution. It is supposed to be faster, less expensive and less formal than litigation. That's why it was invented. If we lose sight of that we lose sight of our reason for being.

As gently and respectfully as I can I'd like to make a few gentle and respectful suggestions to these people.

1. Pull your head up from your carefully prepared list of questions and look around. Do you see a court reporter? No, you do not see a court reporter. And what does that mean? That means no one is going to be fly-specking the transcript in this case looking for appealable issues. *There is no transcript in this case!*
2. No one is saying you shouldn't be careful. Of course you should be careful. You just don't have to be obsessive. We don't need a complete background for every witness starting with where they went to high school. We don't need a twenty-minute foundation laid for every question. We don't need to ask every possible question. Again.
3. It is sometimes possible to let a point go unstated or to let one's opponent's point go unrebutted. Sometimes a point is so obvious or so inconsequentil that it would be *better* to leave it unstated. And, if stated, to leave it unrebutted and, if rebutted, to leave it unrestated.

But, no. The people I'm talking about *cannot* do any of these things.

I want to tell them, with great gentleness and respect, that an arbitrator who is biting his lip to keep from screaming is not an arbitrator who is paying careful attention to the important points of your case. I want to explain that, if you are the kind of lawyer I am talking about, the arbitrator can't even *remember* the important points of your case.

But, alas, the people I'm talking about are beyond the reach of rational persuasion.

If only I had a way to reach these lawyers I would offer this practical suggestion. As you are preparing that long and carefully typed list of questions, from time to time ask yourself:

> It is possible that anyone who ever lived could have the slightest interest in the answer to this question?

If the answer is no, try not to spend a lot of time on that one.

MIOSHA UPDATE

Richard P. Gartner
Assistant Attorney General

Demolition Work

Pitsch Companies v Michigan Occupational Safety and Health Administration, No. 2004-1212. This case involved a fatality which occurred on a multi-employer work site in Grand Rapids. The employer was a subcontractor who was responsible for the partial demolition of Welch Auditorium. This work included demolishing the balcony area that went around the perimeter of the auditorium, demolishing seating on the second floor balcony, removing escalators, removing concrete and imploding the roof of the auditorium. While the demolition work was ongoing, the general contractor and other subcontractors were working in the area of the Welch Auditorium and the adjoining Grand Center. Because of the various work activities, all the contractors at the work site were required to coordinate their activities to protect the employees from the hazards of the demolition work. On the morning of June 18, 2003, the deceased, a carpenter, entered an unlocked area where the demolition was occurring and was struck by demolition debris. Three other employees of subcontractors had also entered the same area earlier that morning. MIOSHA cited the demolition company for failing to inspect the work area to insure that employees were not exposed to the hazards from the demolition. The employer argued that it notified the other subcontractors and general contractor of its demolition plans for June 18, 2003 and that it did an inspection of the entire demolition area on the morning of the accident. The Administrative Law Judge ruled that Pitsch did not violate the demolition safety rule because it had conducted daily inspections, it notified the other employers of its demolition plans for the day of the accident, and that it had not been informed that workers from other subcontractors would be working in the escalator area where the fatality occurred. The Administrative Law Judge also concluded that access to the area of the accident was solely controlled by the general contractor. Accordingly, the citation was dismissed. MIOSHA intends to file exceptions with the Board of Health and Safety Compliance and Appeals.

Preemption.

Raytheon Technical Service Company v Michigan Occupational Safety and Health Administration, No. 2005-374. This case involves the claim that MIOSHA lacked jurisdiction to issue citations to a Michigan employer who was a contractor on a United States Department of Defense site in Warren, Michigan. The employer provided general road and grounds maintenance work pursuant to a contract with the Department of Defense. When a fire broke out in a 30-yard roll off dumpster, a Raytheon employee was instructed by a representative of the fire department to assist by bringing a backhoe to the fire area. While operating the backhoe, the employee inserted the boom of the backhoe into the dumpster to pull out debris. As the debris was being pulled out, a small fire broke out on the surface of the boom of the backhoe due to some grease. The dumpster fire and the backhoe fire were extinguished with no injuries. MIOSHA issued two "general duty" citations to Raytheon alleging that the employer failed to insure that the backhoe was approved for firefighting and that the employer failed to properly equip and train the employee who engaged in firefighting. The employer filed a motion to dismiss arguing that the citations were preempted by federal law because the authority to regulate the working conditions at the work site were controlled by the Department of Defense and not MIOSHA. The ALJ rejected the argument of the employer, holding that there was no preemption because Congress did not intend to displace state safety regulations. Ultimately, however, the citations were dismissed on a different legal ground.

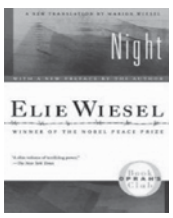
Hazard Assessments.

United Parcel Service v Department of Consumer & Industry Services, Bureau of Safety and Regulation, Ingham County Circuit Court No. 04-1141-AA. On August 26, 2003, the Administrative Law Judge issued a decision upholding two identical citations issued to United Parcel Service (UPS). Under a General Industry Safety Standard, all employers are required to evaluate the "workplace" for the purpose of determining "if hazards that necessitate the use of personal protection equipment present." Michigan General Industry Safety Standard, Part 33, Rule 408.13308(1). UPS did not perform the hazard assessments at its Lansing and Romulus facilities. Instead, it performed hazard assessments at its main aircraft facility in Louisville, Kentucky and another facility in Des Moines, Iowa and claimed that the safety rule at issue permitted it to apply those assessments to its Michigan facilities. The ALJ disagreed holding that the plain language of the rule requires a hazard assessment at each separate workplace and is not satisfied by hazard assessments completed at out-of-state work places. On June 16, 2004, the Board issued an Order affirming the decision of the Administrative Law Judge. On appeal to Ingham County Circuit, the Court on December 16, 2005 issued a written opinion upholding the citations. The Court found that the involved safety standard was site-specific and that representative hazard assessments at out-of-state facilities did not satisfy the involved safety regulation. The Court also concluded that the hazard assessment rule was predicated "on the presumed existence of a hazard", and that MIOSHA was not required to show that an unassessed hazard existed at the employer's Michigan workplaces in order to prove a violation of the involved rule. An application for leave to the Michigan Court to Appeals is expected to be filed by UPS. ■

RECOMMENDED SUMMER READING

John G. Adam

While Europe Slept: How Radical Islam is Destroying the West from Within by Bruce Bawer (2/21/06). Learn how Europe is being destroyed by Militant Islam and why the European elite dislikes America, among other things.



Night by Elie Wiesel. Want to learn about human nature? Man's evil? Do not study law but read Elie Wiesel's memoir about the horror of the Holocaust and the genocidal campaign that consumed his family. It describes his time in Nazi concentration camps. It was originally published in French in 1958, after great difficulties in finding a publisher. A new preface and new translation. Plus, Oprah recommends it, so it must be good!

THE JOY OF LABOR LAW

Justice Scalia Hard at Work on the "Court." Justice Scalia was too busy on the "court" of tennis and attending a function sponsored in part by Jack Abramoff's law firm and the Federalist Society in Colorado to attend the swearing in of the new Chief Justice, as first reported by ABC's Nightline. After all, Justices *only* get fours months of summer vacation, every holiday plus other recesses, far less than President Bush. Indeed, the burden of producing 90 or so opinions divided among *only* nine justices and 28 or so law clerks is too much, which is why down time is so important. At least he was not hunting geese with the Vice President's former Chief of Staff. For what in reality is part-time work, Justices make *only* $199,200.00 a year, with nice fringes, for rest of their lives, plus any wage increases granted by Congress. The Constitution even prohibits wage cuts and the termination of a Justice can only be by impeachment and conviction, far better than any union contract that I have seen. No wonder most Justices do not organize a union or retire but die on the court. As Jethro Tull might say,

Justice Scalia on the "Court."

> "They were too old to rock and roll, but not too old to be on the Supreme Court until they are 90."

At least Justice Scalia was *not* hunting, this time at least, with the Vice President when the Vice President shot a lawyer in the face and chest!

"*Chutzpah* Doctrine." Editor Stuart Israel noted in the last edition of *Lawnotes*, lawyers should study Yiddish, the source of many legal expressions and Seinfield jokes. Indeed, I recently learned that the D.C. Circuit has a "*chutzpah* doctrine" to chastise attorneys who make outrageous claims or who engage in outrageous behavior. *Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930, 937 n. 5 (D.C. Cir. 1991). Indeed, future legal historians should know that the beloved "The Joy of Labor Law" column owes its name to Leo Rosten's *The Joys of Yiddish*, not, as some thought, to *The Joy of Sex*, or to the hybrid *The Joys of Yiddish Sex*.

Clipart and Thuggery. Oy vey. We better be careful with our clipart here at *Lawnotes* in view of the recent reaction to six month old cartoons published by a Danish newspaper, (with a circulation even smaller than *Lawnotes*). Perhaps the Muslim world needs a little Yiddish humor.

Chutzpah would be the minimum to describe the reaction to six month old cartoons that are hardly offensive. Western freedom means the right to criticize and ridicule even religious and political figures. Last time I looked, Denmark was a democracy. Let's be clear: militant or political Islam seeks to intimidate the West and seeks our submission.

Since we too are cowards at *Lawnotes,* like most of the American newspapers, and wish to avoid offending all nuclear-carrying Iranian mullahs, we will edit our clipart to avoid any claim that we were attempting to ridicule any sacred cows.

Even as edited, I, of course, apologize for any 'offense' our clipart may cause. I feel the pain of those who suffer from Western insults and imperialism. While thousands are murdered in Darfur by an Islamic regime, hundreds of Arabs drown in the Red Sea and hundreds of Muslims are trampled to death in Saudia Arabia, it is only the cartoons published in a Danish newspaper that rally the street. As one might say in Yinglish: "You kill people, praise 9-11, burn embassies and threaten jihad because a newspaper published cartoons six months ago and *I* should apologize!?"

In truth, the United States and the free world (including Europe) and even *Lawnotes* should not appease, apologize or grovel over a cartoon or clipart. We cannot be *nebbishes.* We are not *shmucks,* are we?

Bankruptcy Pays. Speaking of *chutzpah* and Scalia (but I repeat myself), one lawyer is charging $835 an hour to represent a bankrupt employer that is seeking to slash the wages and benefits of its workforce, a form of *chutzpah* (or just plain greed). Is anything 'legal' worth $835 an hour? A 11/30/05 *Detroit News* article reported that Delphi's teams of bankruptcy lawyers and law firms are being paid grotesque sums while the workers and creditors will get *bupkes.*

According to the *News* article, Delphi's "lead attorney" gets "$835 per hour" and the "Investment banker (Rothschild, Inc.)" gets $250,000 per month. The article also notes:

> Butler also was the lead attorney in Kmart Corp.'s 2002 bankruptcy. Kmart paid $138 million for bankruptcy attorneys and advisers, including $58 million to Skadden Arps. Enron Corp. spent more than half a billion dollars on bankruptcy lawyers and accountants.

Half a billion? $9.85 million? Child's play next to some arbitrator's bills.

What does a lawyer do for $835 an hour? He must write some really good letters. Paying $250,000 a month for the investment banker? No wonder Delphi filed bankruptcy.

What's the difference between a lawyer who bills $835 and a lawyer who bills $585? $250 an hour.

How many justices does it take to destroy the rule of law?

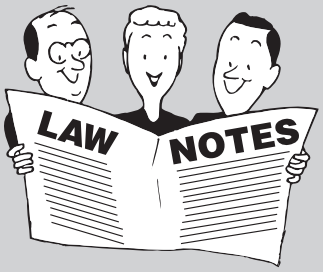
I wonder where the figure $835 comes from but if you divide the salary of a Justice, $199,200, by $835 you get 238 hours.

MARVIN, SMARVIN. More workers will be calling MARVIN and collecting a pittance in unemployment benefits while bankruptcy lawyers and consultants feed at the trough, raking in more dollars than Feiger, who apparently has been "busy" in other areas of the law, including campaign finance law. Who is MARVIN? Not the singer. Rather, according to the Michigan's Unemployment Insurance Agency (UIA), MARVIN is the acronym for the Michigan's Automated Response Voice Interactive Network, a system that allows unemployed workers (due to recent bankruptcies and plant closings, there will be many more Michigan workers talking to MARVIN) to communicate with the UIA's computer by using a touch-tone or a push-button telephone. MARVIN uses the beautiful digitized human speech to provide step-by-step instructions and information regarding a worker's claim. www.michigan.gov/uia

NLRB Closes at 5 p.m. Even For E-Filing. While you may not find Justice Scalia working after 5 p.m., we were recently reminded that the NLRB is not like the federal courts when it comes to e-filing. *WGE Federal Credit Union*, 346 NLRB No. 1 (2005). In *WGE*, the Board's Associate Executive Secretary rejected the filings as untimely as the documents were received via email around 50 minutes after the 5:00 p.m. "official closing time" of the Board. In a 2 to 1 vote, the Board noted that "the rule here is relatively new, distinguishable from, and more rigorous than, the practice in the federal courts. In these circumstances, we would not impose the harsh penalty of forfeiture on the Respondent. We also disagree with the dissent that our decision here somehow makes the Board's rules a 'nullity.'"

To use Yinglish: "I should be *so* lucky if I ever appear in front of Justice Scalia."

– John G. Adam



INSIDE *LAWNOTES*

- John Holmquist reviews *White v. Burlington Northern Railroad* and the concept of *de minimis* retaliation
- Jeremy Chisholm assesses Justice Alito's Third Circuit record in employment cases.
- Stuart Israel chronicles 14 things arbitration advocates want arbitrators to know. Arbitrator Barry Goldman offers some advice to arbitration advocates.
- Lee Hornberger analyzes employer promises not to contest unemployment compensation claims.
- Bill Saxton writes about Bob Battista, NLRB General Counsel and LELS 2006 Distinguished Service Aware recipient.
- Administrative Law Judge Roy Roulhac reports on the fate of MERC cases in the appellate courts.
- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, MIOSHA, MDCR and EEOC news, websites to visit, a cartoon by Maurice Kelman, and more.
- Authors John G. Adam, Brendan Canfield, Jeremy Chisholm, Jeffrey S. Donahue, Richard P. Gartner, Stephen M. Glasser, Barry Goldman, C. John Holmquist, Jr., Lee Hornberger, Stuart M. Israel, Maurice Kelman, Ruthanne Okun, Roy L. Roulhac, William M. Saxton, John W. Smith, Jeffrey A. Steele, and more.

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