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# NEW LIFE FOR SIXTH CIRCUIT JURY TRIALS IN RETIREE HEALTH CARE LITIGATION: THE SUPREME COURT'S DECISION IN *GREAT-WEST LIFE V. KNUDSON*

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In 1996 the Sixth Circuit ruled that plaintiffs bringing a contract action for retiree health care benefits were not entitled to a jury trial. *Golden v. Kelsey-Hayes Co.,* 73 F.3d 648, 660-623 (6th Cir. 1996). The underpinnings of that holding, always wobbly, were knocked out from under *Golden* by the United States Supreme Court in *Great-West Life v. Knudson,* 534 U.S. 204 (2002). It appears that *Golden's* holding on this issue is no longer good law, and the Sixth Circuit must join other courts in recognizing retirees' Seventh Amendment rights to a jury trial in retiree health care litigation.

Simply put, the Sixth Circuit ruled in *Golden* that though money damages are usually legal relief — which carry a right to a jury trial — the money damages sought in retiree health care lawsuits could be characterized as equitable relief, to which no jury trial right attaches. After the Supreme Court's decision in *Great-West,* it is clear that the Sixth Circuit was wrong.

**Retiree Health Care Lawsuits Under LMRA §301**

The typical retiree health care lawsuit is filed as a class action by retirees and/or a union under §301 of the Labor Management Relations Act, 29 USC §185. In the usual situation, the lawsuit is filed after an employer announces or implements reductions — or a complete termination — of the retiree health care benefits. The complaint usually seeks a determination that the employer has breached the contract, money damages for any out-of-pocket amounts retirees were forced to pay as a result of the health care cutbacks, and a permanent injunction requiring that the employer continue to pay amounts necessary to continue the health coverage for the lifetimes of the retirees.

Putting aside for a moment the Sixth Circuit's curious detour in *Golden,* other courts that have addressed this issue have found that retiree health care claims are quintessential legal actions and have recognized the right to a jury trial. See *Stewart v. KHD Deutz of America Corp.,* 75 F.3d 1522, 1525 (11th Cir. 1996); *Rexam, Inc. v. Steelworkers,* 2005 WL 2318957, 7 (D. Minn. 2005); *Senn v. United Dominion Industries, Inc.,* 951 F.2d 896, 813-814 (7th Cir. 1992) *Bower v. Bunker Hill Co.,* 114 F.R.D. 587, 597-598 (E.D. Wash 1986); and *Local 836 v. Echlin, Inc.,* 670 F.Supp. 697, 706-707 (E.D. Mich. 1986); and *UAW v. Park-Ohio Industries, Inc.* 661 F.Supp. 1281, 1310 (N.D. Ohio 1987). Other retiree health care actions proceeded to jury trials without controversy. See *John Morrell & Co. v. Local Union* 304A, 913 F.2d 544, 549 (8th Cir. 1990); *Trull v. Dayco Products, LLC,* 178 Fed. Appx. 247 (4th Cir. 2006); *Webb v. GAF Corp.,* 78 F.3d 53, (2nd Cir. 2996); and *Bidlack v. Wheelabrator Corp.* 993 F.2d 603, (7th Cir. 1993).

**The Seventh Amendment Right to a Jury Trial**

The Seventh Amendment to the U.S. Constitution guarantees the right to a trial by jury in suits which will resolve legal rights. *Curtis v. Loether,* 415 U.S. 189, 193 (1974). Two factors are considered in determining whether legal rights are at stake: whether the underlying action resembles a common law legal action, and whether legal or equitable remedies are sought. *Chauffeurs, Teamsters, & Helpers Local No. 391 v. Terry,* 494 U.S. 558, 564-565 (1990).

As to the first factor, there is no question that LMRA §301 retiree health care breach of contract Lawsuits are typical legal actions, satisfying the first prong of the Seventh Amendment jury trial analysis. The Supreme Court has held that a §301 claim that an employer breached a collective bargaining agreement "is comparable to a breach of contract claim — a legal issue" — and that therefore a jury trial right attaches to such a claim. *Terry,* 494 U.S. 558, 569 (1990). The Circuit courts addressing this question have agreed that the same is true in retiree health care lawsuits brought under §301 — those lawsuits are legal actions which call for a jury trial right. See *KHD Deutz* at 1526; *Bower v. Bunker Hill* at 597-598; and *Rexam v. United Steelworkers* at 7.

As to the second factor in the Seventh Amendment analysis, all the courts to address the issue except the Sixth Circuit have agreed that the money damages sought by retirees in these breach of contract cases are a form of legal relief — not equitable — and therefore entitle retirees to a jury trial. As the courts have held, the money damages sought are "the traditional form of relief offered in courts of law." *KHD Deutz* at 1526, quoting from *Curtis v. Loether,* 415 U.S. 189 (1994) and *Terry,* 494 U.S., at 570. See also *Bower v. Bunker Hill* at 598; *Senn v. United Dominion Industries, Inc.,* 951 F.2d 813-814 (7th Cir. 1992); and *Rexam v. United Steelworkers* at 7-8.

The fact that retirees might seek injunctive relief in addition to money damages does not affect their Seventh Amendment right to a jury. As the Supreme Court explained in rejecting an argument that the jury trial right was lost because a party sought injunctive relief in addition to a monetary award:

> In such a situation, if a "legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The

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**STATEMENT OF EDITORIAL POLICY**

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# NEW LIFE FOR SIXTH CIRCUIT JURY TRIALS IN RETIREE HEALTH CARE LITIGATION: THE SUPREME COURT'S DECISION IN *GREAT-WEST LIFE V. KNUDSON*

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> right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought. [citations omitted]

*Tull v. United States,* 481 US 412, 425 (1987). See also *Senn,* 813-814, citing *Tull* in holding that a request for an injunction in a retiree health care action did not affect the right to a jury trial on the underlying breach of contract action for money damages.

The Supreme Court warned, in upholding the right to a jury trial in a LMRA §301 breach of contract action, that the right to a trial by jury is a fundamental American right:

> . . . this Court has carefully preserved the right to a trial by jury where legal rights are at stake. As the Court noted in *Beacon Theatres, Inc. v. Westover* 359 U.S. 500, 501 [citations omitted], "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

*Terry,* 475 U.S. 558, 565, (1990). The Sixth Circuit casually brushed aside this constitutional right in *Golden,* based on flawed and artificial reasoning.

### The Sixth Circuit's *Golden v. Kelsey-Hayes* Decision

In *Golden,* the plaintiff retirees brought a typical breach of contract action under LMRA §301. They sought money damages for out-of-pocket medical expenses incurred as a result of the termination of medical coverage, and a permanent injunction. The Sixth Circuit ruled that, with respect to the money damages, ". . . we are convinced that the relief they seek is equitable," and therefore denied a jury trial. *Golden,* at 661. The *Golden* panel based its decision on a reading of prior Supreme Court decisions which, the panel believed, indicated that courts had broad authority to award money damages as equitable relief, either under trust law or as restitution. The Sixth Circuit followed *Golden* one year later in denying a jury trial in another LMRA §301 action, *Bittinger v. Tecumseh Products Company,* 123 F.3d 877, 822-883 (6th Cir. 1997).

The Supreme Court subsequently ruled unequivocally, in *Great West,* that money damages are, except in extremely narrow circumstances, *legal* relief. *Great West* made clear that the exceptional circumstances in which money damages could be awarded as an equitable remedy do not include the circumstances presented in retiree health care lawsuits.

### *Great West Life v. Knudson*

Money damages as equitable restitution. In holding that money damages for retirees' medical expenses could be awarded as equitable restitution, *Golden* cited a general statement in *Tull v. United States,* 481 US 412, 424 (1987): ". . . a court in equity may award monetary restitution as an adjunct to injunctive relief . . ."

The Sixth Circuit panel apparently believed that "monetary restitution" is an equitable remedy.

In *Great West,* the Supreme Court clarified that there are two kinds of restitution, *legal* restitution and *equitable* restitution. The Supreme Court explained that all restitution was legal restitution except in those rare situations where a plaintiff could identify a specific discrete fund, in the defendant's possession, that belonged to the plaintiffs:

> In contrast [with legal restitution[1]] a plaintiff could seek restitution *in equity,* ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendants' possession. *Great West,* 534 U.S. at 213.

In retiree health care litigation, the plaintiff retirees do not seek money damages from a specific fund of misappropriated money, but from the defendant corporation's general assets. Under *Great-West* this type of money damages cannot, therefore, be characterized as equitable restitution. See *Rexam, Inc. v. Steelworkers,* 2005 WL 2318957 at 7-8 (D. Minn. 2005), recognizing that *Great-West* closed the door to an employer's argument that money damages sought in a retiree health care action were a form of equitable relief.

The Sixth Circuit's *Golden* holding that the monetary damages retirees seek is equitable restitution — and that therefore no jury trial right exists — is wrong.

Money damages as equitable relief under trust law. The Sixth Circuit also stated in *Golden* that money damages could, in the alternative, be awarded as equitable relief under trust law. The *Golden* panel cited a general statement in the Supreme Court's decision in *Mertens v. Hewitt Assoc.,* 508 U.S. 248, 256 (1993) that money damages could be available in an equity proceeding. *Golden* at 661.

*Great-West* subsequently clarified that its statement in *Mertens* that money damages were sometimes available under trust law did not mean that *all* requests for money damages could be awarded as an equitable remedy. To the contrary, the court noted that the circumstances identified in which money damages could be awarded as an equitable remedy under trust law were very limited:

> . . . they merely allow a trustee to charge the beneficiary's interest in the trust in order to capture money owed. See Restatement of Trust Section 252.
>
> These setoff remedies do not give the trustee a separate equitable cause of action for payment from other moneys. *Great West* at 220.

The money damages sought by retirees in health care litigation is obviously not the type of trust-law equitable set-off described in *Great West.* Rather, as *Great-West* makes clear, those damages are a legal remedy. Because retirees seek money damages in a breach of contract lawsuit, they have a constitutional right to a jury trial.

**— END NOTE —**

[1]Legal restitution (to which a jury trial right would attach) is available in much broader circumstances. ■

# NLRB TO ADDRESS RESTRICTING EMPLOYEE USE OF COMPUTER TECHNOLOGY

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Many employers maintain computer, email and internet policies restricting usage to business purposes only. Such electronic technology may be utilized by labor unions to organize the workplace. These competing interests may be impacted by a long awaited National Labor Relations Board ("NLRB" or "Board") decision. In a case that has been pending for five years, the NLRB will address the issue of whether employers may lawfully restrict the use of company-provided computers and email accounts to business purposes only. In *Register Guard,* the General Counsel for the Board is urging the Board to hold that an employer violated the National Labor Relations Act by maintaining a business-only computer policy that provided no exception for employees who wish to communicate about their union activities. Oral argument has been scheduled and amicus briefs invited in this much anticipated case.


In *Register Guard,* the employer daily newspaper employs reporters, photographers, editors, and secretaries, among others, who have access to company-provided computers and email accounts to perform their duties. In 1996, the newspaper promulgated a written communications policy providing that computers "are not to be used to solicit or proselytize for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." Notwithstanding this policy, the newspaper knowingly permitted its employees to use their computers and email accounts to discuss many subjects unrelated to the employer's business, including sporting events, parties, community events, and jokes. In 2000, an employee was disciplined for violating the policy after sending three emails about union activities to colleagues from her company computer and email account. Later, during contract negotiations with the employee's union, the newspaper proposed limiting the use of electronic-communications systems to business purposes only. The newspaper refused to withdraw the proposal even after the union rejected it.

The union filed unfair labor practice charges, which resulted in a complaint being issued alleging violations of Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the Act. After trial, an administrative law judge held that the employer's communications policy did not violate Section 8(a)(1) explaining that employers generally may restrict the use of their communications equipment. Citing Board precedent holding that employers may limit use of company bulletin boards and telephones to business purposes only, he concluded that the employer lawfully maintained its business-only computer policy.

The General Counsel has appealed to the NLRB challenging the judge's conclusion that the employer's business-only computer policy was facially lawful. The General Counsel has argued in his

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## NLRB TO ADDRESS RESTRICTING EMPLOYEE USE OF COMPUTER TECHNOLOGY

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brief that the Board's longstanding rules regarding restrictions on oral solicitation and paper distribution are inapposite because email communication is like solicitation in some respects, like distribution in others, and unique overall. Instead he contends the correct analysis should balance the interests of employees in using such convenient modes of communication against employers' interests in maintaining productivity, discipline, and the integrity of their computer systems. According to General Counsel's argument, business-only computer policy should be deemed presumptively violative of Section 8(a)(1) of the Act. Pursuant to this standard, an employer can rebut that presumption only if it proves that special circumstances regarding production and discipline necessitate a total ban on non-business communications.

The charging party union has also filed exceptions to the judge's decision and argues that the Board's longstanding solicitation rules should be applied. Under those rules, restrictions on union solicitation in work areas during non-working time are presumptively unlawful. According to the charging party union, company computers and email accounts are "work areas" and that email messages constitute "solicitation," not "distribution," because they invite spontaneous response, are often informal and target specific individuals. Applying the Board's solicitation standards, the union reasons that the employer's business-only computer policy prohibiting solicitation in a work area during non-working time is presumptively unlawful. It further claims that the employer failed to establish that the business-use only policy was necessary to maintain production or discipline.

The newspapers and various employer amici counter that the judge correctly held that computers and email accounts are tools, like telephones and bulletin boards which are properly subject to policies prohibiting all non-business use. They urge the Board to rule that employers may similarly prohibit all non-business use of company computers and email accounts. They also contend that requiring an exception for union-related emails will reduce productivity, expose computer systems to potentially devastating computer viruses, and create potential legal liability for the comments made on computer systems. Moreover, they argue that a compelling justification does not exist for infringing on employers' interests in maintaining the integrity of their computer systems and that employees have many other means of communicating with each other about unionization. For these reasons, they urge the NLRB to find that the newspaper's policy was facially lawful.

In light of the Board's current composition, it would not be surprising if it affirms the judge's decision and that the employer's business-only computer policy is lawful. It is quite likely that the Board will analyze restrictions on use of computers and email systems in the same manner as it analyzes other communications restrictions: an employer may restrict their use to business purposes only, but may not tolerate some personal use and thereafter discipline an employee for sending union-related messages. Alternatively, the NLRB may utilize a balancing test and weigh the parties' competing interests, resulting in crafting a narrow rule entitling employees to use company-provided computers and email accounts under limited circumstances. However the Board rules, its decision will potentially dramatically impact today's workplace. ■

# STRETCHING SUCCESSORSHIP: THE FMLA, THE REGS, AND *COBB V. CONTRACT TRANSPORTATION*

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The FMLA requires an employee to have worked for at least a year before becoming eligible.[1] So here's a riddle: why should a business have to grant FMLA leave to an employee who just got hired? Because that's the law, due to the doctrine of successorship being stretched beyond its logical limit.

In *Cobb v. Contract Transort., Inc.*,[2] the Sixth Circuit held that Ronald Cobb, a new employee of Contract Transport, could use his service with Byrd Trucking, his former employer, to meet the one year requirement for FMLA eligibility. Contract and Byrd were competitors to be USPS's vendor for routes. Contract submitted a lower bid than Byrd for a route that was already being serviced by Byrd, resulting in USPS awarding the route to Contact. After USPS replaced Byrd, it terminated its excess drivers who ran this route, including Cobb. Contract in turn hired Cobb and some other former Byrd drivers for this route. Soon Cobb missed work for needed surgery, and Contract terminated him because of his unavailability. The District Court dismissed his FMLA lawsuit because he hadn't worked for Transport for the one year required to be eligible for FMLA leave. The Sixth Circuit reversed, holding that Transport was a "successor in interest"[3] of Byrd despite the lack of a merger or transfer of assets.

This decision is arguably a permissible reading of the FMLA regulation on "successor in interest,"[4] but that's not where the analysis ought to have begun. Let's go back to the roots of the successorship doctrine as used in the FMLA. The court in *Contract Transport* – and the DOL itself in its preamble discussion of "successor in interest" – noted that the successorship doctrine as developed under Title VII and USERRA should be the focus of FMLA's "successor in interest" provision. What are the Title VII and USERRA roots for successorship?

It goes back to a 1973 U.S. Supreme Court case. In *Golden State Bottling*,[5] the Supreme Court held a new employer that purchased the business from a prior owner can be forced to remedy the predecessor company's violation of the NLRA by providing a job and back pay to an employee of the predecessor company. The Court held that imposing such "successorship liability" was a fair balance of the interests of the three parties – the predecessor, its employee who the predecessor had wrongfully terminated, and the new employer taking over the predecessor's business. The balance struck by the Court took into account –

- that the predecessor couldn't provide reinstatement to its employee because it no longer ran the business from which the employee was unceremoniously fired
- the poor employee should not be left without a remedy just because the scofflaw employer managed to sell its business before the NLRB finished its job of getting the employee's job back
- the new employer – through due diligence review of the predecessor's business before closing on the purchase – could protect itself from the cost of providing a remedy by factoring this into the purchase price.

*Golden State Bottling* is well-settled law. Its balance is here to stay, forcing my fancy-pants M&A partners "doing a deal" to head downstairs to their employment law partners, to make sure that their M&A target doesn't come with too much employment liability baggage.

The question here is this: Is the successorship doctrine that is in § 825.107 and then as applied in *Cobb v. Contract Transport* true to the roots of this doctrine? I don't think so. Here's why.

*First,* the FMLA reg that was interpreted in *Cobb v. Contract Transport* was ill-conceived. It took the limited *Golden State* principle that gave a wronged employee the right to reinstatement (more precisely, "instatement") when the employer had vanished, and used it to give employees of a closed business – employees against whom no wrong had been done by anyone – a new substantive right of immediate FMLA eligibility. Although the factors used in § 825.107 are a fair listing of factors used under *Golden State Bottling*, the successorship doctrine was not intended to treat the new employer as the same party as its predecessor. Instead, the successorship doctrine treats the two employers as separate entities, and just requires the new one to be careful when it purchases a scofflaw predecessor.

*Second,* in *Cobb v. Contract Transport* the successorship doctrine was used to create a new, substantive right for newly hired employees in a setting where there was no purchase. Contract Transport couldn't adjust its purchase price because there was no purchase. Contract Transport wasn't dealing with Byrd at all; they were competitors. This is analogous to a purchase of a business in bankruptcy, for which the new owner has similar ability to protect itself.[6] Although a successor may be obligated to reinstate the wrongfully terminated employee, no injunction prohibiting the successor from engaging in future violations is appropriate, since it didn't do anything wrong in the first place.

*Third,* how is a new employer like Contract Transport going to get employment records needed to determine Cobb's work record for FMLA eligibility (needed to verify his length of service and how many hours he worked in the past 12 months)? Unlike the purchaser in an asset deal, Contract couldn't negotiate with Byrd for these records. Maybe a new employer like Contract should just ask Byrd for them. You can imagine how cooperative the predecessor will be, having just been outbid and replaced.[7]

The bottom line is that the next time this issue comes up, the employer should argue that reg 825.107 is simply not authorized by the FMLA – *a la Ragsdale* – and should not be enforced. Better yet, the DOL should revisit § 825.107 as part of its needed revisions of the FMLA regs.

**— END NOTES —**

[1]29 U.S.C. § 2611(2)(A)(1).

[2]452 F3d 543 (6th Cir 2006).

[3]The FMLA definition of "employer," 29 U.S.C. § 2611(4), includes "any successor in interest of an employer."

[4]29 C.F.R. § 825.107 defines the term "successor in interest" as follows:

[5]414 U.S. 168 (1973).

[6]The *Golden State* successorship doctrine does not apply when the successor is a purchaser of a bankrupt predecessor, even if the purchaser knew of the predecessor's employment liability, since in bankruptcy the purchaser has no reasonable means to negotiate protective terms. *Peters v. NLRB*, 153 F.3d 289 (6th Cir. 1998).

[7]The DOL commentary to its FMLA Final Rule merely notes that "it would be helpful for a predecessor contractor to furnish a list to the successor in interest of the predecessor's employees who are on FMLA leave when contractors change, and a list of benefits being provided (so that they may be maintained and/or restored at the same levels). If lists are not furnished, the successor in interest should attempt to determine its obligations without waiting for the employees on FMLA leave to apply for employment with the successor." ■

# HOW BAD DOES IT HURT? LOOKING AT THE JUST AND PROPER STANDARD FOR INJUNCTIVE RELIEF UNDER 10(j)

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Although the National Labor Relations Board continues to seek injunctive relief in federal court in a small percentage of its cases during the course of its administrative proceedings, the Board itself is more reluctant to authorize injunctive relief, and the Courts have been more circumspect in granting injunctions, absent sufficient evidence that the unfair labor practices alleged in a complaint are continuing to adversely affect a charging party. Put another way, how badly will the charging party (which typically is a union) be hurt by waiting for the Board's administrative processes to finish before it receives a remedy. The purpose of this article is to provide some guidance into the types of evidence, and the inferences, that will be considered in determining whether injunctive relief may be appropriate.

Although a charging party may request that the Region seek an injunction at any time during the administrative proceedings, it is more frequent that the Region itself will initiate an inquiry into the need for injunctive relief. Indeed, the Board's General Counsel, Ronald Meisburg, has directed Regions to always consider the need for injunctive relief in two particular types of cases: those involving initial organizing campaigns and in situations where there have been unfair labor practices committed during bargaining between an employer and union for an initial collective bargaining agreement. In both of these situations, evidence of harm or "chill" to the exercise by employees of their rights to engage in organizing or collective-bargaining activities is important.

Procedurally, under Section 10(j) of the National Labor Relations Act, Regional Directors, acting upon authorization of the Board, can seek injunctive relief in U.S. District Court in situations where, due to the passage of time, the normal adjudicative processes of the Board will be inadequate to effectively remedy violations alleged in a complaint issued by the Region. Although there are variations between Circuits, typically the standard for the issuance of a Section 10(j) injunction requires a showing that there is "reasonable cause" to believe that the Act has been violated and that interim injunctive relief is "just and proper."

Traditionally, courts have afforded considerable deference to the Board's showing of reasonable cause that an unfair labor practice has occurred as alleged in the complaint. The Board need only show that it has a "better than negligible" chance of succeeding on the merits of the unfair labor practice allegations to satisfy the court. In theory, the court has no authority to pass on the merits of the underlying case before the Board. District Court judges do not always see it that way and, indeed, the strength of the Board's evidence and legal theory does come into play. The Board itself

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# HOW BAD DOES IT HURT? LOOKING AT THE JUST AND PROPER STANDARD FOR INJUNCTIVE RELIEF UNDER 10(j)

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will not seek injunctive relief, even if otherwise warranted to prevent frustration of its remedy, if the chances of success on the merits of the complaint allegations are debatable. And, in some Circuits, most notably the Seventh and Ninth Circuits, the likelihood of success on the merits is evaluated on a "sliding scale" in determining whether to grant injunctive relief. A strong showing of reasonable cause may offset a weaker showing under the just and proper element.

So, what types of evidence will the Region solicit from the parties in analyzing whether injunctive relief should be sought? It depends on the allegations in the complaint, but there are some common denominators.

In cases where a complaint has issued alleging the unlawful discharge of an employee for organizing activity, any type of evidence that the employer's violation will adversely affect or "chill" the remaining employees' support for a union or their willingness to engage in further organizing activities during the Board proceedings is relevant. This might include testimony that since the discharge, employees have indicated their reluctance to the union, or through other employees, of continuing their involvement with organizing efforts. This could take the form of statements made directly by employees, or indirectly by the fall off of attendance at union meetings or the unwillingness of employees to any longer sign authorization cards. The union may also begin to find it difficult to contact employees who had previously volunteered to help in the organizing effort. The refusal of employees to voluntarily cooperate with the Board into its investigation of alleged unfair labor practice charges, or to appear at a representation hearing at the request of the union, can serve as secondary evidence of chill.

Direct employee testimony as to any asserted chill is desired, and may even consist of the subjective feelings of employees regarding fear of retaliation because of the discharge of a co-worker and the resulting reluctance to continue their involvement with the union. Hearsay testimony may also be used, but as might be anticipated, district courts have a tendency to give it much less weight.

In cases involving discharge, injunctive relief has been sought, and granted, even without evidence of chill based on an inference that by their nature, discharge allegations are likely to dissuade other employees from sticking their neck out in support of the union, especially if there are other allegations of unlawful conduct in the complaint, such as threats, promises of benefits, etc. The argument is that as time goes on and the discriminatee(s) remain absent from the facility, the remaining employees will understand that union support will likely result in their discharge, and that neither the Board nor the union can effectively protect them. It has also been argued that interim reinstatement is needed now as part of injunctive relief because it is otherwise likely that the discriminatee(s) will have moved on to another job by the time the Board finally enters a reinstatement order. It does happen that as time goes on, discriminatees may relocate as part of their effort to secure interim employment. Such "scattering" of discriminatees is often cited as reason for a more immediate interim order of reinstatement. If reinstatement is no longer a viable option for the discriminatee after several months or years, the employer will have succeeded in removing the union leadership even if it is required to later pay backpay. From the employees' point of view, absent prompt interim reinstatement of the discriminatee, the employees will be deprived of their most articulate and committed activist. It helps if the union indicates that it is willing to resume organizing activities if the key employee activist is reinstated.

The employer, against whom injunctive relief is being considered, is always afforded the opportunity by the Region to provide evidence and argument as to why injunctive relief is not warranted. Too many employers waste that opportunity by limiting their response to a regurgitation of the underlying facts as to the merits of the unfair labor practice allegations. That bridge has already been crossed when the Region notifies the parties that a decision has been made that complaint will issue. However, it can be argued in a case where the employer has a viable *Wright Line* defense to a discharge allegation that consideration of 10(j) should await the administrative hearing where the employer will have the opportunity to fully develop its defense.

Normally, a more beneficial approach for an employer is to attack the need for injunctive relief under the just and proper standard. For instance, the employer may be aware that the discriminatee has already left the area or accepted employment at a higher paying job, making his acceptance of reinstatement unlikely. The employer may also be able to point out that union activities continue unabated without interference from the employer. There may be other employees that the employer can point to who continue to support the union and engage in organizing activities on its behalf, such as handbilling or soliciting authorization cards. The long passage of time between the unfair labor practices and the request for injunctive relief is also a regular theme worth repeating by an employer, which does receive sympathy from the courts.

Aside from allegations involving discrimination and other unfair labor practices during organizing campaigns, the second most prevalent type of case where injunctive relief is likely to be considered is during negotiations for an initial contract. As mentioned early, this is due in large part to the General Counsel's initiative based on a concern that the free choice of employees in selecting a union as their bargaining representative should not be defeated by an employer's unfair labor practices. Many of the same factors as discussed previously are considered as to whether support for the union has waned because of unfair labor practices committed during bargaining. The concern is that newly certified or recognized unions are particularly vulnerable during bargaining for an initial contract if they are perceived by employees as ineffectual in dealing with the employer. If unfair labor practices can be shown to have contributed to that ineffectiveness or loss of support, an interim bargaining order may be considered. Otherwise, by the time the Board issues its final bargaining order, it will be too late to preserve employee choice and for the union to regain its lost support. The types of alleged violations that may be seen as contributing to such a situation include, but by no means are limited to, unilateral changes during bargaining, failure to provide information regarding important subjects of bargaining, surface or bad faith bargaining, and retaliation against supporters of the union.

In seeking such injunctive relief, it is generally argued by the General Counsel that the proposed interim bargaining order will pose little harm to the employer. The costs in terms of time and money spent on such interim bargaining are a burden that falls on both parties. Further, an interim bargaining order does not last forever. The bargaining order will not compel the employer to agree to any specific term or condition of employment advanced by the union in negotiations. Rather, it only requires the employer to bargain with the union in good faith to an agreement or a bona fide impasse. Any agreement reached between the parties under a Section 10(j) decree can contain a condition subsequent to take into account the possibility of the Board's ultimate refusal to grant a final bargaining order remedy.

An employer can effectively argue against the need for injunctive relief in these situations by pointing out that negotiations are ongoing and that the parties continue to make progress. Even if there has been a breakdown in negotiations, an employer may show that the breakdown is not attributable to any alleged unfair labor practices, which either are not directly connected to critical issues in negotiations or have only a tangential connection to negotiations. Negotiations that were stumbling along even before the commission of any alleged unfair labor practices because of a particular issue on which the parties were far apart, cannot be rectified by an interim bargaining order. Furthermore, if the union itself is responsible for not scheduling sufficient bargaining sessions or in delaying bargaining, that can be reason to not seek injunctive relief. Certainly, the employer can report that there are no outward manifestations of loss of support for the union during negotiations, which can mean that employees continue to attend informational meetings held by the union concerning negotiations or to participant in protests or the distribution of materials in support of the union's bargaining position. Even if employees have signed a decertification petition during the course of bargaining after the commission of unfair labor practices, an employer may successfully argue that employee dissatisfaction with the union predated, or cannot be directly attributed to, the unfair labor practices.

The unlawful withdrawal of recognition from an incumbent union has been fertile ground for the Board to seek an interim bargaining order, even without specific evidence of pain being inflicted on the union's support. The argument is that for as the long as the employer unlawfully refuses to recognize the union, employees will have been denied the right to union representation in matters such as grievance handling for example. Also, they are being denied the benefits that had been maintained in their contract and which could be realized in any potential new collective bargaining agreement. The courts generally recognize the real danger that exists when an employer continues to withhold recognition. Much like the types of cases discussed above, there is recognition that while the Board's processes run their course, employee support may erode to such an extent that the union can- no longer effectively represent those employees. At that point, any final remedy which the Board could impose would be ineffective. The inference is that the longer a union is kept from working on behalf of employees, the less likely it is to be able to organize and represent those employees effectively if and when the Board orders the company to commence bargaining. Even though inferences of impact may be enough, the subjective feelings of employees regarding their predicament can help. For example, in a recent case the court noted an employee's testimony that she shared with other employees her worries about what was going to happen to her job and her family if there was no union.

One area where the Board has been much less active than in the past in seek interim relief involves effects to impose a new bargaining obligation upon an employer pursuant to the Supreme Court's decision in *Gissel.* Part of the reason is that the Board itself is more closely scrutinizing whether unfair labor practices by an employer during an organizing drive are of such a pervasiveness or seriousness nature as to preclude the holding of a fair election. Even if the nature of the violations might satisfy the Board, the courts have always been a tough sell that an interim bargaining order is necessary as opposed to letting the Board's administrative processes run their course. For these reasons, evidence of actual loss of support for the union because of the employer's unfair labor practice is almost essential. A potent example can be that a majority of employees had signed authorization cards before the unfair labor practices occurred, but afterwards only a small minority voted for the union in an election.

This summary is not meant to cover all conceivable types of cases where injunctive relief is sought, nor all the possible permutations as to the factors that can figure into a decision to seek 10(j) relief. However, hopefully it will encourage parties to be more proactive in assisting Regions in determining whether injunctive relief is warranted, even in situations where the potential harm to a union may be inferred.

**— END NOTE —**

[1]The views expressed are those of the author and are not to be construed as the official policy or procedure of the National Labor Relations Board. ■

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# THE *EN BANC* SIXTH CIRCUIT OVERRULES ITS PRECEDENT REGARDING REVIEW OF LABOR ARBITRATION AWARDS AND BRINGS ITS LAW INTO CONFORMITY WITH THE SUPREME COURT *OR* CEMENT BOOTS FOR *CEMENT DIVISIONS*

**Mary Ellen Gurewitz**
***Sachs Waldman, P.C.***

The Sixth Circuit Court of Appeals, sitting *en banc,* has issued a landmark decision altering its standard of review for labor arbitration decisions. It has abandoned its deviant course and decided to follow Supreme Court precedent! In *Michigan Family Resources, Inc. v. Service Employees International Union Local 517M,* 475 F. 3d 746 (6th Cir. 2007), the *en banc* Court overruled *Cement Divs., Nat'l Gypsum Co. v. United Steelworkers, Local 135*, 793 F.3d 759 (6th Cir. 1986), the case which for twenty years had controlled its decisions in cases dealing with the review of labor arbitration awards. The Court unanimously held that *Cement Divisions* was inconsistent with the controlling Supreme Court cases in the area, *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29 (1987) and *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001).

Nearly fifty years ago, in *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960), the Supreme Court first addressed the subject of judicial review of labor arbitration awards and stated:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes would be undermined if courts had the final say on the merits of the award." *Id.* at 596.
>
> "[I]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns the construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Id.* at 599.

In subsequent cases, the Court emphasized even more forcefully the limited scope of review and the exceptional deference given to arbitral decisions, stating in *Misco,* that, "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision," and repeating in *Garvey* that, "[E]ven 'serious error' on the arbitrator's part does not justify overturning his decision, where, as here, he is construing a contract and acting within the scope of his authority."

In *Enterprise Wheel*, Justice Douglas also wrote that an arbitrator's award must be enforced so long as it, "draws its essence from the collective bargaining agreement." This inauspicious phrase[1] was subsequently interpreted by a number of Circuit Courts, including the Sixth, to require a far more critical and less deferential review of arbitration awards than *Enterprise Wheel* seemed to contemplate. The Sixth Circuit framed its task as being to discern whether an arbitration award at issue failed to draw its essence from the agreement. The Court's four-part test emerged as a distillation of this experience and it was first articulated in *Cement Divisions, Nat'l Gypsum Co. v. United Steelworkers,* 793 F. 2d 759, 766 (6th Cir. 1986), and framed in the negative as follows:

> "An award fails to derive its essence from the agreement when (1) an award conflicts with express terms of the collective bargaining agreement; (2) an award imposes additional requirements that are not expressly provided in the agreement; (3) an award is without rational support or cannot be rationally derived from the terms of the agreement; and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement [citations omitted.]"

If the Court found, in applying this test, that an award could be said to suffer from any of these four enumerated defects, then the Court necessarily concluded that the award failed to draw its essence from the contract and so had to be vacated. The application of this four-part test required the Court to engage in precisely that detailed review of the merits of the award which the Supreme Court's standard proscribed.

For decades the Sixth Circuit would cite both the Supreme Court case law and its own four-part test, never acknowledging the inconsistency, and all too often in applying its four-part test it would find that an arbitral award "failed to draw its essence" from the agreement, without even considering whether the arbitrator was "arguably construing" the contract. All too often the Sixth Circuit disregarded the Supreme Court case law and substituted its judgment for that of the arbitrator.[2] The Court finally confronted this inconsistency in *Michigan Family Resources.*

This case arose out of a 2003 award in an arbitration between Michigan Family Resources (MFR), a private company which runs the Headstart program in Kent County, and Service Employees International Union Local 517M (SEIU), which represents teachers and others employed by MFR. The parties had a dispute about the meaning of Article 35 of the collective bargaining agreement and the entitlement of bargaining unit employees, in accordance with that article, to a cost of living increase equal to that of the non-unit employees. The collective bargaining agreement required parity in cost-of-living raises from the funding source for union and non-union employees, but the parties disagreed about whether this parity provision was applicable only to COLA increases required and funded by the federal government or to all COLA increases, including those funded by the employer. The arbitrator concluded, in language which reviewing judges found troubling, that the contractual language "becomes ambiguous" and he resolved that ambiguity in favor of the union. In December, 2003, the arbitrator issued his opinion and award, holding that the unit employees were contractually entitled to a wage increase for the 2003 calendar year equal to that received by non-bargaining unit employees. They had received an increase of 2.5%. The arbitrator concluded that they were contractually entitled to a 4.0% increase, and his award directed that they be paid an additional increase so as to total that amount.

MFR filed suit to vacate the award. Judge Gordon Quist of the U.S. District Court for the Western District of Michigan issued a decision in November, 2004, in which he wrote that he had reviewed the relevant portions of the collective bargaining agreement, that he had determined that the provisions regarding wages were clear and unambiguous, and that, "The Arbitrator improperly considered evidence pertaining to the wage dispute." Judge Quist concluded that, "In this case, the Arbitrator's award does not draw its essence from the CBA because the Arbitrator considered evidence to aid in construing the CBA when, in fact, no construction was necessary." The District Court then went on to set forth its own construction of the contractual language and reached a conclusion about the meaning contrary to that reached by the arbitrator, finding that the grievance should have been denied rather than sustained. On that basis, the District Court granted the Employer's motion to vacate the arbitration award. In concluding that the award did not "draw its essence from the contract," the District Court relied upon the Sixth Circuit's four-part test, first articulated in *Cement Divisions.*

SEIU appealed the case to the Sixth Circuit where it was first heard by a panel consisting of Judges Sutton, Gilman and Daughtrey. The panel's per curiam opinion set forth and applied the *Cement Divisions* four-part test. In order to apply the test, the panel engaged in a thorough examination of the contract provisions touching on the dispute and a thorough critique of the arbitrator's evidentiary rulings and factual and legal conclusions. The panel concluded, as had the District Court, that the arbitrator had erred in admitting evidence to elucidate the meaning of a provision which was not ambiguous. The panel further concluded that there was only one proper interpretation of the contract – its own – and that the arbitrator's interpretation was erroneous. Applying the four-part test, the panel concluded that the arbitrator "had imposed an additional requirement not expressly provided for in the agreement" and that his interpretation "conflicted with express terms of the agreement." Having, thus, found at least two of the four enumerated errors from the four-part test, the panel concluded that the award did not draw its essence from the agreement. Hence, the panel held, the district court was correct in vacating the award.

However, both the per curiam opinion and the separate concurring opinion of Judge Sutton recognized that Supreme Court case law might require a different result. Justice Sutton wrote that, "Throughout his ten-page opinion, the arbitrator references, quotes and analyzes the contract. Even the flaw in his analysis does not disprove that he was attempting to construe the contract." Nevertheless, the panel concluded that, "this circuit's four-part test—-resting in part on these same Supreme Court precedents—-has been in place for 20 years and binds us here." Judge Sutton identified the inconsistency more starkly, stating, "I feel obliged to concur in the decision vacating this arbitration award —— even though this case strikes me as presenting precisely the kind of 'serious error' that the Supreme Court has expected we would permit arbitrators to make." He then essentially invited a petition for en banc review, stating, "At some point, it seems to me, the full court should reconsider the Supreme Court's directives in this area or at least explain how our four-part test respects them."

SEIU Local 517M filed a petition for rehearing en banc; the petition was granted; the full court considered the case and issued its decision on January 26, 2007.

Judge Sutton wrote the majority opinion for the full court, which was joined by seven other judges. The opinion recognized that *Cement Divisions* was inconsistent with *Misco* and *Garvey* and overruled it. All thirteen judges agreed with this conclusion (all active judges participate in an en banc panel; there were fourteen active judges at the time of the hearing; one recused herself.)

At oral argument, the Court explored the question of what test should be substituted for its four-part test if that test were to be rejected, even inquiring which of the four parts, if any, should be preserved. In its opinion, the Court accepted the argument of the Union, and the supporting amici, that it needed no test other than that articulated by the Supreme Court. There was, however, some disagreement among the judges about the application of that test —- about how to determine whether an arbitrator was "arguably construing" the contract. In the majority opinion Judge Sutton set forth the general proposition as follows:

> "[I]n most cases, it will suffice to enforce the award that the arbitrator appeared to be engaged in interpretation, and if there is doubt we will presume that the arbitrator was doing just that." (Slip op at 6)

He then addressed the case before them to apply this principle.

> "Was he 'arguably construing' the collective bargaining agreement? The arbitrator's ten-page opinion has all the hallmarks of interpretation. He refers to, quotes from and analyzes the pertinent provisions of the agreement , and at no point does he say anything indicating that he was doing anything other than trying to reach a good-faith interpretation of the contract." (Slip op at 6-7)
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> * * *
>
> "That the deciphering of this contract required implications and inferences suffices by itself to show that the arbitrator was permissibly engaged in interpretation. The arbitrator, it is true, made a legal error, perhaps even a serious legal error, but an error of interpretation nonetheless, which does not authorize us to vacate the award." (Slip op at 8)

And in yet another important passage, Judge Sutton rejected an argument made by MFR that the arbitrator had exceeded his authority:

> "An arbitrator does not exceed his authority every time he makes an interpretative error; he exceeds that authority only when the collective bargaining agreement does not commit the dispute to arbitration. Otherwise, every error would be grounds for judicial intervention, which is inconsistent with the Supreme Court's insistence that we must tolerate 'serious,' 'improvident' and 'silly' legal and factual arbitral errors . . ."

This discussion as to when an arbitrator can be said to have exceeded his authority was important in two respects. The contract at issue provided, as do many, that "the arbitrator shall not have authority to change, alter, amend, or deviate from the terms of this collective bargaining agreement in any respect." Furthermore, in both *Misco and* Garvey the Supreme Court had stated that the arbitrator's decision must be enforced if "the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." Judge Sutton's opinion for the majority answered both of the "scope of authority" arguments. The majority opinion then concluded with a remand to the district court to enter an order enforcing the arbitration award.

*(Continued on page 10)*

# THE *EN BANC* SIXTH CIRCUIT OVERRULES ITS PRECEDENT REGARDING REVIEW OF LABOR ARBITRATION AWARDS AND BRINGS ITS LAW INTO CONFORMITY WITH THE SUPREME COURT *OR* CEMENT BOOTS FOR *CEMENT DIVISIONS*

*(Continued from page 9)*

Judge Martin, wrote an opinion partly concurring and partly dissenting, which was joined by Judges Gilman and Clay. While agreeing with the concept that their task was only to apply the Supreme Court's test —- whether the arbitrator was "arguably construing" the contract — they seemed to have difficulty in practice accepting that very limited role. Judge Martin's opinion thoroughly examined the merits of the dispute, concluded that the arbitrator's decision was "woefully flawed," and that his construction of the contract was "completely nonsensical." While the Supreme Court has long held, and the Sixth Circuit has now finally agreed, that even "serious error" must be tolerated, Judge Martin wrote that he could not tolerate a decision which he found to be devoid of "rational thought." He, therefore, concluded that the case should be remanded to the arbitrator. He did not, as had the District Court, simply resolve the dispute in a manner contrary to the arbitrator's resolution. Rather, he suggested that remand was the appropriate action for the court to take.

Finally, Judge Gibbons, joined by Judge Batchelder, while also joining in the overruling of *Cement Divisions*, wrote that the arbitrator's decision was so wrong that she could not conclude that he was even arguably construing the contract. She would, therefore, have affirmed the district court, without remand to the arbitrator.

In sum, *Cement Divisions* has been overruled. It might seem unremarkable to report that the Sixth Circuit has decided to follow Supreme Court precedent. Isn't that, after all, what lower courts are supposed to do? Yes. But for decades the Sixth Circuit has followed its own course and it has only now acknowledged that its course was erroneous. Unions and their lawyers are celebrating. (In the overwhelming majority of cases it is the employers who challenge adverse arbitration decisions.) Arbitrators are also delighted, the National Academy of Arbitrators having filed an amicus brief in support of the union's position. It may have taken the Sixth Circuit twenty years to actually accept *Misco,* as opposed to merely paying it lip service, but, as the cliche goes, better late than never.

**— END NOTES —**

[1]The late Professor David Feller lamented this language in *Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards*, 19 Berkeley J. Emp. & Lab. L. 296 (1998), ("What an unfortunate choice of words. One man's essence may be another man=s (or a court's) nonsense!")

[2]Professor Stephen L. Hayford in *"Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come,"* 52 Baylor L. Rev. 781 (2000), wrote that the Sixth Circuit's four-part test "sweeps away all pretense of judicial deference to the contract interpretation and application decisions of the arbitrator." He wrote further that the decisions of the Circuit, Ademonstrate a belief that the sweeping rules set down in *Enterprise Wheel* and *Misco* that so severely restrict judicial inquiry into the merits of challenged awards are worthy of little more than a ritualistic incantation."

[3]Sixth Cir. R. 35(c) provides that, "A suggestion for rehearing en banc is an extraordinary procedure which is intended to bring to the attention of the entire Court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court or Sixth Circuit precedent." ■

# H. RHETT PINSKY – DISTINGUISHED SERVICE AWARD RECIPIENT

**Edward M. Smith and Michael L. Fayette**
***Pinsky, Smith, Fayette & Kennedy, LLP***

Recently, Rhett Pinsky received the Distinguished Service Award of the State Bar of Michigan Labor and Employment Law Section. Obviously, to receive that award, the recipient must have had a long and varied record of service to the Bar and to his community. In addition to being the President of the Grand Rapids Bar Association from 1993 to 1994, Rhett was appointed by the Michigan Supreme Court to the Michigan Attorney Grievance Commission from 1978 to 1985, and also served on the Character and Fitness Committee. His past community service includes being elected as a member of the Board of Education of the Grand Rapids Public Schools, 1978-84; Chair, Board of Directors - American Red Cross of West Central Michigan; Chair, Board of Directors - Lake Michigan Academy (special education and learning disabilities); Board of Directors of the Grand Rapids Council for the Humanities; Board of Directors for Alliance for Health; President, Gerald R. Ford Chapter of the American Inns of Court; President, Board of Directors of Grand Rapids Civic Theater; and Chairperson of the March of Dimes campaign. He also received the Civil Libertarian of the Year Award from the ACLU in 1979.

This is a laudable record of civic service, and Rhett is to be congratulated. However, the remainder of this article will showcase Rhett's very interesting personal history and family background so that readers can appreciate the quality of the man.

His father Abraham and his mother Sally grew up in Ohio. Abraham graduated from West Virginia University Law School and began his legal practice in the mid-1920s in Wellsburg, West Virginia, a small industrial town approximately 40 miles from Pittsburgh. (As you might guess, Rhett is a loyal Steelers fan.) Rhett was born on June 28, 1937, and grew up in nearby Follansbee, West Virginia. His mother was a fan of author Margaret Mitchell and her best seller, "Gone With the Wind."

Four and a half years after Rhett was born, the United States entered World War II. His father immediately joined the United States Army at the age of 41 and entered (and endured) boot camp as a private. He was determined to do his part in the fight against Nazism. He applied to the first ever Judge Advocate General school at the University of Michigan, was accepted, and later sent to England in 1943. He served in the Army until 1946 and was discharged as a Lieutenant Colonel. Rhett did not see his father for three long years.

While Abraham was away, Sally and Rhett moved to an apartment near distant relatives located at 14th Street and Collins in Miami Beach, now known as South Beach. They lived there until 1947 when they moved back to Follansbee, West Virginia, where the family was once again united.

Rhett graduated valedictorian of his high school class. In 1955, he attended Princeton University and graduated Magna Cum Laude in 1959 where he was a Phi Beta Kappa. He then attended Harvard Law School, graduating in 1962.

After graduation he worked for the United States Senate in Washington, D.C. until January 1, 1963, when he entered active duty with the Marine Corps. During the summer, while in law school, he was in the Platoon Leader Class program of the Marine Corps, becoming an officer. Rhett met his future wife, Jeralyn Meyer who was from Youngstown, Ohio, in Washington, D.C. in April 1963. She had attended Cornell University. They were introduced by her roommate in college, the future Honorable Gladys Kessler, United States District Judge for the District of Columbia, who recently decided the tobacco litigation brought by the United States. Eventually, Rhett was assigned to the First Marine Air Wing in Iwakuni, Japan from late November 1963 to mid-December. Jeralyn joined him there and they were married on July 22, 1964.

After his discharge from the Marines on January 1, 1966, Rhett and Jeralyn decided that they wanted to locate in a mid-sized town in the north Midwest and settled upon Grand Rapids, Michigan. Grand Rapids was of particular interest to Jeralyn because of its Civic Theater. Today, she is a well known actress and a prominent theater director in West Michigan. Grand Rapids was of interest to Rhett because he wanted to practice where he would not be known as his father's son. While he loved and respected his father, Rhett wanted to be judged on his own merits.

Rhett and Jeralyn have two sons, Adam and John, born February 28, 1966 and March 23, 1968, respectively. They both graduated from the Grand Rapids Public School system. Adam went on to graduate from Dartmouth and John from Skidmore. Adam carried on a family tradition by joining the Marine Corps and spent several months with the First Marine Division in Saudi Arabia. He saw action in Desert Shield and later Desert Storm. As you can appreciate, it was a very worrisome time for his parents.

While he originally came to Grand Rapids to practice law in a medium-sized firm, after five years, Rhett decided he wanted to practice on his own and take up causes that were not particularly popular in the Grand Rapids area. For example, he represented a member of the "Weathermen" who was arrested for disorderly conduct in a public demonstration. For that effort, he was listed in the notorious "Red Squad" files of the Michigan State Police. Later, in 1971, he sued the Grand Rapids Schools on behalf of the ACLU because the school board refused to allow Fania Davis (sister of Angela Davis) to speak at one of the public high schools. Interestingly, as noted above, Rhett was elected and served on the school board for that same school system from 1978 to 1984.

But he is most proud of a Title VII suit against the City of Grand Rapids in 1975 which integrated its fire department.

Rhett eventually hooked up with another medium-sized firm drop out, H.David Soet, and they formed the firm of Pinsky & Soet. Edward "Ned" Smith, who was practicing on his own after leaving a labor firm headed by A. Robert Kleiner, merged his practice with Pinsky & Soet and formed the firm of Pinsky, Smith & Soet.

Michael Fayette, who earlier had also partnered with Attorney Kleiner after Ned went on his own, joined Pinsky, Smith & Soet after Mr. Kleiner's death. Later, David Soet ascended to the circuit bench and Katherine Smith Kennedy joined the firm and became a partner.

It can be honestly stated that we have never had an argument over the running of the firm, fee distributions, or any other issues that small firms encounter. It can probably be said that we've been lucky in that regard, but it's more than luck. We formed our association based on shared values. Interestingly, we come from different religious faiths. Rhett is Jewish, Ned Smith and Kathy Smith Kennedy are Catholic, and Mike Fayette was born Methodist. While we tread lightly on religious issues, we do not when it comes to political issues. It doesn't take a hard look to guess where our sympathies lie.

Rhett sets the example in our firm for the very thorough work-up of his cases. He's always prepared. Rhett is truly a lawyer's lawyer. He is a constant reminder to all of us that "it's not about the money." It's about representing a client as aggressively as one can, yet doing so with intellectual honesty and with respect for the judge and opposing counsel. His partners enjoy the benefit of being able to sit down with him to discuss issues they're struggling with because of his ability to dissect a case into its legal components and analyze the strengths and weaknesses of each part.

Rhett's one "hobby" is downhill skiing. He and Jeralyn go out West three to five times each ski season. Although Rhett is the first one to admit he's not much of an athlete, both he and Jeralyn continue to ski the "expert" runs at age 69, and love to do the moguls.

Any description of Rhett would not be complete without mentioning that he runs about 15 miles each week, even while on some of the fascinating trips he and Jeralyn have enjoyed to China, Italy and Russia. When he arrives at his destination, he scopes out the geography, sets his route, and is up at 6:00 a.m. to get in his three to five miles.

Rhett works hard, laughs easily, and swears often. (He learned more new words in the Marine Corps than "Oorah!") He is our partner and, more importantly, our friend. Congratulations on a well deserved award.

# THE COMPASS OF THE DUTY OF FAIR REPRESENTATION – RECENT COURT DECISION EXALTS *VACA V. SIPES* AND ITS PROGENY

**Ben K. Frimpong**
***Michigan AFSCME Council 25, AFL-CIO***

The duty of fair representation (DFR) is the obligation, incumbent upon labor unions that are the exclusive bargaining representative of workers in a particular group, to represent all those employees fairly, in good faith, and without discrimination. Originally recognized by the United States Supreme Court in a series of cases in the mid-1940s involving racial discrimination by railway workers' unions covered by the Railway Labor Act, the duty of fair representation also applies to workers covered by the National Labor Relaltions Act and, depending on the terms of the statute, to public sector workers covered by state and local laws regulating labor relations.

This duty has acquired much scrutiny with employees' challenging the representational capacity of their respective labor organizations. Although an unfair labor practice action may exclusively allege union iniquitous misrepresentation, often times the challenge to union representation carries with it a challenge to the employer's violation of the collective bargaining agreement. It is axiomatic that treatment of employees that is discriminatory and in bad faith may warrant a finding of a violation of a labor organization's duty of fair representation. By the same token an employer may be found to have violated individual and representational rights of employees governed by a collective bargaining agreement (CBA).

A recent federal court decision addressed the fundamental principles that regulate courts' treatment of suits brought by union members against their respective labor representatives and employers — *Jones v. U.S. Postal Service.*[1] *Jones* addresses the "hybrid" suit brought under § 301 of the Labor Management Relations Act.

The Eastern District had to decide whether the union breached its duty of fair representation through a union representative's failure to timely file a grievance to protest an employee's assignment to a position, and whether the United States Postal Service (USPS) breached the collective bargaining agreement. Jones, a full time USPS employee at the Saline Post Office, voluntarily transferred to a maintenance mechanic position at a Bulk Mail Center ("BMC") in Allen Park, Michigan. He immediately sought to transfer back to Saline because he did not like his work schedule. When he transferred back to Saline, Jones was assigned a part-time flexible clerk position with loss of accrued facility craft seniority.

Plaintiff's union, the American Postal Workers Union (APWU), filed a grievance; however, an arbitrator determined the grievance was untimely and found that it should have been filed within 14 days upon Jones's return to the Saline Post Office — when he became aware that his status had been changed from full-time regular to part-time flexible.

Jones initiated his hybrid § 301 breach of contract/breach of duty of fair representationlawsuit and alleged that the union breached its duty of fair representation by failing to timely file his grievance. He also alleged that the Postal Service breached the collective bargaining agreement with respect to his assignments, seniority rights and transfers.

First, the court determined that in a hybrid suit under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to recover against *either* the company *or* the union, the plaintiff must show that the company breached the CBA *and* that the union breached its duty of fair representation. Unless the plaintiff demonstrates *both* violaltions, he can not succeed against either party.[2]

**The Duty of Fair Representation Claim Against the Union**

The court revived the principles and parameters of the duty of fair representation by determining that as to what is required to establish a union's breach of its duty, the *Vaca*[3] court stated: "[A] breach of the statutory duty of fair representation occurs *only* when a union's conduct toward a member of the collective bargaining agreement is arbitrary, discriminatory or in bad faith." Additionally, the court found that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness" as to be irrational.[4]

Here, the union representative testified, and the court agreed, that the union did not have any evidence that corroborated Jones's version of the events, and the union did not want to pursue a difficult grievance without confirmation that there was actually a violation of the National Agreement. Additionally, the union representative testified that if there were breaches of the CBA, he viewed them as ongoing violations that would allow the union to file a grievance during the entire period that Jones was in the improper classification designation, plus 14 days thereafter. He based this belief on his prior handling of two other grievances involving similar issues of reassignment and loss of seniority where, in both cases, the Postal Service acknowledged that the contract violation was an ongoing one. Consequently, the court found that "merely characterizing a union's conduct as "arbitrary," "perfunctory" or demonstrative of "bad faith" is insufficient to withstand summary judgment. Rather, to meet his burden of proof as to the union's breach of its duty of fair representation, a plaintiff must establish by *substantial evidence* that the union acted arbitrarily, discriminatorily or with bad faith."[5]

**The Breach of Contract Claim Against the Employer**

The court stated that assuming *arguendo* that Jones could make out a DFR breach claim against his union, both defendants would still be entitled to summary judgment on his hybrid § 301 claim because he could not establish a breach of the collective bargaining agreement. The court emphasized that disputed CBA language clearly highlighted that a postal employee loses seniority by requesting to move from one postal installation to another, and that there was no dispute that Jones requested a transfer from the Saline Post Office to the Bulk Mail Center and from the Clerk Craft to the Maintenance Ceaft. He filled out a transfer form, got the transfer approved and went to wotk at the BMC. The fact that Jones did not like the hours he was assigned at the BMC did not operate to nullify his voluntary transfer.

Finally, the court determined that Jones did not cite any contract language in support of his position that he was entitled to keep his seniority under the circumstances of this case. Additionally, when determining the employer breached a collective bargaining agreement, courts are required to look to the "plain meaning of the agreement."[6] The seniority provision in the CBA in this case was clear and unambiguous.

The *Vaca v. Sipes* standards addressed by the court have also been exalted by the National Labor Relations Board, the Michigan Employment Relations Commission and the Michigan Department of Civil Service in similar scenarios governing employees' right to be fair represented and an employer's association in the contract relationship.

**— END NOTES —**

[1]462 F. Supp. 2d 800. (E.D. Mich 2006).
[2]*Id.* Jones, *supra* note 3, at 7.
[3]386 U.S. 171, 87 (1967).
[4]*Id.* citing *Air Line Pilots Association, International v. O'Neill,* 499 U.S. 65 (1991).
[5]*Id.* citing *Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1971).
[6]*Id.* citing *Roeder v. American Postal Workers Union,* 180 F.3d 733, 737 (6th cir. 1998). ■

# IT'S HARD OUT HERE FOR A LAWYER

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

The *ABA Journal eReport* regularly asks a "Question of the Week." The *eReport* e-publishes its "favorite" answers and selects a weekly winner. The winning author gets an *ABA Journal eReport* mug. If only *Lawnotes* had that kind of budget.

Anyway, one week last fall the question of the week asked: "[W]hat part of your practice do you consider a complete waste of your time." The *eReport* published nine answers. Two of the nine, including the winner, were from Michigan lawyers! Using my social science skills, honed during my undergraduate years, I conclude that important things are revealed by this outcome.

About half of the approximately 1.1 million lawyers in the United States belong to the American Bar Association. By my estimate, somewhere between many and very many ABA members have computers. So, many, if not most, of these lawyers get the weekly *eReport.* More precisely, hundreds of thousands of lawyers were asked to spill the beans on what wastes their professional time. Of the select responders — those nine who *most eloquently* described the tribulations of being a lawyer in the new millennium — *two* are from Michigan. *That's 22%!* Ergo, Michigan is a national leader, at the cutting edge of lawyer misery.

There's more. One of the Michigan lawyers is from Southfield. The other is from Troy. To spell it out, of the Michigan lawyers selected by the *eReport* to detail the dark side of law practice, *100% are from Oakland County!* You don't need a master's degree in statistics to recognize that 100% is significant.

So, what can we conclude from this data that will satisfy the *Daubert* standards? At the least, in Michigan, and in Oakland County in particular, it is clear — to paraphrase the uplifting 2005 Academy Award winning song — it's hard out here for a lawyer.

What stimulated these Michigan lawyers to go public in the *eReport?* In two words: Michigan courts.

Mug winner Lynn McGuire of Southfield wrote from the trial court trenches:

> Without a doubt, the most inexcusably wasteful part of law is the use of a "motion call day." Once a week, all of the judges' pending motions are scheduled for hearing on the same day, and at the same time. The courthouse is flooded with literally hundreds of lawyers who then do nothing but sit and wait for their motion to be called. Many of us occupy ourselves by doing math — multiplying the number of attorneys in the room by the average hourly billing rate times the average wait time. Does it really make sense to anyone to conserve one judge's time at the expense of every single party appearing before that judge? The phrase "judicial economy" should be interpreted more broadly than that.

*"Motion Day at Oakland County Circuit Court."*

Robin Lerg of Troy didn't get the mug but insightfully captured the more rarefied atmosphere of the Michigan Court of Appeals:

> Our court of appeals sends "defect letters" — for such things as not putting "oral argument requested" in all capital letters, for having too-narrow margins, for having a too-small font type or for having a too-large font type — then requests that these "defects" be cured. I once got such a letter because my brief allegedly was not double-spaced. The clerk I spoke with insisted my text was not double-spaced because it had more lines per page than the brief of my opponent, who had used a different font. He wanted me to submit a completely new brief and requisite copies to conform to his formula, even though in all other respects, it conformed to the court's formatting requirements.

It is quite satisfying to sit in the privacy of one's office and nod in agreement while reading *others'* complaints about Michigan courts. It's quite safe, too. Still, if you've got the intestinal fortitude to offer constructive criticism directed at the engines of public justice and to the civil and not-so-civil servants who keep those engines running, write an article for *Lawnotes*. Just make sure it is double-spaced and italicized, *not* underlined. ■

## THE JOY OF LABOR LAW

**Saved by the Tape.** This is a Nixonian tale of a lawyer and his client. Plaintiff testified at trial that he signed an employment contract which required arbitration. Why was he in court, the judge apparently thought. The trial was halted and the judge left the courtroom. Plaintiff told his lawyer, in what he thought was an "off-the-record" discussion, that he did not understand the contract. Later, ruling on defendant's sanctions motion, the judge reviewed the secret "tapes" of the "off-the-record" discussion preserved by the courtroom video and sound recording equipment. The tapes confirmed that the lawyer did not know that his client would admit he signed the contract. Thus, the lawyer was duped, so to speak, by his client or his client did not understand the situation, and no sanctions were warranted. The Court of Appeals agreed, I think:

> The [trial] judge also played a videotape of conversations that took place between plaintiff and his trial counsel in the courtroom, when the trial had been halted and the trial judge was not on the bench, *but while the video and sound recording equipment continued to record.* On the videotape, plaintiffs' counsel indicated that the trial was over because while plaintiff had said he did not know about the contract until counsel told him about in 2001, *he just testified that he knew about and signed it.* Plaintiff asserted to counsel that he did not sign the contract and did not understand what he was being asked. *Saveski v. Tiseo Architects, Inc.* 2007 WL 948449, *2 (3/29/2007) (emphasis added).

Anyway, this case raises lots of questions that have nothing to do with sanctions. Was it proper for the court to rely on the tape? How did the court find out about it? Is the court guilty of violating Michigan's eavesdropping statute, M.C.L. § 750.539a *et seq.?* Is the Patriot Act implicated? Has anyone actually read the Patriot Act?

— John Adam

# FOR WHAT IT'S WORTH

**Barry Goldman**
***Arbitrator and Mediator***

Everybody knows how to set up the room for a labor arbitration. The arbitrator sits at the head of the table. the union team lines up along one side and the employer team lines up on the other. Counsel sit closest to the arbitrator. A chair for the witness is set up on one side of the arbitrator or the other. If there is a reporter, she will sit opposite the witness.

And everybody knows there is a problem with this arrangement. It works alright when the witness is being examined by the lawyer sitting opposite her. But it doesn't work when she's being examined by the lawyer sitting next to her. At that point the witness is facing away from the arbitrator while she testifies.

Switching chairs with her lawyer doesn't help because then the lawyer is facing away from the arbitrator.

You can move the witness from one side to the other depending on which lawyer is doing the questioning, but that's annoying and distracting. You can move the lawyers from one side to the other depending on who's doing the questioning, but that's just as bad.

One way this has been solved is by the use of a U-shaped table with the witness in the center of the U. This is okay, but it gives the proceeding an inquisitorial feel. Witnesses feel like they're in the dock. Some arbitrators refuse to conduct hearings in that configuration because it's so unnerving to witnesses.

So, it is with great pride that I announce the invention of a new and improved arrangement that will get your whites whiter, your brights brighter, give you rich, thick, natural looking hair and help us all look 10 pounds thinner. To wit:

The arbitrator sits in the center of one of the long sides of the table. Counsel for the union sits on one side of the arbitrator. Members of the union team, including the grievant, range down the table starting with the union lawyer and may wrap around the end if necessary. Counsel for the employer sits on the other side of the arbitrator and members of the employer team range down the table in that direction. The witness sits directly across from the arbitrator.

For opening and closing statements, the arbitrator sits in the witness chair.

It's beautiful. Lawyers get to look at the witnesses. The arbitrator gets to look directly at the witnesses. Nobody is facing in the wrong direction.

At this writing I've had a chance to use it exactly once. I liked it. Both lawyers said they like it, but I've been doing this too long to believe what lawyers with cases pending before me say about my ideas.

The only problem I saw with it is that it would be possible for a sharp-eyed lawyer to see my notes or for me to see his. This could be solved by putting an empty chair between the arbitrator and the lawyers on either side of by just leaving a little respectful space between them.

There are trade-offs. This arrangement makes arguing objections a little awkward. And it provides less opportunity to observe, for instance, the grievant's or the supervisor's reaction to damaging testimony. It will take some getting used to. But I like it and I'm going to use it again.

As always, I am very interested in your comments.

# MERC AND THE OPEN MEETINGS ACT

**Ruthanne Okun,** ***Director***
**Lynn Morison,** ***Staff Attorney***
***Bureau of Employment Relations***

Virtually all labor law practitioners are aware that the Michigan Employment Relations Commission (MERC) is a quasi-judicial body whose primary function is to administer the Public Employment Relations Act (PERA). The Commission, with the assistance of the staff of the Bureau of Employment Relations and administrative law judges from the State Office of Administrative Hearings and Rules, adjudicates alleged unfair labor practices, disputes over bargaining unit composition, and other issues related to public employee representation. MERC's orders on unfair labor practices are rendered after an administrative law judge issues a recommended decision. Under Michigan's Open Meetings Act (OMA), MCL15.261, *et seq.,* MERC's review of those recommended decisions must be conducted at an open meeting. MERC is considered to be a "public body" under the OMA and, as such, is subject to the law's requirement that all of the Commission's business must be conducted at an open meeting that has been properly noticed.

Because the Commission is comprised of three members, two members constitute a quorum. Therefore, when two Commissioners want to discuss the merits of a particular case pending before the Commission, their discussions must take place in an open meeting convened in accordance with the requirements of the OMA. This makes it extremely difficult for any meaningful judicial deliberations to take place since Commissioners may only discuss the cases before them when they are together at monthly meetings. The problem has been exacerbated by the fact that the Commission is often comprised of members who live great distances from each other. Commissioners assume only part-time appointments and, typically, they do not work in MERC offices. This has resulted in protracted delays in the issuance of decisions – especially those of a complex nature — as the rationale behind a decision can be discussed only at a public meeting. Finally, it has significantly interfered with the free discussion and exchange of ideas that should take place in Commission deliberations.

Section 3(7) of the Open Meetings Act exempts certain agencies from the Act's requirements when deliberating the merits of a case. Those agencies include the Worker's Compensation Appeal Board, the Employment Security Board of Review, the State Tenure Commission, and the Public Service Commission. Also exempted are some arbitration panels selected by MERC. Yet, MERC itself is not exempted even though its responsibilities run parallel to the exempt boards and agencies.

To correct an apparent oversight by the original drafters of the statute, we have proposed an amendment to the OMA to include MERC in the listed exceptions. The amendment provides that the section of the Open Meetings Act exempting certain public bodies when deliberating the merits of a case, should also apply to the Employment Relations Commission.

As this *Lawnotes* submission proceeds to print, the amendment is receiving legislative consideration. We encourage your support of the amendment and welcome any comments you might have concerning it. Please feel free to submit them to Bureau Director Ruthanne Okun at rokun@michigan.gov, and we will assure that your comments are submitted to our department's legislative affairs office and/or to the sponsors of the legislation. ■

# VARIATIONS ON THE NLRB DEFERRAL THEME

**Andrew M. MacEachern,**
***NLRB Field Examiner, Region 7***[1]

Following up on my article "Deferral: The NLRB's Version Of The Punt, Pass and Kick" Vol 16, No. 4 *Labor and Employment Lawnotes* 14 (Winter 2007), here are additional thoughts on NLRB deferral.

## I. Handing off to the Courts and Other Players

*ERISA and §301*

In GC Memo 02-05, then General Counsel Arthur F. Rosenfeld expressed support for the views of former General Counsels Fred Feinstein and Rosemary M. Collyer regarding deferral of fringe benefit fund and "collection" cases to available relief under ERISA or Sec. 301 lawsuits "when the aggrieved party has access to the courts to seek vindication of its contract rights."

Accordingly, Regional staff was directed to use the approach set forth in GC Memo 95-8, which requires that when concurrent relief is available under either ERISA or Section 301, Regions should defer Section 8(a)(5) collection cases pending the result of litigation.

In doing so, Regional personnel should: (1) dismiss those allegations that clearly lack merit; (2) defer charges where arguable merit exists for a "failure to make contributions claim," even if no suit has yet been filed; (3) ensure that the employer is not a "problem" employer (i.e. recidivist or the subject of an outstanding Board order); (4) ensure collection cases include no other unfair labor practice allegations, since deferral could result in resolution in more than one forum; (5) where alleged delinquencies arise during the life of the contract, but extend beyond such, defer to any pending lawsuit as to the pre-expiration delinquencies. (However, the parties will not be required to proceed to a suit with respect to post-expiration delinquencies, as noted above); (6) the status of the cases should be apprised every six months. In situations where no suit is ultimately filed, or a suit is no longer being pursued, the case should be dismissed. Finally, upon disposition of the law suite, the charging party should be given an opportunity to contend that the Agency should not defer to the court's disposition (though the scope of review is limited given the issue of collateral estoppel where a Federal court has ruled on the substantive merits).

*Deferral To Other Agencies' and Courts' Authoritative Construction of Statutes Which They Have The Responsibility For Enforcing.*

In *Roseburg Forest Products,* 331 NLRB 999 (2000), the Board deferred to the EEOC's interpretation of confidentiality requirements under the Americans With Disabilities Act.

In *PCC Structurals, Inc.,* 370 NLRB 868 (2000), the Board deferred to the EEOC's and courts' interpretation of harassment as creating a hostile work environment under the ADA.

In *OXY USA, Inc.,* 329 NLRB 208 (1999), the Board deferred to the Justice Department's opinion regarding the provisions of Section 302 of the Act.

In *Brown & Root, Inc.,* 246 NLRB 33 (1979), the Board upheld the ALJ's decision on the merits of an unfair labor practice complaint despite a pending complaint to OSHA filed by the employees who Brown & Root was alleged to have unlawfully discharged for having engaged in a concerted refusal to work in protest of hazardous working conditions and the employer's request that it defer the charge to the OSHA proceedings.

In declining to defer the unfair labor practice case, the ALJ noted the existence of a 1975 agreement between the Board's General Counsel and the Department of Labor. That agreement, in relevant part, provided that the Board's General Counsel would dismiss or defer unfair labor practice charges in cases involving issues covered by Section 11(c) of the Occupational Safety and Health Act where those issues emanate from the same facts. The ALJ concluded the work stoppage was safety related but the thrust of the unfair labor practice allegations did not directly evolve from filing OSHA charges. Because of this, he concluded the Board need not defer to OSHA all charges for activities involving safety conditions.

## II. Expanding the Rulebook:

*Deferral of the Info Cases*

As suggested above, the days of non-deferral of information cases may be numbered. In *Shaw's Supermarkets, Inc.,* 339 NLRB 871 (2003), the employer refused to provide the Union requested information when the Union asked for the information to assist it during an ongoing arbitration proceeding. The Board upheld the ALJ's decision that the case should not be deferred. The Board noted that the long-standing policy of non-deferral in information cases actually aids the functioning of the arbitration process by allowing evaluation of the merits of the claim before placing the effort and expense of the arbitration on to the parties. It concluded that this rationale also applies where a union seeks information to determine whether it should seek judicial enforcement of an arbitration award.

*Discord on the Sidelines*

Chairman Battista, in his dissent, stated that he would "defer the dispute to the same arbitration process through which the parties agreed to resolve the merits of the underlying grievance." He argued that the information request pertained directly to the arbitration process and that the parties "should attempt to resolve it through that mechanism." Chairman Battista argued that the purpose of the Board's non-deferral policy in information cases stems from a concern that deferral would delay the ultimate determination of the grievance and the prospect of a two-tiered grievance process: initial arbitration on the information request issue, followed by an arbitration of the merits.

Chairman Battista distinguished this case from pre-arbitration cases, arguing "[h]ere, the arbitrator has already ruled on the merits of the grievance and has ordered a remedy. Thus, in a critical respect, this case differs from those in which the Board has applied its non-deferral policy." Hence, the Board's "entanglement" creates the very inefficiency the Board seeks to avoid.

*Instant Replay: Shaw's Supermarkets Revisited*

The issue of deferring cases involving the alleged failures to comply with information requests continues to occupy space in the Board's playbook — though still, perhaps, under the "Hail Mary" category.

For example, the Board issued decisions and orders on two cases within two weeks that again addressed this issue. In the first case, *WSNCHS North, Inc., d/b/a New Island Hospital,* supra, the

*(Continued on page 16)*

## VARIATIONS ON THE NLRB DEFERRAL THEME

*(Continued from page 15)*

Board determined that deferral to arbitration was inappropriate because the arbitrator did not resolve the parties' information request dispute in a reasonably timely manner, absent such a delay, the Board properly should defer an information-request allegation to arbitration where a charging party has invoked the grievance-arbitration process and has also filed a charge with the Board."

In the second case, *Pacific Bell Telephone Company, d/b/a SBC California,* 334 NLRB No. 11 (Feb. 4, 2005), though the Board adopted the Recommended Order, Chairman Battista and Member Shaumber noted that if not bound by Board precedent, they would defer the information-request case to the parties' contractual grievance-arbitration procedures. It was further noted that in the absence of a three-member Board majority to overrule current Board law, the ALJ correctly applied the Board's non-deferral policy.

*ALJs stick to the playbook*

ALJs who have considered the issue of deferring information cases in lieu of arbitration since the *Shaw* decision, though showing respect for Chairman Battista's argument, remain steadfast to the Board's long-held policy. For example, on February 25, 2005, ALJ Raymond P. Green issued a decision in *Kellogg's Snack Company,* JD(SF)-50-05, wherein he concluded deferral was not appropriate in a case in which the Union had subpoenaed the requested documents in contemplation of arbitration. "I note that it could be argued that the Board should defer this case to the arbitration process because the information sought via this unfair labor practice case is a subset of the information subpoenaed by the Union in the arbitration case. Nevertheless the board has consistently refused to defer its own procedures to the Arbitration process in cases involving information requests."

**— END NOTE —**

[1]The views and analysis expressed herein, including those on the applicability of the cases and other material cited herein, are my own, and not necessarily those of the Regional Office, the General Counsel, or the National Labor Relations Board. Large portions of this article were presented at the 4th Annual Bernard Gottfried Memorial Labor Law Symposium held on October 12, 2006. ■

## WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for *Lawnotes.* But the muse is elusive. And you just can't find the perfect topic. You make the excuse that it's the press of other business but in your heart you know it's just writer's block. We can help. On request, we will help you with ideas for article topics, no strings attached, free consultation. Also, we will give you our expert assessment of your ideas, at no charge. No idea is too ridiculous to get assessed. This is how Larry Flynt got started. You have been unpublished too long. Contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, Klass, Legghio & Israel, P.C., 306 South Washington, Suite 600, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@martensice.com.

# MERC UPDATE

**James T. Feeny**
***White, Schneider, Young & Chiodini, P.C.***

Since the previous issue of *Lawnotes,* the Michigan Employment Relations Commission has issued 19 Decisions and Orders in a variety of cases. A brief summary of some of those cases follows. Of those 19 cases, 16 were unfair labor practice hearings and/or duty of fair representation hearings, three were unit clarification hearings and/or representation hearings. Recent decisions of the Commission may be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/cis.

### Unfair Labor Practices

***Brownstown Twp -and- Michigan Ass'n of Police -and- Teamsters Local 214***
Case No. R06 G-077 (October 30, 2006)

This incumbent Union filed an Unfair Labor Practice against its Employer in May of 1005. While the ULP was pending, an intervening union filed a Petition for Representation. In response, the incumbent Union requested the election be blocked pending the outcome of the Unfair Labor Practice. The Director of the Bureau of Employment Relations (BER) ordered the election petition be held in abeyance and consolidated the unfair labor practice in the representation case.

The ALJ found the Employer committed an unfair labor practice and held a free and fair election could not be conducted because of the Employer's actions. Thereafter, the ALJ recommended dismissal of the Election Petition. The intervening Union filed another representation petition, and the incumbent Union objected to the election because it had already filed under Act 312. The BER Director dismissed the Representation Petition citing the Commission's long-standing policy that "if the collective bargaining agreement has expired and an Act 312 arbitration proceeding is pending, the filing of a representation petition will be barred by the arbitration proceeding." The intervening Union objected to the dismissal of the Representation Petition on the grounds that its prior representation petition had already been dismissed and dismissal of its current Petition would deprive the unit employees of the opportunity to vote on whether to choose a new bargaining agent for the three year contract bar period. The intervening Union further argued the lengthy period of time in which bargaining unit members would be barred from selecting alternate bargaining unit representation conflicts with the purpose and policies of PERA.

The Commission held that, because the finding of an unfair labor practice had previously prohibited the processing of a representation petition, barring of the second petition for representation would "unduly restrict the right of unit employees to choose their bargaining representative." The Commission proceeded to reinstate the representation proceeding and stay the Act 312 arbitration pending the outcome of the Representation Petition.

Of note, the Commission indicated the Act 312 bar policy has led to a proliferation of Act 312 Petition filings for the sole purpose of "insulating incumbent unions from challenge." The Commission further noted that only 25% of Act 312 Petitions result in the issuance of an arbitrator's award. The Commission indicated

that these actions constitute a burden unrelated to the Commission's statutory responsibilities, and indicated it may take a closer look at whether it will continue to "accept this burden."

***17th District Court -and- Teamsters Local 214 -and- Michigan Ass'n of Public Employers***
Case Nos. C05 E-113; C05 I-233; R05 F-088
(December 20, 2006)

The Commission rejected the ALJ's finding that the Employer breached its duty to bargain in good faith by holding the Employer insisted on the settlement of a grievance as a condition of obtaining a new collective bargaining agreement with the Union. The Commission also rejected the ALJ's finding that the Employer committed an unfair labor practice by threatening to discipline a union steward for exercising her right to communicate to union members about contract negotiations.

The Commission adopted the ALJ's finding of facts, which found the Employer offered to drop its demand of a specific proposal if the parties agreed to settle an outstanding grievance. The ALJ also found that, at the next bargaining meeting, the Employer accused the Union of holding up resolution of the contract and of distributing misinformation to members of the unit. Finally, the ALJ found the Employer stated that, "something would be done about it, or that the Employer knew how to handle the matter."

The Commission found that, although settlement of grievances are permissive subjects of bargaining, the Union voluntarily participated in discussing the resolution of the grievance during bargaining. The Commission went on to find the Employer's willingness to drop a proposal in return for settlement of an outstanding grievance did not constitute a demand to settle the grievance as a condition of settling the contract. The Commission further found, in disagreement with the ALJ's conclusion, that the Employer had not in fact unlawfully threatened the union steward because of her protected activities. The Commission held an employer who believes its interests have been harmed due to misinformation may respond lawfully. The Commission further found the Employer's comments that, it will deal with or handle the alleged miscommunication, do not presume the Employer will respond unlawfully.

**Representation Election**

***33rd District Court -and- Michigan Ass'n of Public Employees***
Case No. R06 B-013 (November 30, 2006)

The Union sought to hold a representation election to include the position of Administrative Secretary into the bargaining unit. The Administrative Secretary position has been excluded from the bargaining unit as a confidential employee. The Union requested the Commission to overturn its rule allowing the Employer to designate one clerical employee as confidential. The Union argued the rules is antiquated in light of modern work environments where executives and labor relations representatives generate their own correspondence and handle their own confidential document without the assistance of clerical employees.

The Commission found the Administrative Secretary performs "little or no confidential labor relations work," supporting Petitioner's argument that the Commission should abandon its policy for allowing an employer to designate one clerical employee as confidential. The Commission noted technological advances in the realm of communication constitute one reason why the Employer no longer designated confidential duties to the Administrative Secretary.

However, the Commission found the Administrative Secretary did participate in at least one confidential duty and remained available to process other confidential work. The Commission held the policy of allowing an employer to exclude one clerical employee for confidential reasons, even in light of modern technology, is a sound policy. The Commission refused to find that an employer has no need for a confidential clerical employee simply because administrators now utilize modern technology and handle a large amount of confidential material themselves.

**Miscellaneous**

***City of Grand Rapids -and- Grand Rapids Employees Independent Union***
Case Nos. C03 C-053 and C03 C-054 (December 12, 2006)

On October 19, 2006, the Commission affirmed the ALJ's conclusion that the Employer violated its duty to bargain in good faith when it unilaterally removed two positions from the bargaining unit; however, the Commission overruled the ALJ and found the positions lacked supervisory authority and ordered the position back into the bargaining unit. On November 9, 2006, the Commission received notice the Employer had appealed the matter to the Michigan Court of Appeals. On November 13, 2006, the Employer filed a Motion for Reconsideration of the Commission's Decision and Order. In a footnote, the Commission questioned whether it retained the authority to reconsider its opinion following the proper appeal to the Michigan Court of Appeals.

The Commission did not reach a decision on this issue, as it found the Employer's Motion for Reconsideration merely repeated the same issues ruled on by the Commission. Moreover, the Commission refused to allow the parties an opportunity to submit further evidence, holding a motion for reopening the record can only be granted upon a showing that the additional evidence is newly discovered material evidence which would require a different result. In denying the motion, the Commission found the Employer failed to identify the existence of new additional evidence. ■

**KELMAN'S CARTOON**


"I'll never understand why it starts out 'We the People' when the only ones who can make sense out of the damn thing are We the Judges."

# MORE MERC UPDATE

**Michael M. Shoudy**
***White, Schneider, Young & Chiodini, P.C.***

The following are some additional MERC unit clarification/representation decisions from August 2006.

***Cesar Chavez Academy and The Leona Group, LLC***
Case No. R05 D-070 (August 30, 2006)

On April 21, 2005, Petitioner Michigan Association of Public Employees filed a petition seeking an election to represent all certified and non-certified teachers, social workers, and school counselors employed at Cesar Chavez Academy ("CCA"). The petition named both CCA and The Leona Group ("TLG") as employers. The parties agreed that the union sought to represent an appropriate unit. However, TLG and CCA asserted that the National Labor Relations Act preempted the Commission's jurisdiction. In brief, the Commission found merit in the employers' argument and dismissed the petition.

CCA is a Michigan nonprofit corporation that was granted a contract by the Board of Control of Saginaw Valley State University to organize and operate a public school academy under the Revised School Code. TLG is a private, for-profit school management company engaged in interstate commerce.

CCA is housed in three separate facilities: an elementary school, a middle school, and a high school. The school's facilities where the teachers and professional staff work are either owned or leased by CCA. CCA's Articles of Incorporation state that the Academy is a governmental entity. CCA must be consulted prior to any substantial adaptation or modification of the educational program.

Professional personnel seeking to perform services at CCA fill out a TLG application. TLG supervises the teaches, social workers, and the school counselor on a daily basis. Additionally, TLG assesses the annual performance of each of these individuals. The employees enter into annual employment contracts with TLG. The contracts state that the employees are employed by TLG. TLG sets and provides the annual salary and fringe benefits of the employees, and they receive their paychecks from TLG.

TLG and CCA asserted that TLG was a private employer and therefore the NLRA preempts PERA. Petitioner asserted that even though CCA had contracted with a private entity, CCA's Board of Directors was intimately involved in the operation of the Academy, and TLG was merely a tool for implementing the requirements of running the school.

The Commission noted that when an activity is arguably subject to the provisions of the NLRA, states must defer to the exclusive competence and jurisdiction of the NLRB. The original test utilized by the NLRB to determine jurisdiction was the "control" test. The Board subsequently altered this legal standard indicating henceforth that the Board would only consider whether the employer met the definition of "employer" under the NLRA.

The Commission found this matter to be governed by *AFSCME v. Dept. of Mental Health,* 215 Mich App 1 (1996). The *AFSCME* case concerned appeals in which multiple unions had field representation petitions seeking to represent employees of group home providers with contractual ties to the Michigan Department of Mental Health. The Commission determined that the public and private entities were joint employers and found that a question concerning representation existed, therefore ordering elections. The Court of Appeals reversed the decision of the Commission, finding that the joint employer status was irrelevant. The Court held the where the NLRB's jurisdiction is arguable and an insufficient showing has been made that the Board would decline to assert jurisdiction, the Commission must defer to the NLRB. Therefore, the Commission dismissed the Petition without prejudice, noting that in the event the Board concludes that TLG is not the "employer" as defined by the NLRA, MERC would assert jurisdiction.

***South Lyon Community Schools***
Case No. UC05 D-015 (August 29, 2006)

On April 5, 2005, South Lyon MESPA/NEA field a unit clarification petition seeking to add a position entitled "Restorative Practices District Trainer/Coordinator: (hereinafter "RPC") to its existing bargaining unit of secretarial and clerical employees, full and part-time paraeducators, and daycare center caregivers and site leaders employed by the South Lyon Community Schools. The employer disputed petitioner's assertion of community interest maintaining that the RPC position requires skills and training beyond those found in the petitioner's unit. In brief, the Commission granted the petition filed by the MESPA, and ordered that its bargaining unit be clarified to include the position at issue.

Petitioner argued that the responsibilities of the RPC position were essentially the same as the Options Room/In-School Suspension Paraeducator (hereinafter "OR/ISSP") position. Until 2004, the employer employed OR/ISSP personnel at both its Centennial and Millennium middle schools. In October 2004, the employer abolished this position at Centennial and posted the RPC position as a new position outside of the bargaining unit. Debbie Little, the former OR/ISSP at Centennial, was awarded the new position. The employer continued to employ an OR/ISSP employee at Millennium. Prior to October 2004, students with behavioral problems at the middle schools were sent to an "options room." The OR/ISSP was in charge of the options room. The OR/ISSP helped the student fill out a written "behavioral plan" that included a series of questions about the student's misconduct and how it affected the student and others.

Teachers also sent assignments to the options room, and the OR/ISSP was responsible for distributing the work. The employee supervised and monitored the students while they worked, and also answered questions or helped students with their work. After a student was sent to the options room from the same teacher for a third time, the OR/ISSP would set up a meeting with the student, the teacher, the assistant principal, and the student's counselor.

In the fall of 2002, a consultant with expertise in a process called "restorative practices" volunteered to conduct services with students and staff at Centennial Middle School. Restorative practices focuses on helping individuals recognize how their actions affect others, accepting responsibility, and "right the wrongs" they have committed. Ms. Little, the OR/ISSP at Centennial, attended training sessions from the consultant on restorative practices. Eventually, the employer eliminated the OR/ISSP position at Centennial and posted the RPC position. At the time of the hearing, Ms. Little, as the RPC, was spending about 70% of her time holding restorative practices sessions at Centennial and at two elementary schools with students who had committed offenses that would have previously warranted traditional discipline. The other 30% of Little's time was spent using restorative practices for other purposes, including resolving disputes among school staff and settling conflicts among students before they escalate.

# ARBITRATORS AND ATTORNEY FEES: "I KNOW IT WHEN I SEE IT"

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

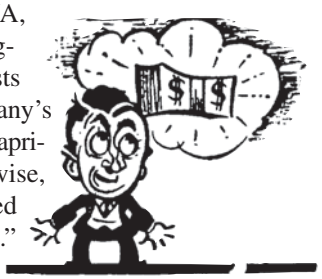
Arbitrators have broad powers to fashion remedies, including the power to award attorney fees. Recently, a district court enforced a fee award in a labor arbitration case, concluding that the arbitrator "was within his authority to determine that substantial back pay and attorneys' fees were proper remedies under the agreement. This court, accordingly, will not disturb that determination." *Interlake SS. Co. v. American Maritime Officers Union,* 2006 WL 1876586, *4 (N.D. Ohio, 2006). In the company's "view," the arbitrator "overstepped his authority by imposing remedies, namely back pay and attorneys' fees, not specified in the CBA." The court found that because the arbitrator's construction of a general remedy provision is "legally plausible," it was entitled to deference. See *IBEW, Local Union No. 1842 v. Cincinnati Elecs. Corp.,* 808 F.2d 1201, 1203 (6th Cir. 1987) ("Deference is particularly appropriate when the arbitrator's choice of remedy is disputed.").

The broad remedy power was recognized in *Enterprise Wheel and Car Corp.,* 363 U.S. 593, 597 (1960):

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.

See also *Armco Employees Independent Federation, Inc. v. Armco Steel Co.,* 65 F.3d 492, 497-498 (6th Cor., 1995) ("Assuming a violation, the arbitrator can best determine whether Armco's failure was in bad faith and can decide what sort of damages or remedies are appropriate. The arbitrator . . . is the only entity empowered to fashion a proper remedy. Finally, an arbitrator, not a court, can then decide whether the Union's attorney's fees should be paid by Armco.").

*Remedies in Arbitration* (BNA, 2d ed, 1991) *("Remedies")* recognizes that an award of fees and costs may be warranted where a company's conduct is egregious or arbitrary or capricious. *Remedies* at 460-61. Likewise, *Elkouri* states that fees are justified when an employer acts in "bad faith." M. Voltz and E. Goggin, *Elkouri and Elkouri, How Arbitration Works* 591-2 (5th ed. 1997) *("Elkouri").* In *Sunshine Convalescent Hospital,* 62 LA 276 (1974) the arbitrator ordered interest and attorney fees where the employer's conduct in withholding vacation pay was known by it to be without merit.



*"Contemplating a motion for attorney fees."*

In the right case, attorney fees should be awarded. Perhaps arbitrators can apply Justice Stewart's classic definition of obscenity: "I know it when I see it." *Jacobellis v. Ohio,* 387 U.S. 184, 197 (1964) (concurring opinion).

While fee awards might be rare, interest awards should not be, but interest is commonly not awarded. *Remedies* provides a summary of arbitral law showing a trend toward awarding interest:

> Awarding interest in arbitration has been the exception rather than the rule. When it has bee awarded, it resulted because it had been requested or because there had been such dilatory or bad-faith action by the employer that the arbitrator concluded some penalty in the form of interest was due. The calculation of the interest rate when interest has been found appropriate has taken on several aspects. Some regard it to be the current market rate while others use other yardsticks such as the state "legal" rate. While interest in arbitration awards traditionally had not been granted, there is reason to believe that a contrary trend had developed. *Remedies* at 459-60.

*Elkouri* also notes that interest on awards are not customary, except when the circumstances warrant it. *Elkouri* at 591. Some arbitrators are awarding interest, for example, because interest is "routinely granted by courts and the NLRB, and we seen no reason why this remedy should not apply to an arbitration remedy when interest is requested." *Atlantic Southeast Airlines,* 102 LA 656, 660 (1994).

Likewise, in *Coppes, Inc.,* 80 LA 1058 (1983), interest was awarded for failure to pay vacation monies. The arbitrator rejected as "no significance" the fact that the CBA did not mention interest or other damages since CBAs do not address the remedies for every breach. See *Falstaff Brewing Corp. v. Local No. 153, Intern. Broth. of Teamsters,* 479 F.Supp. 850, 862 (D.C.N.J., 1978) *affirmed* 609 F.2d 501, 108 L.R.R.M. 2864 (3rd Cir., 1979) ("Interest is not a penalty against the Company. Its function is to make the employees reasonably whole, and that is the proper remedy. I am also mindful of the long time that has passed since the layoff of the employees.l . . . Interest is within the traditional inherent powers of an arbitrator to award in order to make an employee whose rights have been violated reasonably whole."). Interest may be awarded using the NLRB's formula ("short term federal rate" presented by 26 U.S.C. § 6621). ■

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The educational requirements for the OR/ISSP position and the RPC position are similar. Neither position required a college degree. The hours of work were similar as were the benefits received. The hourly rate of the RPC was higher that the hourly rate of the OR/ISSP but less than other positions included in petitioner's bargaining unit.

In applying the community of interest test, the Commission noted that in a K-12 school district, a broad unit of support employees is presumptively an appropriate unit. The RPC position was not simply the OR/ISSP position with a new title. However, petitioner's unit includes a broad range of positions that, like the RPC, provide services that aid and support instruction. Based on the similarities in hours, rate of pay, and educational requirements, the Commission concluded that the RPC shared a community of interest with the employees in the petitioner's unit. Therefore, the unit clarification petition was granted. ■

# VIEW FROM THE CHAIR

**Michael K. Lee,** ***Chair***
***Labor and Employment Law Section***

## RECENT ACTIVITIES OF THE LEL SECTION

The Labor and Employment Law Section has had a busy and productive bar year thus far. The goal of the Section's Council has always been to give our members value for their Section dues. To that end, the Section Council constantly seeks input from our members about the value of our programs and our publications. The members' input helps guide our activities for the year. This year has been no exception. Obviously, the law students of today will be the lawyers, and Section members of the future. In November, the Section continued its tradition of financing scholarships for law students to attend the Bernard Gottfried Labor Law Seminar. The National Labor Relations Board sponsors the Gottfried Seminar.

The Section also sponsors seminars for continuing legal education. The Section was a participant in two such seminars in December. First, the Section co-sponsored, along with the Grand Rapids Bar Association's Labor Law Section, a Seminar on e-Discovery on December 6, 2006. Special thanks go to Council Member Brent Rector, who was the liaison between the Grand Rapids Bar and the Labor and Employment Law Section. The program was held in Grand Rapids. There were both individual presentations and panel discussions. The seminar featured, among others, Magistrate Judge Joseph G. Scoville from the Federal District Court for the Western District of Michigan, and the Honorable James R. Redford of the Kent County Circuit Court. Hearing the "view from the bench" firsthand, along with the opportunity to ask questions, was an invaluable learning experience for practitioners. On December 18, the Section sponsored a seminar at the Townsend Hotel in Birmingham. The featured speaker was Gerald Meyers, who discussed crisis management techniques. Special thanks go to Immediate Past Council Chair Deb Gordon for her leadership in putting this program together.

On January 26 and 27, the Section held its Annual Mid-Winter Meeting. The Mid-Winter Meeting consists of a dinner on Friday night, at which the Distinguished Service Award is given to an outstanding practitioner, as well as a keynote speech. On Saturday morning, we featured an educational component with legal updates and panel discussions. This year's Mid-Winter Meeting will be long remembered for its quality and its location. For the first time, the Section held the Mid-Winter Meeting at the prestigious Detroit Athletic Club, breaking with a nearly two decades long tradition in Ypsilanti. Attendees to both the dinner and the educational event overwhelmingly enjoyed and embraced the new location. Council Secretary Dan Bretz did an outstanding job working with the Detroit Athletic Club to make this a memorable event.

At the dinner on January 26, 2007 the Section honored H. Rhett Pinsky, an attorney from Grand Rapids, with its Distinguished Service Award. Council Vice Chair Dave Calzone, and Council Member Darcie Brault served on the Selection Committee that chose Mr. Pinsky. Mr. Pinsky is a military veteran and a graduate of Harvard Law School. He has practiced law in Grand Rapids for several decades. Mr. Pinsky touched the audience by giving voice to the notion that the law is a noble profession and lawyers are honorable people. Mr. Pinsky showed that he is indeed a worthy recipient of the Distinguished Service Award with his moving acceptance speech.

The Dinner also featured a Keynote Speech by Professor Kevin Boyle, who is the author of four books; including his latest, *Arc of Justice: A Saga of Race, Civil Rights, and Murder in The Jazz Age.* The book is the story of the trial of Dr. Ossian Sweet, an African American doctor who purchased a home in what had been an all-white neighborhood; but who was then charged with murder when a member of a threatening mob was shot by someone in the Sweet home, where a group of Sweet's family members and friends had gathered to protect the home from the mob. Professor Boyle also captivated the audience. The audience was so enthralled with Professor Boyle that he spent nearly an hour *after the Dinner ended*, answering questions and signing copies of his book.

On Saturday morning, January 27, 2007 the Section hosted its legal education seminar. Council Member Stanley Moore coordinated the seminar. The seminar featured an update on the latest case law from the Michigan Employment Relations Commission by Council Member Jeff Donahue, an update on the latest case law from the National Labor Relations Board by Stan Moore, and an update on employment law cases from Jeffrey Steele. As always, the written materials from the presenters were both thorough and informative. Professor Kevin Boyle also treated the attendees to another presentation, this time relating a gripping story of civil rights challenges in the auto plants in the 1950's. The last component of the program was a panel discussion on leaves of absence featuring Chris Davis and Michael Shoudy, along with Council Members Darcie Brault, David Calzone, and Kathryn VanDagens. Council Member George Wirth moderated the panel discussion.

The Council is always interested in new ideas for programs or publications. When considering candidates for Council, we often look to individuals who have volunteered to work on projects in the past. If you have an interest in working on a project for the Section, you may contact me, or any of the other Council Members. If you are interested in writing an article for this publication, please contact Stuart Israel with your ideas, or Stuart will give you ideas for topics if you do not already have something in mind. Finally, our purpose is to help our members grow and strengthen their practices. If there is some way that we can do that better, please let us know.

# UNITED STATES SUPREME COURT UPDATE

**Regan K. Dahle**
***Butzel Long, P.C.***

**FELA Contributory Negligence Standard the Same for Railroads and Employees.**

On January 10, the Court issued its opinion in *Norfolk S. Ry. Co. v. Sorrell*, U.S. 127 S. Ct. 799 (2007). Sorrell brought a Federal Employers' Liability Act (FELA) action against his employer, Norfolk Southern Railway Corporation, after he was injured in a truck accident involving another employee. Norfolk argued that the jury should receive an instruction that if Sorrell's negligence "contributed in whole or in part" to his injury—the same contributory negligence standard applied to the railroad—then the verdict must be reduced accordingly. Sorrell argued that the proper standard for employee contributory negligence under FELA was whether his actions "directly contributed" to his injuries, a different standard than that applied to the railroad. The trial court gave the instruction requested by Sorrell. The jury returned a verdict in favor of Sorrell, without indicating Sorrell's percentage of fault.

Norfolk appealed the decision, and the Missouri Court of Appeals affirmed. The Missouri Supreme Court denied review, and Norfolk petitioned for United States Supreme Court review. The basis of Norfolk's appeal is that the contributory negligence instruction given to the jury, which was based on Missouri state law, conflicted with FELA's contributory negligence standard, and thereby defeated federal substantive rights.

In an opinion written by Chief Justice Roberts, in which Justices Stevens, Scalia, Kennedy, Souter, Thomas, Breyer and Alito joined, the Court held that the trial court erred by giving the jury instruction requested by Sorrell. The jury instruction should have applied the same causation standard to both a railroad's and an employee's contributory negligence. The Court recognized that while states do have some flexibility in instructing a jury about the appropriate causation standards for railroad and employee negligence, the instruction still must apply the same standard to both parties. The Court vacated the opinion of the lower court and remanded the case back to the Missouri Court of Appeals to determine whether the error was harmless or if a new trial was warranted.

**Federal Courts Must Retain Jurisdiction of Westfall Act Cases**

On January 22, 2007, Justice Ginsburg delivered the Court's opinion in *Osborn v. Haley*, U.S. No. 05-593. Osborn worked for a federal contractor; she sued Haley, a federal employee, in state court claiming that Haley improperly influenced the federal contractor to terminate Osborn's employment. The United States Attorney General invoked the Westfall Act, a federal statute allowing the AG to certify that a federal employee being sued for tortious conduct was acting within the scope of his or her employment. As a result of the AG's certification, the United States was substituted as a defendant for Haley, and the case was removed to federal district court. Once in the district court, the AG denied that Haley engaged in any tortious conduct. The district court concluded that the AG's denial essentially revoked Westfall Act certification and required that the United States be removed as a defendant. The district court finally held that the case should be remanded.

On appeal, the Sixth Circuit held that the district court erred in holding that the AG's denial that Haley engaged in tortious conduct revoked Westfall Act certification. The Sixth Circuit also held that the district court should not have remanded the action; the case should have remained in district court, since the question of certification was an important federal question.

On review, the Supreme Court found that the district court's order rejecting the AG's certification and denying substitution of the United States as a defendant was a reviewable final decision under 28 U.S.C. Sec. 1291. The Court also held that the Sixth Circuit had jurisdiction to review the district court's remand order, even though 28 U.S.C. Sec. 1447(d) provides that an order of remand is not reviewable on appeal. The Court reasoned that the Westfall Act's conclusive forum-selection rule establishing exclusive jurisdiction in the federal courts controlled over the general antishuttling provision in Sec. 1447(d). Finally, the Court agreed with the Sixth Circuit that once the AG certified the case under the Westfall Act, the United States should have remained a defendant and the case should have stayed in the district court. In fact, the Court held that the United States must remain a defendant in the case until the district court determines that the employee, in fact, acted beyond the scope of his employment, after which Westfall Act certification would no longer be appropriate. ■

# FROM THE EDITOR


## ANDREW NICKELHOFF NAMED *LAWNOTES* MANAGING EDITOR

Andrew Nickelhoff, of Sachs Waldman, P.C., has been named the first managing editor of *Labor and Employment Lawnotes*. After he successfully completed the FBI background check, attained acceptable results on the Minnesota Multiphasic Personality Inventory, and persuaded the LEL Section Council to overlook what are referred to in the Council minutes as his "youthful indiscretions," the Council voted to award the prestigious, much-coveted, and non-remunerative position to Nickelhoff. The *Lawnotes* editorial board endorsed the appointment by a vote of one to one, with editor Stuart M. Israel's vote being more equal than that of associate editor John G. Adam.

Nickelhoff will focus on the business and management side of *Lawnotes*. Included in his responsibilities will be improving accessibility to archived back issues of *Lawnotes* (on www.michbar.org), studying the feasibility of creating an index and adding searchability functions and broader Internet accessibility to back issues, and considering other projects to bring *Lawnotes*' technological capabilities into the Twentieth Century. In addition, Nickelhoff will administer the *Lawnotes* subscription and mailing list and liaise with the State Bar. Finally, Nickelhoff will be responsible for labor relations and human resources, if *Lawnotes* ever gets anybody to boss around.

*Lawnotes* is circulated to the members of the State Bar of Michigan Labor and Employment Law Section, to Michigan circuit and appellate court judges (and justices), to federal judges in Michigan and to Sixth Circuit appellate judges, as well as to law libraries at Michigan's six law schools and other law libraries in the state.

"I heartily welcome Andy to the *Lawnotes* editorial board," said *Lawnotes* editor Israel, "and look forward to dumping lots of work on him."

Associate editor Adam said, "Nickelhoff's name is going to be below mine on the editors' list, right!?"

Accepting the appointment Nickelhoff said: "I am thrilled to become part of the proud *Lawnotes* tradition. I am honored to work with Stuart Israel and John Adam, two of the finest lawyers, legal scholars and journalists in the history of Anglo-American jurisprudence. When do I get a press pass?"

– Stuart M. Israel

# ARBITRATION HEARING TRANSCRIPTS

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

Arbitration generally is a better way to resolve labor-management differences than, say, strikes, court litigation, or Hobbesian warfare. One reason for this is that arbitration usually is the faster and cheaper way to dispute resolution.

*"Making a record."*

Some lament that labor arbitration in the new millennium is too formal, that it has become the province of lawyers — at least on the management side — who bring the accouterments of the courtroom: evidentiary hypertechnicality, extensive briefing, court reporters, and hearing transcripts. While more due process usually is good, and the presence of lawyers often improves the quality of arbitral justice, formality has a price tag.

This brings me to my topic: the arbitration hearing transcript. More particularly, I am interested in management's unilateral imposition on unions of a never-bargained transcript requirement. Often this happens with the complicity of an unwary arbitrator.

Here's how this happens: The parties show up at the appointed place and time. A court reporter appears, too. The reporter has been commissioned by management to: (1) record the hearing; (2) prepare a transcript; (3) provide the original to the arbitrator, with copies to the parties; and (4) send a bill — for the reporter's appearance fee, the original transcript and copies, and other bells and whistles — with half charged to management and half to the union. Although the parties' agreement does *not* require a transcript, the arbitrator expresses a preference for having one and the union acquiesces in what seems to be a *fait accompli*.

**1.**

Transcripts can be useful, of course. They become the official record. They preserve for posterity everything said at the hearing, permitting the arbitrator and the advocates to listen, observe, and concentrate, without the distracting need for extensive note-taking. Transcripts also capture those watershed moments, like when the human resources director gives away the store on cross-examination. While useful, however, transcripts are *not* essential. As *Elkouri* puts it:

> In simple cases the arbitrator can take adequate notes. Likewise, in cases involving contract interpretation only, there being no disputed facts, the arbitrator's notes and the parties' exhibits and/or briefs ordinarily make a transcript unnecessary.[1]

Still, many arbitrators and parties want transcripts. *Elkouri* observes: "It is said the palest ink is more accurate than the most retentive memory."[2]

**2.**

But transcripts are expensive. The reporter's bill for appearing at the hearing and producing the transcript and copies may approach $1,000 *per party* for a full hearing day. Transcripts also burden the briefing and decision-making process. It takes two or three weeks or more to get the transcript. Brief writers are slowed by the need to review, and accurately quote and cite to, the transcript; it is quicker to rely on notes, memory, and poetic license. The same goes for the arbitrator, who must painstakingly study the transcript before writing the decision. The decision — which may include transcript quotes and cites — must be precise in recounting and analyzing the events of a hearing memorialized in a verbatim transcript.

Because transcripts are both useful and expensive, there is tension between preference for a transcript and interest in keeping the process expeditious and economical. Where the parties *agree* to have a transcript, there is no problem, of course. Problems arise, however, when management wants a transcript and the union does not. The union may regard a transcript as unnecessary. Or as unjustified on a cost-benefit analysis. Or as creating inappropriate formality. Or the union may just believe that management should not be able to *unilaterally* impose a transcript requirement and its attendant burdens. When management brings a court reporter and the union objects, the arbitrator is presented with a preliminary dispute which requires on-the-spot resolution.

**3.**

Typically the union does not object to the court reporter's presence. If management wants to employ the reporter as a high-tech note-taker, most unions will not protest (so long as management doesn't repeatedly delay the proceeding to pore over the reporter's work product and so long as the reporter doesn't disrupt the flow of the hearing with repeated breaks or to address technological snafus and so long as the reporter doesn't usurp the arbitrator's function with demands that the witnesses speak up or repeat testimony or that the advocates slow down or cease simultaneous remarks). Where the union objects to a transcript, it is usually on the basis that it is improper for management to dictate the format of the "official record" *and* make the union pay for it.

If the arbitrator accedes to management's preference, the union is caught in a *Catch-22* situation. Either the union has to pay half the cost or do without the official record. Doing without the record, of course, puts the union at a serious disadvantage. This is unfair. So, absent *agreement*, the transcript should *not* be the official record and the transcript should *not* be quoted or cited by management or given to the arbitrator.

**4.**

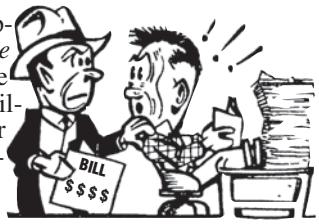
Transcript disputes usually can be resolved to all parties' satisfaction by presenting management with a choice: either (1) the transcript is *not* the official record and is *not* provided to the arbitrator, and may *not* be quoted or cited in management's brief *or* (2) the transcript is the official record and is provided to the arbitrator *and* the union *at management's expense*. In short, if management chooses to have a reporter-recorded official record, management must pay for its choice.

This resolution of transcript disputes is fair. It also is contemplated by American Arbitration Association ("AAA") Labor Arbitration Rule 21. The rule provides:

> Any party wishing a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of such arrangements in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties to be or, in appropriate cases, determined by the arbitrator to be the official record of the proceeding, it must be made available to the arbitrator and to the other party for inspection, at a time and place determined by the arbitrator even if one party does not agree to pay for the transcript.[3]

Of course, the "inspection" concept is archaic. Court reporters no longer laboriously type transcripts on bond paper using White-out Correction Fluid, backed by multiple sheets of carbon paper to make the requisite copies. Nowadays, the transcript is produced and corrected on screen and is delivered electronically with a gentle left click. So the arbitrator should not endorse "inspection" of the 337-page transcript at management's uncomfortable office at an inconvenient time. Petulant management is *not* entitled to exact payment for "inspection" — either in money or in aggravation. Rather, the union advocate is entitled to a copy to review on the union advocate's timetable, in the privacy of the union advocate's office, with the union advocate's clients. The arbitrator

should direct management to supply the transcript to the union *in the same manner* that it supplies it to the arbitrator — it "must be made available to the arbitrator and the other party for inspection" — which typically means by e-mail.[4]



*"A request to share the cost of the transcript."*

AAA Rule 21 does not govern every labor arbitration, but fairness, common sense, and the *Code of Professional Responsibility for Labor-Management Disputes* ("CPR/LM") should. The CPR/LM is promulgated by the National Academy of Arbitrators, the American Bar Association, and the Federal Mediation and Conciliation Service.[5] The CPR/LM provides (emphasis added): "A transcript is the official record of a hearing *only when both parties agree* to a transcript or an applicable law or regulation so provides." If "the parties do not agree to a transcript, an arbitrator may permit one party to take a transcript at its own cost. The arbitrator also may make appropriate arrangements under which the other party may have access to a copy, if a copy is provided to the arbitrator."[6] Again, there is no legitimate reason to permit "access" to the union that is less convenient — or more burdensome —than the "access" provided to the arbitrator.

**5.**

Management arbitration advocates often argue that an arbitrator should not recognize a right that the union did not — or was unable to — negotiate at the collective bargaining table. This principle applies to management here: where management did not — or was unable to — negotiate a contract right to a stenographic official record with costs shared by the parties, an arbitrator should *not* impose such a requirement. To do so would improperly "add to" the collective bargaining agreement, something anathema to every management advocate.

**— END NOTES —**

[1]M. Volz and E. Goggin, eds., *Elkouri & Elkouri, How Arbitration Works* (5th ed. 1997) ("*Elkouri*") at 359.

[2]*Elkouri* at 359.

[3]American Arbitration Association, *Labor Arbitration Rules*, available at www.adr.org. See also **(1)** *U.S. Dept. of Agriculture*, 93 L.A. 920, 928-929 (Arb. Seidman 1989)(the employer "is solely obligated to pay for the transcript" where: the contract provides that the requesting party or parties must pay for the transcript, the union "made clear that it did not require nor would it pay for the transcript," the employer "required a transcript for its own purposes," and the arbitrator requested as a "courtesy" that the employer provide him with the transcript "for his use" and said he would consider it to be the "official transcript provided the Union was given access to it"); **(2)** *Nuturn Corp.*, 84 LA 1058, 1060 (Arb. Seidman 1985) (rejecting employer argument that a transcript is "at least a reasonable expense of the arbitration, if not a necessary expense"; while the arbitrator "prefer[s] a court reporter [he does] not have the authority to require it" where the CBA "does not specifically require it"; the party requesting the court reporter "is bound to pay [the reporter's] full cost, unless the other party volunteers to participate in such payment"); and **(3)** *Cleveland Pneumatic Tool Co.*, 42 LA 722, 723, 729 (Arb. Dworkin 1964)(despite CBA language providing that "the expense of ... the public stenographer shall be shared equally," and "[n]otwithstanding the consistent past practice," the union is not required to "share equally in the expense of a public stenographer" where the union "stated that it does not wish to share in the cost of the transcript").

[4]The unfairness of designating the transcript as the official record over the union's objection without directing management to pay the cost is illustrated by Arbitrator Holman's unsatisfactory decision in *General Telephone Co.*, 79 LA 102, 103 (1982). The parties shared equally the costs of arbitration transcripts for the past "15 or 20 years," but in 1982 the union advised the employer that "because of escalating costs it no longer would request a stenographic record and transcript." The employer argued that the shared transcript cost was a "past practice" and relied on the CBA term which provided that each party was to "share equally ... the general expense of the arbitration." Citing AAA Rule 21, the arbitrator ruled (1) that the transcript "would become the official record" and the arbitrator would be "furnished a copy"; (2) that the union was "not bound" to share the transcript cost; and (3) that the union attorney "could examine the transcript for accuracy ... at some time within one week following its completion." The arbitrator ruled that union's "inspection of the transcript for accuracy ... shall be brief and conducted without taking notes except that a note may be made of those portions, if any, which it contends are inaccurate and that the inspection shall be made at a neutral site specified by the arbitrator." *Catch-22*. Under this ruling, the transcript became the official record despite the union's objection. The union was left with an unfair choice: either knuckle under to management's unilateral imposition of a transcript requirement and take on the extra expense or do without the transcript and advocate at a serious disadvantage. It seems the arbitrator disregarded the principles embodied in Rule 21 and gave effect to *his* preference for a transcript over the fact that one party never agreed — and objected — to the transcript and its attendant expense. I suspect that a union on the wrong end of such a ruling would not readily select that arbitrator again.

[5]National Academy of Arbitrators, the American Bar Association, and the Federal Mediation and Conciliation Service, *Code of Professional Responsibility for Labor-Management Disputes*, available, among other places, at www.ilr.cornell.edu.

[6]*Id.* at "Hearing Conduct," paragraphs B.1.a. and c. ■

# OBTAINING PROFESSIONAL LIABILITY COVERAGE – AN INSURANCE AGENT'S ADVICE TO LAWYERS

**Marie Pellerito**
***The Goodman Agency, Inc.***

Obtaining professional liability insurance involves a two-way assessment. Lawyers and law firms need to be prudent consumers, and get policies tailored to their professional needs from reliable insurers. At the same time, responsible insurers want assurances that the lawyers and firms they insure have histories and structures demonstrating appropriate "risk management."

Both lawyers and insurers profit from a frank and comprehensive assessment of the firms and lawyers to be insured. The assessment typically entails a detailed application and, ideally, a person-to-person discussion between representatives of the insurer and the to-be-insured firm or lawyers.

The insurer will ask about "loss control" procedures such as docket control systems monitoring court due dates and other deadlines. The insurer will ask about the firm's standard documents defining the attorney-client relationship, and their effectiveness in eliminating misunderstandings and avoiding disputes. These may include (1) *retainer agreements* and *engagement letters* — defining expectations and specifying the parties' economic relationship and responsibilities; (2) *non-engagement letters* — specifying that the lawyer or firm declines to represent the prospective client, confirming information communicated during discussions about possible representation, and providing follow-up information to aid prospective clients in seeking other representation and protecting their interests; and (3) *disengagement letters* — confirming and specifying the termination of the attorney-client relationship, whether at the conclusion of the object of the representation or at some interim point, before the object of the representation is completed but at the end of the parties' relationship.

Insurers also look at the finances of to-be-insured firms and lawyers. Insurers disfavor firms and lawyers with inappropriate client trust procedures, high receivables, flawed accounting practices, over-extended credit lines, and similar financial deficiencies that spell disorganization and portend future problems with client representation.

While the application/interview process may be time-consuming, it can be highly valuable to to-be-insured firms and lawyers. It may expose deficiencies in their organization and structure. It may suggest improvements and new techniques and practices. In addition, it is a process that will enable to-be-insured firms or lawyers to tailor professional liability policies to their particular needs, with coverages and provisions beyond those that are standard. For example, for various reasons a firm might want to increase their coverage amounts, adjust deductible numbers, expand the definitions of claims and covered acts or omissions, create procedures for selection and approval of defense counsel in the event of a claim, provide for "innocent partner" protection, or other negotiate terms to meet their needs.

The wise consumer of professional liability coverage will view periodic assessment of their "loss control" procedures and insurance needs as an appropriate and prudent expenditure of resources, to be sure they have maximum protection and that their policy is the right tool for the task. ■

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