LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

Volume 18, No. 1 Spring 2008

THE IRS EXPECTS PARTIES TO MAKE A REASONABLE ALLOCATION OF SETTLEMENT PROCEEDS

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How many times has it happened that you reach an agreement to settle an employment discrimination case—the parties have agreed upon a number—and then someone brings up the issue of allocating the settlement proceeds, and the settlement falls apart? Sometimes the plaintiff's counsel demands that all of the settlement proceeds be allocated to emotional distress damages; sometimes the defendant's counsel demands that all of the settlement proceeds be allocated to lost wage damages. And while in certain cases, depending on the facts, those allocations may be appropriate, under most circumstances an appropriate allocation is one that designates some of the proceeds as compensation for alleged emotional distress damages and some of the proceeds as compensation for alleged lost wages.

Legal Framework for Taxation of Settlement Proceeds

Amounts paid in settlement of an employment discrimination claim are considered part of that plaintiff's gross income for federal tax purposes. 26 U.S.C. § 61(a) This includes amounts paid to the plaintiff for alleged lost wages and emotional distress. If the facts support a finding that the plaintiff's emotional distress arose directly from a *physical* injury or sickness, then any settlement proceeds allocated to emotional distress are not taxable to the plaintiff. 26 U.S.C. § 104(a)(2). However, as is typically the case in an employment discrimination claim, if the emotional distress does not arise directly from a physical injury or illness, then it is taxable to the plaintiff.

If a plaintiff has a contingent-fee arrangement with his or her lawyer, and part of the settlement proceeds is allocated to the lawyer's fee, that amount is also taxable to the plaintiff. *Commissioner v. Banks,* 543 U.S. 426 (2005) However, the American Job Creations Act of 2004 amended the Tax Code to allow a plaintiff to deduct from his or her gross income attorneys' fees and court costs paid by the plaintiff or on the plaintiff's behalf in connection with an employment discrimination claim. 26 U.S.C. § 62(a)(20) If the underlying employment claim is based on a fee-shifting statute, the IRS will permit the parties to allocate an amount to attorneys' fees before they allocate amounts to lost wages and emotional distress. I.R.S. Technical Advice Memorandum (TAM) 200244004. A TAM is not binding on a court and cannot be cited as precedent.

The amount of the settlement proceeds allocated to lost wages are subject to normal employment withholdings, even if the plaintiff is a former employee of the defendant. 26 C.F.R. § 31.3121(a). The amount of the settlement proceeds allocated to emotional distress damages and attorneys fees would not be considered wages subject to employment withholdings, because they are not intended to compensate the former employee for services rendered to the former employer. *Appoloni v. United States*, 450 F.3d 185, 189-190 (6th Cir. 2006)

The IRS Expects the Allocation to Reflect the Nature of the Original Claim

The IRS has recognized that both parties in an employment discrimination lawsuit (the employer and former employee) can benefit by categorizing a payment made in settlement of an employment discrimination claim as compensation for alleged emotional distress damages, which is not subject to traditional employment taxes. Consequently, the IRS expects the parties settling an employment discrimination claim to allocate the settlement proceeds between lost wages and emotional distress damages in a way that reflects the true nature of the underlying claims.

For instance, in *Peaco v. Commissioner*, 48 Fed. Appx. 423 (3rd Cir. 2002) the plaintiff filed an age discrimination claim against her former employer, which the parties settled for $584,000. The plaintiff failed to report any of the settlement proceeds as income on her tax return. The IRS brought an action in the Tax Court for the tax deficiency. The Tax Court held that the plaintiff had to report as income and pay taxes on all but the portion of the settlement proceeds paid for attorneys' fees.

The Third Circuit affirmed and agreed that while the settlement agreement allocated the entire amount of the settlement to pain and suffering, this "did not reflect the realities of the settlement given the nature of the lawsuit and the parties' intent." *Id.* at 425. The court instructed that courts have a "duty to look behind the agreement of the parties to discern the true nature of the payor's intent in settling claims." *Id.* at 425-426. This duty is "particularly so where the allocation of damages within the settlement agreement is driven by tax considerations and [does] not reflect the true value of the settled claims." *Id.* at 426. The court concluded that the parties' allocation was "influenced more by tax considerations than the merits of the lawsuit" and affirmed the Tax Court order that the plaintiff pay the tax deficiency. *Id.*

Similarly, in *Pipitone v. United States*, 180 F. 3d 859 (7th Cir. 1999), the plaintiff executed a settlement agreement upon the termination of his employment. That agreement included a release of all claims against his employer and provided for the payment to the plaintiff of $95,000. The plaintiff initially paid income tax on the entire amount, but then filed an amended return seeking a refund of the income tax. He argued that the amount should have been excluded from his gross income. The district court and court of

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STATEMENT OF EDITORIAL POLICY

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

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THE IRS EXPECTS PARTIES TO MAKE A REASONABLE ALLOCATION OF SETTLEMENT PROCEEDS

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appeals disagreed with the plaintiff. The court of appeals stressed that "[i]n cases in which damages are received pursuant to a written settlement agreement, the focus is on the origin and characteristics of the claims settled in determining whether such damages are excludable" from gross income. *Id.* at 862.

In *Moran v. Commissioner*, T.C. Memo 1997-412 (Sept. 17, 1997), the plaintiff demanded a separation package from his employer that included severance pay, benefits and legal fees. The parties reached a settlement agreement under which the plaintiff would receive four monthly and a fifth lump sum payments, and the employer would receive a release of all claims from the plaintiff. The employer withheld income and employment taxes from the entire amount of the settlement, and the plaintiff, in turn, took practically the entire amount as a deduction on his income tax return for compensatory damages associated with tort and employment discrimination claims. The Commissioner disallowed the deduction.

"On the way to the IRS!"

In determining whether any or all of the deduction should have been allowed, the Tax Court first reviewed the nature of the claim that was the basis for the settlement. The Court had difficulty differentiating the actual basis for the settlement, since the settlement agreement was silent on the nature of the claims being settled. Under that circumstance, the court held that "where the settlement agreement lacks express language stating what the settlement amount was paid to settle, then the most important factor is the intent of the payor." *Id.* at *12. While the intent of the company in paying the amounts was not clear, the Court was able to determine that, based on the facts, the amounts were not being paid to settle any tort or other personal injury claim, and therefore, the amounts should not be excluded from gross income.

Practice Pointers

The above cases are just some examples of when the IRS intervened after the settlement of an employment discrimination claim because it took issue with the allocation, or lack thereof, of the settlement proceeds. They illustrate why it benefits all parties to make a realistic and reasonable allocation of settlement proceeds.

To reduce the risk that the IRS will challenge a settlement agreement, the parties should specifically state in the agreement the allocation between lost wages, emotional distress and, where appropriate, attorneys' fees. Furthermore, any allocation must reflect the original claims and relief requested. Unless there is some fact-specific basis for not making an allocation to lost wages or emotional distress, if the plaintiff sought both types of damages in the complaint, then the settlement agreement should reflect and allocation to both types of damages. Finally, the settlement agreement should specify that the amount allocated to lost wages will be subject to all normal employment withholdings, while the amount allocated to emotional distress and attorneys' fees will not. ■

THE END OF THE BUSH NLRB

C. John Holmquist, Jr.
Nemeth Burwell, P.C.

"That's all I can stands; I can't stands no more."
– Popeye the Sailor

The relationship between labor and the Bush administration with respect to the National Labor Relations Board has always been contentious. Labor's "Popeye moment" came last September when the NLRB issued 61 decision. Change to Win referred to the decisions as the "September Massacre." The AFL-CIO called it the "September Steamroll" and led protests in twenty cities at Board offices urging that the agency be "closed for renovations" until a new President is elected. Employers responded by noting the Board under President Bush merely returned to its decisions before the Clinton Board's mass reversal of precedent during its eight years.

Were the decisions in September the culmination of efforts on the part of the Bush Board majority to dismantle prior Board precedent and to complete the weakening of the National Labor Relations Ace? Supporters of the Bush majority cautioned that such a conclusion should not be reached so quickly. September is the last month of the fiscal year and has historically yielded a high number of decisions. The decisions for prior years are 112, 54, 114, and 105. In addition, by the end of the session of Congress three board members' appointments expire, so the push was made to get decisions out before the board no longer had a full complement of five members.

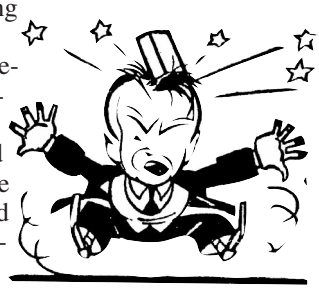
The Bush Board may very well have come to an end. Chairman Battista's term ended on December 16, 2007, and the recess appointments of Members Walsh and Kirsanow expire when the Senate adjourns. During the holiday break, the Democratic majority held performance sessions in the Senate to prevent any recess appointment by President Bush.

On January 25, 2008, President Bush announced his intentions to nominate three members. Gerald Morales will be nominated for a five year term to expire December 16, 2012. Chairman Battista will be nominated to fill a remaining time of a five year term to expire on December 16, 2009. Member Walsh will be nominated to fill out the remaining part of the five year term to expire on August 27, 2008.

The nominations were met by labor as expected. AFL-CIO president John Sweeney called the President's renomination of Chairman Battista a blatant attempt to keep a labor board with an unbalanced anti-worker bias and stated the Board would be "poisonous" to America's working families. Senator Edward Kennedy expressed his disbelief that the President would renominate Chairman Battista to the Board because he led the "most anti-worker, anti-labor, anti-union board in its history."

While it is possible that Congress, in an election year, may be able to agree on a package of two appointees, such a compromise would seem highly unlikely. As a result, it appears that the Board will be operating with two out of five members for an indefinite period of time.

Anticipating the loss of three members, the Board temporarily delegated to the General Counsel authority on court litigation matters that would otherwise require Board authorization, specifically including injunction proceeding under Section 10(j), in Section 10(e) and (f) of the Act. The board also delegated its powers to members Liebman, Schaumber and Kirsanow. This action allows members Liebman and Schaumber, as a quorum of the three member group, to issue decisions and orders in unfair labor practice and representation cases. The two member panel has begun issuing decisions.[1] In support of its actions, the Board relied on a March 4, 2003 opinion issued by the Office of Legal Counsel in the U.S. Department of Justice. Whether or not the memorandum provides sufficient legal basis for the Board to operate indefinitely with two members remains to be seen and will likely be challenged before the Court of Appeals.



"The NLRB delivers the latest decisions to organized labor!"

Were all the decisions issued by the Board in September adverse to labor? It would be inaccurate to characterize the decisions as being adverse to labor in their totality since, in numerous cases, the Board found one or more violations of the Act by the employer involved. What were the decisions that have triggered the response? The decisions which are particularly disturbing to labor are summarized below:

***Dana Corp.,* 351 NLRB No. 28 (9/29/07)**

An employer's voluntary recognition of the labor organization does not bar a decertification or a a rival union petition that is filed within 45 days of the notice of recognition. An employee or rival union may file a petition during a 45 day period following notice that a union has been voluntarily recognized. The petition will be processed if it is supported by 30% of the bargaining unit. The rationale for the Board's decision is that the uncertainty surrounding voluntary recognition based on an authorization card majority, unlike union certification after a Board supervised election, justifies the delay in the application of the election bar for a brief period during which unit employees can decide whether they prefer a Board conducted election.

***Wurtland Nursing and Rehabilitation Center,* 351 NLRB No. 50, (9/29/07)**

An employer had withdrawn recognition form the union based on an employee's petition seeking a vote to remove the union. In reviewing the language of the petition, the Board majority found that the more reasonable interpretation of the language was that the employees wished to *remove* the union. The language in the petition did not simply state that the employees wanted to *vote* on union representation. Since the language spoke of "removal," it should be interpreted as stating that the employees wanted to remove the union, and therefore, the company was free to rely on this petition as the basis of its belief that the union had actually *lost* the majority of unit employees at the time it went through recognition. Therefore, the withdrawal of recognition was lawful.

***Toering Electric Co.,* 351 NLRB No. 18 (9/29/07)**

In a case involving an unlawful refusal to hire a union "salt," the Board ruled that an applicant for employment must be genuinely interested in establishing an employment relationship. The Board stated that "one can not be denied what one does not genuinely seek." The majority stated that the submission of an application with

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THE END OF THE BUSH NLRB

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no intention of seeking work but rather to generate meritless unfair labor practice charges is not protected activity. As a result, the Board imposed upon the General Counsel in all hiring discrimination cases the burden of proving that the alleged discriminatee was genuinely interested in seeking to establish an employment relationship; there must be an application for employment, and the application must reflect a genuine interest in becoming employed by the employer.

***St. George Warehouse,* 351 NLRB No. 42 (9/30/07)**

The Board modified its procedure in back pay cases. The General Counsel has the burden of producing evidence concerning any employee's efforts to find interim employment after an unlawful discharge. An employer bears the ultimate burden of persuasion concerning whether an illegally discharged employee made an adequate search for interim employment. Once the employer shows that there were comparable jobs available in the relevant geographic area, the burden of production shifts from the discriminatee to the General Counsel to show that the discriminatee took reasonable steps to seek those jobs. Evidence must be produced through the employee's testimony or other competent evidence of the employee's interim job search. The majority noted that the new rule is not burdensome to the General Counsel who under existing guidelines routinely gathers evidence of job searches in employment discrimination cases likely to result in back pay.

***Jones Plastic & Engineering Co.,* 351 NLRB No. 11 (9/27/07)**

Where an employer follows its normal employment practice of hiring employees as "at will," the "at will" status of strike replacement does not detract from the employer's argument that the individuals hired were "permanent replacements." As employer is not bound to discharge those hired permanently to fill places of economic strikers; however, permanent replacement status is an affirmative defense with the burden on the employer to show a mutual understanding with the replacement that they are permanent.

***Anheuser-Bush, Inc.,* 351 NLRB No. 40 (9/29/07)**

The employer installed hidden surveillance video cameras and, through their use, learned that certain employees had engaged in misconduct. Those employees were either disciplined or discharged. Even though the employer was found to have violated the Act by making an unlawful unilateral change in working conditions, the Board majority held that it lacked authority to reinstate or to provide back pay to the employees who were disciplined for cause; regardless of the fact that their employer learned of their misconduct only as a result of its own unfair labor practice. The majority stated that the employees should not benefit from their misconduct through a windfall of reinstatement and back pay.

***BE&K Construction Co.,* 315 NLRB No. 29 (9/29/07)**

The Board majority held that the filing and the maintenance of a reasonably based lawsuit does not violate the Act regardless of the motive for bringing suit. The case was on remand from U.S. Supreme Court.[2] The majority stated that in determining whether a lawsuit is reasonably based, it will apply the same test as utilized by the Supreme Court in the anti-trust context: a lawsuit lacks reasonable bases, or is "objectively baseless," if "no reasonable litigant could realistically expect success on the merits."

Additional case discussion took place in a rare joint Congressional committee hearing entitled, "The National Labor Relations Board: Recent Decisions and Their Impact On Workers Rights," held on December 13, 2007. The hearing provided another forum for partisan review of the Bush majority decisions. Chairman Battista and Board member Liebman were among the witnesses. Battista defended the decisions issued in September and noted that actually seventy decisions were issued. In defending the decisions, Chairman Battista stated that the statute was amended in 1947 to give employees the *equal* right to refrain from union activities and representation and to protect employees not only from employer interference but also from union misconduct. He stated that the fundamental principle of the Act is to provide for employee free choice; allowing employees to decide for themselves whether or not to be represented by a union or otherwise to act in concert in dealing with their employer. He stated that the law is neutral as is the agency.

Not surprisingly, Board member Liebman had a different perspective. She stated that with reference to the attention given the September decisions and their mass issuance, she was hesitant to fault her colleagues. She noted that decisions are often keyed to the end of the fiscal year which is September 30th. She stated that it had become common in recent years for the Board to push too hard during the final months of the fiscal year to issue decisions.

Member Liebman critiqued several of the decisions issued in September repeating the position she stated in her dissent in those decisions. While recognizing that the Board is notorious for seesawing with every change of administration, she stated that what has occurred with this Board has been more of a "sea change" than a "see-saw." She observed that the current majority had reached back decades to reverse long established precedents and often reversed precedent of its own initiative without seeking briefing or oral argument.[3]

Member Liebman has also written an essay concerning her dismay with the current state of the Board. The essay is entitled "Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board."[4] In her essay, Member Liebman notes that the current Bush Board has "almost reflexively" overruled key decisions made by the prior Clinton Board which she indicated had endeavored to update the law by affording greater protections to workers in an evolving economy. She stated that the Board majority regularly has found that employee statutory rights must yield to countervailing business interests. She identified the interests as private property rights; various managerial prerogative (focusing on employer refusal to provide unions with requested information); business justification; notions of workplace decorum and civility; and employer free speech rights. With respect to decisions involving unionized workers, the majority's decision signifies a laissez-faire approach to bargaining giving employers free reign to operate without meaningful bargaining.[5]

One of the direct results of labor's dissatisfaction with the Bush Board has been the introduction of the Employee Free Choice Act which would amend the National Labor Relations Act to dramatically change how unions are able to organize employees and how to bargain for the first collective bargaining agreement occurs. The significant provisions of the proposed legislation are as follows:

- A union can be certified through either an election or through a majority of employees signing union authorization cards. This specific procedure is to be developed by the Board.

- If the union is certified and if negotiations do not result in an agreement after ninety days, either the employer or the union can request the assistance of the Federal Mediation and Conciliation Service. If such assistance does not result in an agreement within 30 days, the matter can be referred to binding arbitration. The results of that arbitration are binding upon the parties for two years.

- Employers found to have willfully or repeatedly violated employee's right in either a campaign or in relation to first contract bargaining can be fined up to $20,000 per violation.

- Back pay for employees who are unlawfully discriminated against for involvement in a campaign or relation to the first contract will be troubled.

- The grounds for obtaining injunctive relief against the employer are dramatically lower.

The statute has not been enacted, and President Bush had indicated that if it were, he would veto it. The question arises of whether a change in administration would lead to the law's passage. Perhaps the biggest obstacle to its passage is the Senate rules with respect to filibusters. Under the Senate's rules, only forty-one members are needed to prevent filibusters from ending. The Republicans had tried to change this rule in 2005 during Democratic opposition to Bush's judicial nominations, but those attempts were unsuccessful. Therefore, it is less certain that such legislation would ultimately be enacted.

The five member Board is, by design, a creature of politics. The new President and his/her party will have the ability to place three members on the Board while the losing party will place two. The National Labor Relations Board is the only area in the labor and employment law field where case precedent can change every four to eight years based on the philosophy of the party controlling the White House. While both management and labor can eagerly anticipate decisions when it is "their" Board, the political nature of the Board makes it difficult to counsel clients. At the present time, in discussing issues with a company, does the practitioner base advice on the current Reagan/Bush line of decisions or anticipate a change and a return to the Clinton Board's line of decisions? In the long run, it would be preferable to know that interpretations of the statute are not based upon ideology as much as upon the law itself.

So what will happen after President Bush leaves office? The reality of Board practice with its decisional swings based on politics can best be summarized by again paraphrasing from Popeye, "it is what it is, and that's all that it is."

— END NOTES —

[1]*Windstream Corp.,* 352 NLRB No. 9 (2/7/08); *Hercules Drawn Steel Corp.,* 352 No. 10 (2/7/08).

[2]*BE&K Construction Co. v. NLRB,* 356 US 516 (2002).

[3]The testimony of Chairman Battista and Member Liebman can be found on the Board's website: www.nlrb.gov. Additional witnesses were Professor Matthew W. Jenkins, Feliza Ryland (former employee of Grosvenor Resort, Charles Cohen, Jonathan P. Hiatt) witness testimony can be accessed from the website of the Committee on Education and Labor, House of Representatives, http:\\www.edworkforce.house.gov\hearings\help121307.

[4]*Berkley Journal of Employment and Labor Law,* Volume 28:2, p. 569 (2007).

[5]Vol. 28 at p. 584. ■

EMPLOYMENT LAW AND THE MICHIGAN BAR EXAMINATION

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Isn't it time for the Michigan Bar Exam to include Employment Law?

Pennsylvania, the state where I now teach, includes Employment Law on the bar exam.

As someone who is passionate about Labor and Employment Law, I appreciate the public acknowledgment of its importance.

As someone who teaches in this area, I am, of course, pleased. Student enrollment gets a boost when a course is on the bar, which makes the professor feel loved and important. Students will take bar courses to pass the bar, but also because inclusion on the bar exam sends a message that a subject is important to practice.

Indeed that is exactly why the Pennsylvania Bar Examiners decided to include Employment Law, while eliminating other subjects, in a revision a couple years ago. As one Pennsylvania Bar official told me, they wanted to send a message to the law schools about the education lawyers needed to be prepared for modern practice.

This is a message that many law schools across the country have not heard. A survey by the Labor and Employment Section of the Association of American Law Schools found that many do not offer courses in labor and employment law. The main reason for not offering courses — or more courses — was that this area of law involves no important social and policy issues.

This is a puzzling view, given the obvious importance of jobs and what happens at work to the welfare of families, businesses, cities, and our country. This dismissive view has led law schools to offer either no labor and employment law courses or only Employment Discrimination, and to only hire adjuncts to teach them. Adjuncts have a lot to offer, but the reality is that when a subject is offered only by adjuncts, that means the law school sees it as of low status and low value.

This situation needs to be turned around, and law schools need to be educated about the importance of this area of law. The facts are there. It is not only Pennsylvania that recognizes the importance of employment practice. Fulbright & Jaworski's annual litigation survey of corporate counsel consistently finds labor and employment cases to be their greatest concern. The most recent report stated: "The Number One litigation fear factor among corporate law departments was labor and employment: 62% identified it as the chief cause of action. Retailers especially fear employment suits — 76% said it was their top concern. Number Two concern was contract disputes (58%), followed by intellectual property."

Corporations know that they need lawyers who are well educated in these areas. The question is how to educate the law schools about this need.

Including Employment Law as a bar subject is one small move and one that should be taken. It will have some impact on the courses students take or demand, and that may have some incremental impact on law school hiring.

Quite frankly, the most direct way to ensure that law schools hire faculty in these areas is money. Law schools might want to consider endowing chairs in labor and employment law at the Michigan law schools. Nothing says respect like money, and it would be a way to honor the many fine lawyers who have practiced in these areas. ■

JUDICIAL INTUITION

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"Story problems!?"

The online *ABA Journal* reported on a recent study of 295 Florida trial judges. The study is soon to be analyzed in a *Cornell Law Review* article called "Blinking on the Bench: How Judges Decide Cases."[1]

The judges were asked to answer three "story problems." Nearly a third of the judges failed to answer even one question correctly. Nearly another third gave only one correct answer.

The Judges tended to select "intuitively obvious" but incorrect answers. The study's authors observed that judges "are predominantly intuitive decision makers" even though "intuitive judgments are often flawed."

Judges using intuition, the study observes, are "vulnerable to such distractions as absurd settlement demands, unrelated numeric caps, and vivid fact patterns." This problem would be ameliorated, the study suggests, if judges were given more time to deliberate and were encouraged to write opinions explaining their decisions. The *ABA Journal* reports: "Training, peer review, and checklists should also be helpful."

In defense of Florida judges — and they seem to need a defense — the judges' test results "although poor, were comparable to those of other well-educated adults."

The "story problems" were part of a "cognitive reflection test" intended to distinguish intuitive from deliberative processing. Here are the three "story problems." Test yourself. You're a well-educated adult. The correct answers are in the end notes.

1. A bat and ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the ball cost?

2. If it takes five machines five minutes to make five widgets, how long would it take 100 machines to make 100 widgets?

3. In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for a patch to cover half of the lake?[2]

— END NOTES —

[1]The *ABA Journal Law News Now* online article is by Debra Cassens Weiss, titled "Judges Flunk Story Problem Test, Showing Intuitive Decision-Making" (February 19, 2008). The study — "Blinking on the Bench: How Judges Decide Cases" — is by Chris Guthrie of Vanderbilt University School of Law, Jeffrey J. Racylinski of Cornell Law School, and U.S. Magistrate Judge Andrew J. Wistrich of the Central District of California and is available online at papers.ssrn.com.

[2]Answer 1: five cents, not ten cents. Answer 2: five minutes, not 100 minutes. Answer 3: 47 days, not 24 days. ■

THE RORSCHACH RIGHT OF EMPLOYERS TO RESTRICT EMPLOYEE USE OF E-MAIL FOR UNION RELATED SOLICITATIONS

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Employers and courts struggle with the delicate balance between private property rights and employee rights to organize for the purposes of collective bargaining. This epic struggle between two pillars of American democracy has roared into cyberspace as fights ensue over the electronic communication systems of employers. On December 16, 2007, the National Labor Relations Board came down on the side of private property rights and issued a decision that grants employers a broad right to regulate employee e-mail use. The decision is *Register Guard,* 36-CA-087431-1.[1]

THE *REGISTER GUARD* DECISION

According to *Register Guard,* employees' right to organize does not include a right to use electronic property of an employer to assist in the organizing process. Section 7 of the National Labor Relations Act protects employees' right to organize and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." In *Register Guard,* the Board held that "Section 7 protects organizational rights . . . rather than particular means by which the employees may seek to communicate." *Id*. at 6 (quoting *Guardian Industries Corp*. *v*. *N.L.R.B*., 49 F.3d 317, 318 (7th Cir. 1995)). In *Register Guard,* the employer's personnel policies prohibited employee use of e-mail for all "non-job-related solicitations." The Board held that the employer's policy did not violate the Act.

The Board also held that the employer did not discriminatorily enforce its policy by disciplining employees for sending union related solicitation e-mails, e-mails asking employees to take action in support of the union, because there was no evidence the employer "permitted employees to use e-mail to solicit other employees to support any group or organization." *Register Guard, supra* at 10. However, the Board held that the employer did violate the Act by disciplining employees for sending union related communication e-mails, e-mails that relayed facts about the union but did not call for action, because there was evidence the employer allowed employee communication e-mails "concerning social gatherings, jokes, baby announcements, and the occasional offer of sports tickets or other similar personal items." *Id*. In so holding, the Board redefined its definition of "discrimination."

The Board adopted a new definition of "discrimination," holding that "unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status." *Id*.

The *Register Guard* decision allows employers to narrowly tailor e-mail use policies to allow a broad range of content while still prohibiting union related e-mails. The Board provided examples of policies it considers acceptable under the new definition of "discrimination." By way of example, the Board held:

> [A]n employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business-related use.

Register Guard, supra at 9. To further illustrate, the Board held that "a rule that permitted charitable solicitation but not noncharitable solicitations would permit solicitations for the Red Cross and the Salvation Army, but it would prohibit solicitations for Avon and the union." *Id*.

REGISTER GUARD AND THE SIXTH CIRCUIT

A reading of the *Register Guard* opinion might leave one with the impression that the decision has no effect on law within the Sixth Circuit. After narrowing its definition of "discrimination," the Board pointed out in a footnote that its new "view of "discrimination' is broader that that of some courts." *Id*. at 10, fn. 21. To support this statement, the Board cited *Cleveland Real Estate Partners v. N.L.R.B.,* 95 F. 3d 457, 465 (6th Cir. 1996). If the Sixth Circuit previously adopted a narrower definition of "discrimination," it must have been settled that employers in the Sixth Circuit could adopt policies prohibiting employee use of e-mail for Section 7-related purposes, and still allow employees to use e-mail for other, nonwork-related communications. However, as the Buddhist saying goes, "things are not what they appear to be: nor are they otherwise."

In *Cleveland Real Estate Partners ("CREP"),* the Sixth Circuit adopted a narrow definition of "discrimination." *Id*.[2] The case involved nonemployees' right to access an employer's property for the purpose of informational picketing. In holding that the employer did not violate the Act by prohibiting nonemployee informational picketing, the Court defined "discrimination" as "favoring one union over another or allowing employer-related information while barring similar union-related information." *Id*. In this regard, things are as they appear in *Register Guard*.

Register Guard does not tell the whole story. The definition of "discrimination" adopted in *CREP* was disagreed with by the Sixth Circuit in *Meijer, Inc. v. N.L.R.B.,* 130 F. 3d 1209 (6th Cir. 1997).[3] *Meijer* addressed the legality of disciplinary action taken against employees who wore union pins and other paraphernalia. The employer relied on the Court's holding in *CREP,* but the Court "decline[d] to adopt *CREP's* narrow definition of discrimination." *Id*. at 1213. The Court in *Meijer* held that *CREP* was about an employer's right to prohibit trespassers from its property, "a situation where the interests of the trespasser are at their weakest, and therefore, the property owner has a presumptive right to exclude non-employees from its property." *Id*. In contrast, the Court held that situations involving employees and organizational activity accord the highest amount of protection under the Act and *CREP's* narrow definition is inappropriate in those situations. The court held that "rules dealing with employees' rights of self-organization should reflect the primacy of those rights over the employer's property rights." *Id*. The *Meijer* decision implies that all is not as it appears to be in *Register Guard*.

PROJECTING THINGS TO COME

Despite *register Guard's* broad grant of authority to regulate employee e-mail use, employers should be advised to proceed cautiously. Individual projections onto the state of the law will determine whether or not one believes that the employer's new right really exists. The Board's decision will almost certainly be appealed, and it is unknown how the decision will be received by the Courts of Appeals. Also, the Board itself may not entirely follow the *Register Guard* decision in the future. The Board was split 3-2 on its decision in *Register Guard*. The appointments of three Board members have since expired, leaving one member who was in the majority and one from the dissent. The U.S. Senate will likely wait until the next Presidential Administration to approve new Board members.

For now, employers should review employee e-mail use policies, and make sure systems are in place for uniform enforcement of the policies. Employers are free to draft new restrictions based on *Register Guard*. However, employers should keep in mind that the restrictions most likely to withstand fluctuations in the law are those which can be demonstrated as necessary to maintain production or discipline.

— END NOTES —

[1] *Register Guard* was a three to two decision with Chairman Battista, and Members Schaumber and Kirsanow in the majority. Members Liebman and Walsh dissented.

[2] *Cleveland Real Estate Partners* was a unanimous decision issued by Circuit Judge Ryan. Also on the panel was Circuit Judge Norris and the Honorable Charles W. Joiner, United States District Judge for the Eastern District of Michigan, sitting by designation.

[3] *Meijer, Inc*. was a split decision. Circuit Judge Keith issued an opinion that was joined by Circuit Judge Daughtrey. Circuit Judge Norris issued a dissenting opinion. ■

LOOKING FOR *Lawnotes* Contributors!

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

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

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

EMPLOYER NOT NEGLIGENT BASED SOLELY ON FOREMAN'S CRUDE SEXUAL COMMENTS

Julia Turner Baumhart
Kienbaum Opperwall Hardy & Pelton, P.L.C.

In the Fall 2006 edition of *LABOR AND EMPLOYMENT LAWNOTES*, we reported on a controversial Michigan Court of Appeals decision, *Brown v. Samuel Whittar Steel*, 270 Mich. App. 689 (2006). In *Brown*, a foreman at the defendant's plant had raped a security guard working at the plant who was employed by an outside firm. According to the security guard, she had earlier complained to plant management that the foreman had made sexually crude – but not physically threatening – comments to her. Although negligent retention claims have historically required evidence that the employer knew its employee had engaged in prior physically violent acts (and typically had a prior criminal conviction), the Court of Appeals held that the security guard's negligence claim against the foreman's employer could proceed to trial based simply on her report of his crude comments.

In July 2007, the Michigan Supreme Court reversed in a 4-3 decision, *Brown v. Brown*, 478 Mich. 545 (2007). The majority emphasized that foreseeability has always been the linchpin of negligence claims, and that it is the employer's knowledge of the employee's past violent acts that may render future violent acts foreseeable. Because employers are entitled to assume their employees will obey the criminal laws, crude language alone does not render it foreseeable that the employee will progress from mere words to criminal sexual assault. Indeed, in this case the security guard rape victim, despite the foreman's earlier crude sexual comments, admitted that she did not fear he would physically assault her. She simply thought he was "weird." The Court's majority refused to "transform the test of foreseeability into an 'avoidability' test that would merely judge in hindsight whether the harm could have been avoided."

In essence, the Michigan Supreme Court returned negligent retention claims to their historical moorings, i.e., a standard of foreseeability based on the employer's knowledge of prior assaultive or other violent acts, rather than a standard of clairvoyance. While the Court did not say that words alone can never be enough to invoke the foreseeability standard, it made clear that any such words must "convey an unmistakable, particularized threat of rape" — much more than the crude comments of sexual lust involved in this case. If the standard were weakened, the majority reasoned, a prudent employer would feel called upon to terminate any employee who gave verbal or behavioral "clues" that might allow a jury, exercising 20-20 hindsight, to hold it responsible for a subsequent crime. What employee could possibly survive such scrutiny? ■

SEXUAL HARASSMENT IN THE COURTS

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Recent court decisions suggest that employers should ensure that they have a good complaint gathering process. Court decisions also continue to emphasize the importance of an adequate response by an employer once a complaint of harassment is received. A regular review of an employer's process of handling harassment complaints will ensure less liability for any type of harassment in the workplace.

Complaint System

Recent decisions of two circuit courts reaffirm the importance of a clear and effective complaint process to gather complaints about harassment in the workplace. The claim of a 16 year old fast food employee survived a motion for summary judgment even though she had failed to use the employer's procedures for reporting harassment. Even though the Burger King employed many teenagers, the reporting procedure was ineffective because it was confusing and not tailored to the level of understanding among those employees. *EEOC v. V & J Foods, Inc.*, 101 FEP 1676 (7th Cir. 2007).

The complaints of the teenager to the Burger King shift supervisor and assistant manager, as well as the complaints of the teenager's mother, gave the employer sufficient notice of the suggestive comments and propositions by the store's general manager. The assistant manager gave the teen a company phone number to complain through, but she found that it was a wrong number. At the same time, the employee handbook directed employees to the district manager, but they did not know the name or contact information for that manager. Employees were also expected to direct complaints through the store general manager, even if the manager was the harasser. The court suggested that a toll-free number for human relations should have been posted in the Burger King's employee room.

In contrast to the V & J procedure, the procedure used by Blue Cross has been validated. The U.S. Supreme Court has refused to review a decision from March 2007, in which the Court of Appeals for the 11th Circuit held that a harassed employee failed to take advantage of her employer's means to complain. Ms. Baldwin, the only female Blue Cross marketing representative in her office, suffered propositions and offensive language from her supervisor for about a year before complaining to human resources. *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287 (11th Cir. 2007).

"I'm tired of being viewed as a sex object!"

The *Baldwin* court affirmed the summary judgment for Blue Cross in part because Ms. Baldwin failed to take timely advantage of Blue Cross' valid anti-discrimination policy prohibiting harassment. The policy provided that: "An employee who believes that he or she has been subject to harassment or violence in any form should report the incident or conduct *immediately* to his or her manager or to Employee Relations." Ms. Baldwin failed to comply with the reporting rules and procedures her employer established, according to the court.

Ms. Baldwin also failed to fulfill her prompt reporting duty under the rules the Supreme Court built into Title VII in their *Faragher* and *Ellerth* decisions, requiring that employees take full advantage of the employer's preventative measures. Ms. Baldwin's complaint was made three months and two weeks after the first proposition incident and three months and one week after the second incident. Her delay in reporting the harassment was unreasonable because she did not have good reasons for not complaining sooner. Her fear of being fired or damaging her career prospects did not justify the delay, according to the court.

Appropriate Response by Employer

If an employer learns of harassment, it must attempt corrective action to avoid liability. In the *Baldwin* case outlined above, even if Ms. Baldwin had reported the harassment promptly, the court of appeals would have dismissed her claim based on the adequacy of Blue Cross' response to her complaints. Given the nature of her complaint, Blue Cross was not required to conduct a full-blown, due process, trial-type proceeding in response to her complaints of sexual harassment.

The *Baldwin* court held that Blue Cross's investigation was reasonable under the circumstances, even though the chief investigator failed to speak personally to her, and failed to take notes during his interview with the harassing supervisor. The court discounted the fact that the interview of Baldwin's colleagues took place in a restaurant where the harassing supervisor was present and the finding of one investigator that the responses of one of the interviewed employees seemed rehearsed.

The investigation that Blue Cross conducted met the minimum standards for investigating this type of case, where it was conducted by the director of Blue Cross's Human Resources Department, who had relevant experience. The investigation was also adequate since it included interviews of Ms. Baldwin and the harassing supervisor, as well as other employees of the office who could have witnessed any harassment that had occurred. Overall, the court refused to second guess investigations on grounds of inadequate investigation, because the court did not want to get in the business of supervising internal investigations of harassment conducted by an employer.

The *Baldwin* court also accepted the results of the challenged investigation because the remedial result was adequate. The substantive measures taken by the employer were sufficient to address the harassing behavior, because it was "reasonably likely to prevent the misconduct from recurring." Transferring Ms. Baldwin to another office may have imposed a hardship on her, but that was just one of the options she was given. Blue Cross's offer to have an industrial psychologist conduct a counseling program with Ms. Baldwin and her supervisor, and monitor their relationship, was a reasonable response. The court concluded that a warning to the alleged harasser combined with an offer to counsel both parties and monitoring their relationship was an adequate corrective remedy where the employer could not corroborate the allegations.

In contrast to the response by Blue Cross, a public school district failed to adequately address harassment by a coworker. A public school employee, DeDe Engel, was the target of sexual remarks and requests for sexual favors by a coworker. The appellate court reversed the summary judgment granted for the school, finding that although the school may have responded adequately to the first complaint of harassment, it failed to adequately address continued harassment after the initial discipline of the harasser. *Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118 (8th Cir. 2007).

After Ms. Engel first made a written complaint, the coworker was suspended for more than a month. After he returned to work, he was directed to enter counseling and warned against being alone with any female employees. He was also warned that any further incidents of harassment would result in his dismissal.

Ms. Engel reported continued "leering" by this coworker, who was again suspended. He was again threatened with dismissal when he returned, but he continued to leer at Ms. Engel. She eventually resigned. The court held that after his first suspension, the district failed to prevent further harassment. Instead, by failing to dismiss him as promised, the court suggested that the harasser was "emboldened" to continue his harassing ways. ■

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.

FMLA AMENDED BY 2008 NATIONAL DEFENSE AUTHORIZATION ACT

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The Family & Medical Leave Act (FMLA) provides eligible employees of covered employers up to 12 work weeks of unpaid leave during any 12 month period for certain qualifying events. Until recently, those events only included the following:

1) a parent's birth and care of a newborn child
2) placement of a child for foster care or adoption
3) care for a spouse, child, or parent with a serious health condition
4) an employee's own serious health condition

These qualifying events were expanded under the 2008 National Defense Authorization Act (NDAA), which was enacted in January 2008.

The first new category of eligibility for up to 12 weeks of FMLA leave applies to employees who request leave based on a qualifying exigency arising out of the active military duty of a parent, child or spouse of that employee. Qualifying exigency has not yet been defined. By its express terms, this provision of the NDAA is not effective until the Secretary of Labor issues final regulations defining qualifying exigency.

The second new category allows up to 26 weeks of FMLA leave by an employee to care for spouse, child, parent or next of kin who is a covered service member. These 26 weeks of leave can be taken within a single 12 month period.

Up to 26 weeks of leave can be taken to care for any of the covered relatives if that person is a member of armed forced (including the National Guard or reserves). Leave can only be taken if that service member has suffered a serious injury or illness that was incurred in the line of duty, while the service member was on active duty.

Serious injury or illness is defined as rendering the service member unfit to perform the duties of the person's office, grade, rank or rating. In addition, the service member must be meet one of the following requirements:

1) undergoing medical treatment, recuperation, or therapy
2) otherwise on outpatient status OR
3) otherwise on temporary disability retired list

Just as with other types of FMLA leave, an employee can bring a claim against an employer if the employer denies leave for which the employee is eligible under these new qualifying events. In addition, the employee is entitled to return to work from leave for these new reasons, to the same or an equivalent job, with equivalent pay and benefits (unless the employee is deemed a key employee).

More changes to the interpretation of the FMLA are expected. On February 11, 2008, the Department of Labor published proposed revisions to the regulations interpreting the FMLA. These proposed regulations include a clarification of the definition of a "serious health condition" based on 2 visits to a health care provider and the content of both employer and employee notifications regarding the use of leave. The Notice of Proposed Rulemaking from the Federal Register can be accessed at http://www.dol.gov/esa/whd/fmla/FedRegNPRM.pdf. Commenters were encouraged to submit their comments electronically through the Federal eRulemaking Portal at http://www.regulations.gov but the deadline was 12:00 midnight April 11, 2008. ■

LEONARD PAGE – DISTINGUISHED SERVICE AWARD RECIPIENT

Samuel C. McKnight
Klimist, McKnight, Sale, McClow & Canzano, P.C.

I am honored to introduce Leonard Page as the recipient of the State Bar of Michigan Labor and Employment Law Section's Distinguished Service Award. Leonard has been my friend, my colleague, my mentor and my rabbi for 35 years.

I met Leonard in 1973 when I was a brand new lawyer in private practice, and Leonard was an attorney with the UAW Legal Department. Leonard was also the captain of the UAW union labor lawyers softball team. Leonard had me batting second in the order, but he had himself batting cleanup. A couple years later, my partner Roger McClow joined the team. Leonard put Roger at the top of the order and me at the bottom. But he kept himself batting fourth.

I think Leonard has been batting cleanup ever since with his family, his friends, his community, his colleagues and his profession.

Leonard grew up in Detroit and he grew up in the UAW. His dad was a member of Local 15 at Cadillac Fleetwood. And Leonard worked at Cadillac Fleetwood as a UAW member long before he became a UAW lawyer.

Leonard was class president and valedictorian at Divine Child High School. He got his Bachelors Degree from U of M in 1965 and his MBA from U of M in 1968. He worked in personnel for Ford Motor Company before he became a lawyer. Once he fired a worker, but then he negotiated with the rest of management to reduce the discharge to a suspension.

Leonard got his law degree from Detroit College of Law in 1972, and he joined the UAW Legal Staff full-time. In the years since then, he has touched the lives of hundreds of colleagues who have worked with him as union and management lawyers, representatives and bargainers. As a lawyer, Leonard made a real and a lasting difference in the lives of tens of thousands of workers.

Leonard and Nancy Schiffer wrote the brief to the Sixth Circuit Court of Appeals in the landmark *UAW v. Yard-Man* case. Leonard argued *Yard-Man* before the Sixth Circuit. In 1983, Leonard and the UAW and, most importantly, the *Yard-Man* retirees, won. The Sixth Circuit held that the *Yard-Man* retirees had the right to keep the health care they had earned for their retirement just as they had the right to keep the pension they had earned for their retirement.

Twenty-five years later, the Sixth Circuit's decision in *Yard-Man* is still good law in the Sixth Circuit and continues to enlighten the judgment of courts throughout this country. Many of the lawyers in the Labor Section have argued against as well as for the merits of the Sixth Circuit's decision in *Yard-Man*. But no employee anywhere who worked to earn retirement health care would question the merits of the *Yard-Man* decision which upholds their right to retirement health care.

Leonard served as Associate General Counsel of the UAW for 27 years. He was a key member of the UAW's bargaining team in numerous rounds of GM negotiations, and he represented the UAW in negotiations with literally hundreds of other employers. Leonard litigated virtually every kind of dispute which required the knowledge and skills of a labor lawyer. And Leonard helped resolve virtually every kind of dispute that could possibly occur between owners and workers, between management and labor, and between unions and their members.

On the side, Leonard found time to chair this Section. Time to help administer the UAW Legal Services Plan. Time to be a founding fellow of the College and Labor and Employment Law. Time to serve in the Labor Law Section of the American Bar Association. Time to serve as a Cheboygan County 4-H mentor. Time for countless friends, and, above all, Leonard found time to be true to himself and to his values of family, community and social justice.

In 1999, Leonard was appointed General Counsel of the National Labor Relations Board. He served with distinction until the Administration changed in 2001. As the General Counsel of the NLRB, Leonard, as always, was true to himself. He treated the staff of the Agency, like he treats everyone — with dignity and respect. Leonard valued the principled commitment of many NLRB attorneys and agents to justice; and he focused the authority of the General Counsel's office on fulfilling the noble purpose of the National Labor Relations Act — to promote industrial peace through collective bargaining.

After the Bush Administration retired Leonard from the NLRB, Leonard and Susan built a home on the Page family land on Long Lake near Cheboygan, Michigan. But Leonard has never retired from being Leonard. He has continued his life-long service as an active and contributing member of the NLRB Practice and Procedure Committee of the American Bar Association. Leonard speaks throughout the country about the need for meaningful labor law reform to fulfill the true purpose of the National Labor Relations Act and to protect the rights and opportunities for workers and employers in our country. Leonard is of counsel to our firm and his extraordinary legal talents have continued to make a difference in the lives of workers. Indeed, Leonard is basically of counsel to just about any worker north of Flint whose life is touched by a labor dispute or an employment problem.

In 2006, Leonard was narrowly elected as a Cheboygan County Commissioner. In that role, Leonard, as always, has been true to himself. In the face of recall threats, Leonard successfully sponsored the Cheboygan County Recycling Ordinance because it is the right thing for his community.

Earlier today, I spoke with Leonard about the qualifications for the Section's Distinguished Service Award: make a major contribution to our field of law; have the highest ethical standards; advance the development of labor and employment law; exhibit a commitment to excellence; and be respected by all your colleagues and constituents.

Leonard, as always, was true to himself when he said — I don't think I'm qualified.

But all of us here today know that no one is better qualified than Leonard Page for this award. Not one of us has ever seen Leonard fail to treat any person from any walk of life with anything other than charity, respect and compassion. As I said at the outset, I am honored to introduce Leonard Page to receive the Distinguished Service Award; so that we can all show our appreciation for Leonard's many years of service batting cleanup for his family, his friends, his community, his colleagues and his profession.

MERC UPDATE

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Since the last issue of *Lawnotes*, the Michigan Employment Relations Commission has issued 33 Decisions and Orders in a sundry of cases. A brief summary of three of those cases follows. Of the 33 cases, 23 were unfair labor practice hearings, seven were unit clarification and/or representation hearings, and three were decisions on motions. Recent decisions of the Commission may be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/cis.

Unfair Labor Practices

Utica Community Schools –and- Utica Education Association and Lawanda Parker
Case No. C04 L-320 (October 16, 2007)

On July 24, 2006, the ALJ issued a Decision and Recommended Order finding Respondent violated Section 10(1)(a) and (c) by eliminating Lawanda Parker's "assignment and extra-curricular position" of assistant band director in retaliation for her union activity.

Parker, who was the head building representative for the union at one of Respondent's high schools, filed a grievance concerning the number of students per teacher, as regulated by the collective bargaining agreement. The agreement required increased compensation when teachers' loads exceed the maximum student load. Parker and another union member discussed the grievance with the school's principal, who brashly responded that the problem could be resolved by removing Parker from her band assignment. In a subsequent memorandum to the school staff, the principal indicated Parker was unwilling to volunteer "to provide relief to her colleagues."

Soon after the memorandum, Respondent created a budget committee that recommended the elimination of 30 full-time teaching positions, with Parker's position as the only specifically named position to be eliminated. After reviewing the record, the Commission upheld the ALJ's decision finding Respondent eliminated the assistant band director position in response to Parker's protected concerted activity of filing and pursuing a grievance.

Chippewa County -and- American Federation of State, County and Municipal Employees Council 25, Local 946 and Susan Shunk
Case Nos. C04 F-145, R04 D-058 (January 9, 2008)

-and- ***AFSCME Council 25 v Chippewa County,*** **2007 Mich App Lexus 2498 (October 30, 2007) (Unpublished Opinion)**

In this case, the contract between the parties expired on December 31, 2003. A tentative agreement ("TA") was reached on April 7, 2004. The parties agreed that this TA had to be ratified by both parties. The union ratified the agreement, while the county was scheduled to ratify the agreement on May 10. However, on May 5, the county received a decertification petition. The county, after discussing the matter with legal counsel, decided that it would be improper to proceed with the ratification process while the decertification petition was pending and refrained from voting on the TA.

The union filed a ULP charge alleging the county's failure to ratify the TA within 30 days of its execution demonstrates bad faith bargaining and was a purposeful attempt to assist the decertification effort.

In its initial decision (18 MPER 83 (2005)), the Commission reiterated its prior ruling that a TA will, for a period of up to 30 days thereafter, bar a rival union's election petition or decertification petition pending subsequent action on the TA by the employer's legislative body. A petition is dismissed if the legislative body approves the TA within the 30 days, and is not dismissed if the legislative body votes to reject the TA or takes no action within the 30-day period. So, the Commission held that the petition here should not have been dismissed, and the decertification election could proceed, because the TA did not constitute a legally enforceable collective bargaining agreement.

The Court of Appeals first considered whether it was illegal for the county to refuse to ratify the TA within 30 days following the negotiation of the TA. The Commission has held the duty to bargain collectively requires a party to act expeditiously and decisively to accept or reject a TA. The Court concluded that the county did not violate PERA since there was no evidence that it had unreasonably delayed its ratification vote. The county scheduled the vote in a timely manner and consulted with its legal counsel once the decertification petition was received. Even though the county was mistaken in concluding that it could not proceed, there was no evidence of bad faith.

The Court next considered whether the Commission erred in ordering that a decertification election take place. The Commission precedent indicates that where the parties have signed and dated a TA, ratification is a condition subsequent to a valid agreement. The Court held, since the county's belief that it could not ratify the TA after the decertification petition was filed was erroneous, the 30-day contract bar should be enforced. The Court noted, "there is no indication that the county would have failed to vote on the TA had the decertification petition not been filed and had the county not believed that it was precluded from proceeding to vote on the TA."

On remand, the Commission ordered a 30-day period for the county to take action on the TA, or to allow the decertification petition to proceed if the county rejected the TA or allowed the 30-day petition bar to elapse.

Unit Clarification

City of Livonia –and- Michigan AFCSME Council 25
Case No. R06 G-075

On July 10, 2006, Petitioner filed a representation election petition for a residual unit of part-time and seasonal employees in Respondent's parks and recreation department. Respondent designates all of its positions as either permanent full-time, permanent part-time, temporary full-time, or temporary part-time. Petitioner sought to create a residual unit covering employees designated as temporary part-time. The petition covers 35 separate positions within Respondent's parks and recreation department, with many positions being filled only during the summer. In determining whether the proposed unit should be included, the Commission noted several individuals worked sporadically and had no real continuing interest in the terms and conditions of employment. The Commission indicated the following employees are eligible to vote:

(1) Employees who averaged eight or more hours per two week pay period in two of the three quarters immediately preceding the date of this direction of election;

(2) Employees hired within the quarter immediately preceding the date of this direction of election who averaged eight or more hours per two week pay period worked; and

(3) Employees who averaged eight or more hours per two week pay period between June 15 and Labor Day in each of the two years immediately preceding the date of the decision and direction of election.

While determining voter eligibility, the Commission rejected the NLRB's *Davison-Paxon* on-call test, finding on-call substitutes to be "casual employees." In rejecting the NLRB's *Davison*-Paxon on-call test, the Commission rejected an average regular hours worked test, finding that "casual employees'" assignments are irregular and that such "casual employees" make no commitment to work from day to day. The Commission further held employees who only work one season (usually summer) have no interest in the terms and conditions of their employment. Having selected the appropriate employees eligible to vote, the Commission ordered an election. ■

NOTES FROM A DEPLOYED JAG ATTORNEY

Jeffrey S. Kopp
Foley & Lardner LLP
and
U.S. Army

The chartered Boeing 767 loaded with weary soldiers touched down at Kuwait City International Airport at 10:25 p.m., after nearly 24 hours of grueling multi-continental travel. After we deplaned, I boarded a small passenger bus headed for a nearby base, where I would stay for a few days before heading north to Iraq. We were told to keep the window curtains pulled closed for security reasons. But travel that night was not to be. Welcome to the desert! A huge sandstorm came in and stalled the bus in the staging area right next to the tarmac. "Enjoy your first night in country," the veteran bus driver noted, as my body quickly became L-shaped as I settled into the seat for the next 12 hours where I would toss and turn hoping to get a wink of sleep. You can imagine the relief when the sandstorm ended, and we were permitted to begin the short ride to the nearby base where we would make final preparations before continuing on to Iraq.

A few days later, I boarded a UH-60 Blackhawk helicopter, duffel bags loaded on top of me and my fellow soldiers, and we took off on the short flight to Camp Bucca, Iraq, where my unit, the 300th Military Police Brigade from Inkster, Michigan, was stationed. The 300th arrived at Camp Bucca more than a month before me, and I was a later arrival who would be working as the detention operations attorney for the brigade. The scene was much like Charlie Sheen's arrival at his base camp in the movie "Platoon," where hardened veterans with their desert style boonie caps eyed the "green" newcomer with curiosity, if not disdain. Bags in hand, I headed to the Quonset hut tent where I would download my bags and stake a claim to an unoccupied bunk that I could find among the 100 or so already occupied. This feat would be unremarkable, except that it is a true accomplishment to navigate the obstacle course of duffel bags and personal object in a pitch black tent without causing injury or serious damage to myself or a sleeping soldier. I dropped my bags and promptly headed to the office.

Within an hour of my arrival, I had my first legal issue — and it has been non-stop ever since. Camp Bucca is the U.S. military's largest detention operation facility in Iraq, housing approximately 20,000 detainees. The issue dealt with whether a military guard followed proper rules for the use of force in handling an obstinate detainee. The situation prompted a detailed investigation, which required obtaining numerous sworn witness statements, affidavits, and pictures. It turns out the guard did exercise the proper protocols, validated by the investigation. After completing my review of the investigation report and attached exhibits, I concurred with the investigating officer that there was no wrongdoing. So, several hours later, long after the sun had gone down, my first day in Iraq ended.

It has been over a month since that introduction, and I've learned much that I can share with you, I can tell you that how we conduct detention operations is probably the most important factor that will determine the outcome of the United States presence in Iraq. In prior wars, the "front line," if you will, was the place where the battle was taking place — usually for land or ground — places like Bastogne and Gettysburg. But today, this war is not about conventional battle, and it is not being waged in a similar vein. Today, the "front line" is Camp Bucca, Iraq.

It is here at Camp Bucca where the commanders and their soldiers, sailors, and airmen are fighting the battle every day. These brave young people have an awesome responsibility to provide exceptional care and custody of detainees under their charge — those who have been identified as presenting a security threat to Coalition Forces or to the people of Iraq. They provide that care and custody with utmost dignity, upholding our American values of respect, liberty, justice, and fairness for each and every detainee under their care. The United States can only succeed if we accomplish this mission flawlessly — there can be no more Abu Ghraibs.

But the mission of detention operations goes beyond care and custody, as success in Iraq not only demands exceptional care and custody, but requires a concerted effort of coordinated counterinsurgency methods. Our counterinsurgency has the goal of isolating extremism and empowering moderate detainees to believe that they have the resources and ability to establish a peaceful society founded on equality, democracy, and liberty. We do this by providing them the resources and skills to do so — we provide illiterate men the ability to attend school to learn basic reading and math skills, we teach them civics, art, carpentry, agriculture, and religious tolerance. We are teaching them to be productive citizens who can take pride in their communities and country, and can peacefully coexist with their neighbors, even if they are a different religious sect. We hope that someday they will be able to enjoy the same blessings that you all share in your lives.

Only through proper care and custody and our engagement efforts can we at Camp Bucca properly assess which detainees should be released to their homes and families. Assessment is the most difficult aspect of this operation, because we want to release only those who no longer pose a threat and continue to detain those who are unwilling to accept those ideals that we wish to promote. And we are getting better and better at proper assessment every day.

It is these important goals that make the family separation that deployed soldiers, sailors and airmen endure worthwhile and tolerable. We accept the brutally hot days, the aggressive flies that could be called terrorists in their own right, and the dreadful, painfully slow internet connections (I know — wah, wah!) — all with very little complaint. We do this because we hope that our efforts will result in a world with less violence, greater respect for each other, and a more likely probability that our children can grow up in a world free from terrorism. These things are not "pie in the sky" goals at Camp Bucca.

So while I write this article, I look forward to the many challenges during the next several months that require legal input for decisions affecting U.S. operations at Camp Bucca. These questions range from whether we are using the correct appropriated funds to purchase necessary supplies, to whether detainees must be provided a certain minimum square feet of space in order to satisfy the Geneva Conventions. Luckily, I have experienced paralegals and attorney colleagues who are great resources and have exceptional expertise in these areas. My own experience with human resources investigations and employment law certainly has helped make this transition easier.

I am looking forward to sitting on a tarmac waiting to jump on that UH-60 helicopter for the return flight home. Home to my family, friends, and firm that I miss dearly. When that day comes, I will be a different person from that "green" soldier who stepped off the bird some months before, thankfully knowing that this experience has exposed me to real world issues and provided me a chance to make a valuable contribution to our country's goals.

I just hope that I won't have to endure another miserable bus ride. ■

COURTS GRAPPLE WITH FMLA ISSUES

Shannon V. Loverich
Kienbaum Opperwall Hardy & Pelton, P.L.C.

In recent months federal trial and appellate courts have addressed another batch of the seemingly endless interpretive issues that can arise under the Family and Medical Leave Act (FMLA) and the accompanying Department of Labor (DOL) regulations.

Fourth Circuit Reinstates Decision Requiring Supervised Waiver of FMLA Claims.

After granting rehearing, a panel of the U.S. Court of Appeals for the Fourth Circuit reaffirmed its original view in *Taylor v. Progress Energy, Inc.* 493 F.3d 454 (4th Cir. 2007): the plain language of a DOL regulation stating that employees cannot waive their rights under the FMLA precludes both prospective and retrospective waivers of FMLA rights, including claims for past violations of the Act, without DOL or court supervision. Taylor executed a release of legal claims in exchange for severance benefits when she was terminated, but later sued her employer, claiming she was improperly denied FMLA leave. The Fourth Circuit held in 2005 that the release was ineffective as to Taylor's FMLA claim, but granted rehearing after its decision stirred controversy and DOL filed a post-decision amicus brief criticizing the Court's interpretation. According to DOL, the regulation was intended to bar only the prospective waiver of FMLA rights, not the settlement of claims. One judge changed her vote because she believed that DOL's position reformulated the issue, but the majority reiterated that the FMLA is not an anti-discrimination law, but a labor standards law like the FLSA, which prohibits the unsupervised settlement of claims. The Fourth Circuit criticized a contrary 2003 interpretation of the regulation by the Fifth Circuit.

Hours An Employee Was Paid – But Did Not Work – Do Not Count Toward Eligibility.

In *Mutchler v. Dunlap Memorial Hospital*, 485 F.3d 854 (6th Cir. 2007), the U.S. Court of Appeals for the Sixth Circuit confronted the question whether hours credited as a reward, but not actually worked, count for purposes of FMLA eligibility. A nurse who requested FMLA leave to have surgery for carpal tunnel syndrome fell only seven hours short of the 1,250 "hours of service" in the prior twelve months required for FMLA eligibility. She was also paid for additional hours not actually worked through her employer's "weekend program," which compensated nurses who worked four twelve-hour weekend shifts in a two-week period for 68 hours of work instead of 48. The Sixth Circuit rejected the nurse's position that the additional paid hours should be counted as "hours of service" for FMLA eligibility because she had not worked those hours. The court distinguished its 2004 decision in *Ricco v. Potter*, 377 F.3d 599 (6th Cir. 2004), which held that hours a wrongly terminated employee would have worked had he not been terminated must be counted for FMLA eligibility purposes.

FMLA Does Not Protect Employee Who Submits Suspicious Medical Certifications.

Another recent Sixth Circuit case, *Novak v. MetroHealth Medical Center*, 503 F.3d 572 (6th Cir. 2007), involved a financial counselor who was terminated for violating her employer's no-fault attendance policy, which assigned points based on an employee's hours of unexcused absence. Approved absences such as FMLA leave were not counted. After exceeding the number of points that would require discharge, Novak sought to designate a series of absences as FMLA leave, citing her own back condition and alleged serious health conditions of her daughter and newborn grandson. She initially submitted incomplete medical certifications from a physician who, it developed, had no personal knowledge of her back condition and had not examined her recently (although a colleague had). She also submitted certifications attempting to demonstrate that she was needed to help care for her grandson due to her daughter's post-partum depression. MetroHealth determined that none of the absences qualified for FMLA leave and terminated Novak.

The Sixth Circuit agreed that Novak's certification forms were insufficient to establish a serious health condition. The first certification was unreliable because the doctor who completed it lacked personal knowledge of the employee's condition, and MetroHealth was not required to obtain a second medical opinion before rejecting the certification. The court also rejected Novak's request for leave based on her daughter's depression, noting that the FMLA does not authorize leave to care for an employee's grandchild and permits an employee to take leave to care for an adult child only if the child suffers from a serious health condition and is "incapable of self-care because of a mental or physical disability." The certification regarding the daughter's short-term depression did not state that she was unable to care for herself. Consequently, Novak's absences were properly counted under the no-fault attendance policy.

The panel members expressed differing views about whether EEOC interpretive guidance under the ADA, indicating that temporary, non-chronic impairments of short duration are not disabilities, could be used in the FMLA context – a proposition the First Circuit has firmly rejected – but agreed that Novak's case did not require deciding the issue.

Employee Receiving STD While on Leave Cannot Be Required to Use Sick or Vacation Benefits.

In *Repa v. Roadway Express*, 477 F.3d 938 (7th Cir. 2007), the U.S. Court of Appeals for the Seventh Circuit limited an employer's right to require "substitution" of accrued paid time

for unpaid FMLA leave. After suffering a non-work related injury that required a six-week absence from work, Repa began receiving short-term disability (STD) benefits through a multi-employer welfare benefit plan to which her employer contributed. Roadway granted Repa's request for FMLA leave but notified her that she must "substitute" accrued paid time, and it paid her for vacation and sick days in addition to the STD benefits. Repa sued, arguing that, although the FMLA allows "an employee [to] elect, or an employer [to] require the employee, to substitute" accrued paid time, this right of "substitution" is limited by a DOL regulation, 29 C.F.R. 825.207(d)(1). The Court agreed with Repa that DOL was entitled to provide that if "leave pursuant to a temporary benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable."

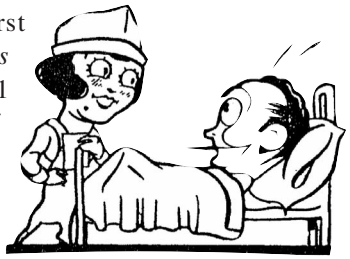
Prorated "Production" Bonus Does Not Violate FMLA.

In *Sommer v. Vanguard Group*, 461 F.3d 397 (3rd Cir. 2006), the U.S. Court of Appeals for the Third Circuit addressed a recurring FMLA issue. Sommer's eight-week FMLA leave meant that he did not have enough work hours for the year to meet a performance-based threshold for earning a full bonus. He sued, claiming his employer could not legally reduce his bonus due to time he had spent on FMLA leave. The Court disagreed, drawing a distinction between "production" and "occurrence" bonuses. "Production" bonuses require positive effort on the employee's part (*e.g.*, billing a certain number of hours or selling a particular number of products), whereas "occurrence" bonuses reward an employee for complying with rules (*e.g.*, for having no safety violations or having perfect attendance). The Court held that employers can prorate production bonuses — but not occurrence bonuses — for factors resulting from FMLA leave, including reduced hours.

Prior Approved Leaves Do Not Excuse Employee From Documenting New Leave.

In *Greenwell v. State Farm Mutual*, 486 F.3d 840 (5th Cir. 2007), the U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal of an employee's FMLA lawsuit because she did not provide sufficient FMLA notice to prevent her termination. Greenwell had a history of excessive absences and was required by State Farm to give at least 24 hours notice for scheduled time away from the job. She was terminated after she missed work without giving the notice. She told her supervisor that she needed to stay home with her son because of a flare-up of his asthma condition, and did not complete FMLA forms because she did not have medical documentation for this event. Greenwell argued that she had provided sufficient notice of her intention to seek FMLA leave because she previously had two FMLA leaves approved to care for her son's asthma condition. The court held that Greenwell had not sufficiently connected the latest absence to a medical condition qualifying for FMLA protection. Her decision not to complete the forms prevented her employer from making an FMLA determination, and she offered no persuasive reasons for departing from normal FMLA procedures or neglecting to secure medical documentation.

Employer Correctly Counted Holidays in Calculating Intermittent FMLA Leave.



"You'll need medical leave!"

Deciding an issue of first impression in *Mellen v. Trustees of Boston University*, 504 F.3d 21 (1st Cir. 2007), the U.S. Court of Appeals for the First Circuit held that the University provided Mellen with the full duration of leave required by the FMLA even though it counted holidays that fell within her leave period in calculating her intermittent leave entitlement. Mellen contended that a DOL regulation, 29 C.F.R. 825.205(a), obligated BU to extend her intermittent leave to replace three holidays that fell within it, and that because of its failure to comply BU had prematurely treated her absence as a voluntary resignation. BU pointed to another DOL regulation – 29 C.F.R. 825.200(f) –stating that a holiday falling within a week taken as FMLA leave has no effect on counting that week as a week of FMLA leave. Agreeing with the University, the First Circuit concluded that the two regulations work together. If an employee's intermittent leave includes a full, holiday-containing week, the "amount of leave used" includes the holiday. The purpose of the regulation cited by Mellen, said the Court, is to prevent an employer from claiming that an employee who takes off one day during a five-day week has used an entire week of leave, not to give an employee who takes five weeks of intermittent FMLA leave more days than an employee who takes five weeks of continuous leave.

FMLA Damages Allowed For Employee's Injury In Non-Comparable Job.

In *Bordeau v. Saginaw Control & Engineering*, 477 F.Supp.2d 797 (E.D. Mich. 2007), an employee sought damages under the FMLA for back injuries he received after returning from FMLA leave to a manual labor position. Before his leave he had been a purchasing manager. A U.S. District Court in Michigan found that the FMLA does not authorize compensatory damages for such physical injuries, because its remedy section makes an employer who violates the FMLA potentially liable for "any wages, salary, employment benefits, or other compensation denied or lost" by reason of the violation, or any directly resulting actual monetary losses. The Court held that Bordeau's inability to work and earn because of his back injury did not amount to wage loss or actual monetary loss as a "direct result of" the FMLA violation. Nevertheless, it allowed Bordeau's lawsuit to go forward on the theory that the FMLA permits "equitable relief," including front pay where reinstatement is not appropriate or possible, in cases where the employee – like Bordeau – had been physically disabled from working because of the violation. ■

UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long

The Court Will Hear Oral Argument on Two Additional Employment Cases This Term

The Court has agreed to review two more employment cases this term, adding to the six previously set for oral argument. One of the cases involves the burden of proof in a disparate impact age discrimination case. The other involves the definition of protected activity under Title VII of the Civil Rights Act of 1964.

In *Meacham v. Knolls Atomic Power Lab.*, No. 06-1505, the defendants terminated the plaintiffs' employment as part of a reduction in force. The plaintiffs brought a claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 631(a), alleging that the defendant's reduction in force policy had a disparate impact on older workers. A jury found in favor of the plaintiffs and agreed that the defendant's facially neutral reduction in force policy had a discriminatory impact on older employees. The Second Circuit affirmed the verdict. The court held that the defendant's reliance on subjective factors to select employees for the reduction in force was not a "business necessity" and that there were available alternatives that would not have adversely impacted older workers. *Meacham*, 381 F.3d 56 (2d Cir. 2004)

The United States Supreme Court granted certiorari, vacated the Second Circuit's order and remanded for reconsideration in light of *Smith v. Jackson*, 544 U.S. 228 (2005). In *Smith*, the Court held that a plaintiff may bring a disparate impact claim under the ADEA, but rejected the "business necessity" test in favor of a "reasonableness" test. The reasonableness test precludes a finding of liability if the adverse impact can be attributed to a reasonable factor other than age. The reasonableness test does not involve an inquiry into whether there were other ways for the defendant to reach its goals that would not result in a disparate impact.

On remand, the Second Circuit changed its position and reversed the jury verdict. *Meacham*, 461 F.3d 134 (2d Cir. 2006) The court reasoned that the "business necessity" test was not applicable to ADEA claims and that the appropriate test was whether the defendant's reliance on "reasonable factors other than age" constituted a reasonable means to achieve the defendant's legitimate business goals. The court also held that the plaintiffs held the burden of proof.

The plaintiffs sought review on the issue of burden of proof, and the Court granted certiorari. The issue before the Court will be whether plaintiffs alleging a disparate impact claim of age discrimination have the burden of proving that the defendant did not rely on reasonable factors other than age. The Solicitor General has filed an amicus brief asking the Court to adopt the Equal Employment Opportunity Commission's position that the "reasonable factors other than age" analysis is an affirmative defense on which the defendant bears the burden of proof.

The Court has also agreed to review *Crawford v. Metro. Gov't of Nashville & Davidson Cty., Tenn.,* No. 06-1595. In *Crawford,* the Court will consider whether an employee's participation in her employer's internal sexual harassment investigation amounts to protected activity under the anti-retaliation provision of Title VII. The plaintiff in *Crawford* had been employed as the defendant's payroll manager. During her employment, she provided information during an internal sexual harassment investigation. Several months later, the defendant terminated the plaintiff due to alleged embezzlement and drug use. The plaintiff sued, claiming that the defendant terminated her employment because of her participation in the internal sexual harassment investigation.

The district court granted summary judgment to the defendant, and the Sixth Circuit affirmed. The court of appeals held that because there was no charge of discrimination pending at the time the plaintiff participated in the defendant's internal investigation, her participation was not a protected activity under the participation clause of Title VII's anti-retaliation provision. *Crawford v. Metro. Gov't of Nashville & Davidson County*, 211 Fed. Appx. 373, 376 (6th Cir. 2006) The plaintiff appealed. The Justice Department submitted an amicus brief, signed by the EEOC General Counsel and Solicitor General urging the Court to grant certiorari and arguing that the Sixth Circuit's holding is contrary to the intent of Title VII. The Court granted certiorari to address the issue of whether employee participation in an employer's strictly internal investigation is entitled to protection under Title VII.

— END NOTE —

[1]A TAM is not binding on a court and cannot be cited as precedent. ■

THE BEST KEPT SECRETS AT MERC

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Following are several MERC-related issues about which even the most seasoned practitioner may not be aware. We hope that this information is helpful as you navigate through Commission procedures.

1. A party may strike the name of an "advocate" from a proffered panel of Act 312 arbitrators or fact finders.

Some members of MERC's panel of Act 312 arbitrators and fact finders are "advocates," per the definition set forth in Commission Act 312 Rule 1(b) that provides:

> "Advocate" means an individual who has represented management or a union in the past 5 years prior to his or her appointment to the arbitration panel. Advocate also means an attorney who is associated with a firm that has represented management or a union in the past 5 years prior to his or her appointment to the arbitration panel.
>
> According to Act 312 Rule 6(1):
>
> If a commission-nominated arbitrator is an advocate, either party may notify the other party and then ask the commission to delete the arbitrator's name from the list of nominees and provide the parties with the name of an arbitrator who is not an advocate.

Based on these rules, a party may object to the name of an individual who is an "advocate," and a replacement name will be provided. The right to strike for advocacy is also followed in the MERC's fact finding procedures.[1]

2. The same panel member may serve simultaneously as an Act 312 chairperson and as a fact finder and issue an Act 312 award and a fact finding report/recommendation.

From time to time, a bargaining unit is comprised of Act 312 eligible employees and employees who are not eligible for Act 312; or an employer may have two or more bargaining units (of Act 312 and of non-312 eligible employees) engaged in negotiations simultaneously. In such cases, the parties may agree or MERC may direct that the neutral chairperson of the Act 312 panel also serve as a fact finder and issue both an Act 312 arbitration award and a fact finding report. Allowing one individual to serve as both arbitrator and fact finder is both expeditious and financially prudent as it alleviates the need for repetitious proceedings.

3. Act 312 awards and fact finding reports are posted (via a link) on MERC's web-site.

When our agency receives a request for a copy of a previously-issued Act 312 award or a fact finding report, we direct the requestor to our web-site at www.michigan.gov/merc. There, under Fact Finding Reports and Act 312 Arbitration Awards, is a link to the web-site of the MSU School of Labor and Industrial Relations library (the repository of MERC Act 312 awards and fact finding reports), on which the documents are posted. If a PDF version of the final document has been sent to the library, a signed copy will be posted.

You may access these documents directly at the MSU School of Labor and Industrial Relations library web-site at http://turf.lib.msu.edu/awards/.

4. A MERC mediator cannot testify about mediation matters.

On rare occasions, a MERC mediator is subpoenaed to provide testimony concerning mediation or documents prepared during a mediation conference. Rule 25a of the Labor Relations and Mediation Act provides:

> . . . [A] labor mediator, or other agent of the commission dealing with the mediation process shall not disclose confidential information received by him for the purpose of resolving a dispute in the course of his official duties under this act.
>
> Confidential information is defined in subsection (3) of that rule as:
>
> . . . a statement, report, memorandum, document, or other communication or instrument which is not intended to be disclosed to third persons other than those to whom disclosure is necessary to enable … the labor mediator or other agent of the commission dealing with the mediation process to perform his duties in resolving the dispute.

5. An appellant must file a Claim of Appeal with MERC along with a request for the Docket Entry Sheet, but need not request the MERC transcript.

A party who disagrees with the Commission's final order may file an appeal with the Michigan Court of Appeals. Upon filing the appeal, the appellant must file with MERC a copy of the claim of appeal *and* a written request that a copy of the register of actions (docket entry sheet) be provided to the Court. It is *not* necessary for the appellant to request that a copy of the transcript be sent to the Court.

Generally, within two weeks of receiving the request for the docket entry sheet, it will be prepared by Commission staff. The docket entry sheet lists all documents considered part of the record including: pleadings, motions, briefs, transcripts, exhibits, decisions, orders, and other correspondence in the matter that has been filed by the parties or sent to them by the Commission or its staff. On completion, the docket entry sheet is sent directly to the Court, and copies are sent to each of the parties.

Sometime thereafter, the Court will send MERC a request for the certified record in the case. The certified record includes the transcript of any hearing in the matter, all exhibits, and the original of every other document that has been listed on the docket entry sheet. At this point, the file and docket entry sheet are reviewed once again to ensure the correctness of the docket sheet and to make any necessary amendments. Generally, within three weeks of receiving the Court's request, MERC sends the certified record to the Court. At the same time, we send the parties notice that the record has been provided to the Court and a copy of the docket sheet listing the contents of the record.

When the Court of Appeals disposes of the case, the Court provides MERC with a copy of its decision or order. Once the appeal period has passed, if the matter has not been appealed to the Michigan Supreme Court, the Court of Appeals will return the record to our offices.

6. MERC has jurisdiction over some private sector matters.

Under the Labor Relations and Mediation Act, MERC has jurisdiction to regulate the collective bargaining relationships between private sector employers and unions not within the exclusive jurisdiction of the National Labor Relations Act. Thus, MERC has jurisdiction over small employers who do not meet the monetary threshold required by the NLRB, as well as some private sector employers over whom the NLRB will not assert jurisdiction (e.g., race tracks). Also, Section 8(d) of the National Labor Relations Act and Section 7(2) of the Public Employment Relations Act require parties to a contract to notify the FMCS and the state agency (MERC) of upcoming contract expiration. MERC mediators, therefore, often mediate alongside their federal counterparts or act as the sole mediator in private sector cases.

While, in general, MERC has no jurisdiction over State classified civil service employees and federal government employees, MERC mediators may be asked to assist with the resolution of State of Michigan labor contracts or issues. Also, MERC administers Act 17 of 1980 – a statute that provides for compulsory, binding arbitration of labor-management disputes between the State and the Michigan State Police Troopers and Sergeants Association.

7. MERC rarely grants requests for oral argument.

While parties frequently request oral argument before the Commission per Rule 161(4), MERC rarely grants requests for oral argument, concluding that it would not materially assist them in deciding the merits of a case.

8. An answer to an unfair labor practice charge is not required by statute or MERC Rules.

There is no statutory or other requirement that a party file an answer to an unfair labor practice charge; however, answers assist the Administrative Law Judge to better understand the fundamentals of the case prior to hearing.

— END NOTE —

[1]You might recall that in a previous MERC Corner, we solicited applications for MERC's panel of neutrals. At that time, we stated that the fact that an individual is an advocate for management or a union should not dissuade someone from making application. While a number of advocates applied and were placed on the panel, they were overwhelmingly "management advocates." In an effort to assure a balanced panel, MERC continues to actively seek and encourage applications from qualified neutrals or "union advocates." ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

"The inquiries of the jurist are in truth prosecuted much as inquiry in physics and physiology was prosecuted before observation had taken the place of assumption."

- Sir Henry Maine, *Ancient Law* 1861

Sir Henry got it exactly right. In earlier times physics and medicine were arts. The physicist and the physician proceeded by light of intuition and inspiration. In more recent times first physics and then medicine became sciences. Notwithstanding the recent fascination with "alternative" treatments and a revival of interest, in some quarters, in ancient mumbo-jumbo, real medicine, like physics, now proceeds on the basis of data.

When you go to a doctor she takes a history and conducts a physical examination. Based on the history and physical and your presenting symptoms, she orders tests. And based on the results of those tests she orders appropriate treatment.

In contrast, consider what happens when you go to a mediator. Suddenly we're back in the middle ages. The mediator proceeds guided by intuition. Mediators have nothing even remotely equivalent to a history and physical to guide us at the beginning of an intervention; and we have nothing like an autopsy to act as a corrective at the end of one.

We have no idea when to use caucus and when to use joint sessions, when to be evaluative and when to be facilitative, when to allow venting and when to cut it off, when to be active and when to be passive. We do it by feel.

Some of our cases settle, to be sure. And it is enormously satisfying when they do. But some patients used to get better following primitive medical procedures. What we do not know, just as our ancestors did not know, is whether those results occurred because of our efforts or in spite of them.

Like ancient physicians, we are happy to take the credit when things go well, and we're happy to collect our fees in any event. But if we are honest even the most experienced of us have to admit we don't really know what we're doing. Certainly not in the sense that a doctor administering a medication knows what she is doing.

Some people will tell you that a scientific understanding of dispute resolution is impossible. Human beings are just too complicated, they will say, or there are just too many variables. This is nonsense. It is the argument always raised by witch doctors when their livelihood is threatened by scientific medicine.

There are only two possible ways the field of dispute resolution can become more scientific. One is that we can do the necessary work. The path from speculation and intuition to firmly grounded science comes through careful measurement and collection of data. If dispute resolution is ever going to take its place as a legitimate area of study concerned with a meaningful body of knowledge, it is going to have to do the same. We are going to have to develop measurement instruments and consistent data collection protocols. We are going to have to test our hypotheses in randomized, controlled, double-blind studies. We're going to have to *do the math*. There is nothing sexy about this kind of work. It's much more fun to stride in like a witch doctor in a puff of colored smoke.

The other possibility is that we can steal the work of others. A great deal of real science has been done in economics, psychology, evolutionary theory, game theory, decision theory, cognitive science and elsewhere that can have direct application to the field of dispute resolution.

Editor's Note: Barry Goldman's contribution to the application of other disciplines to ADR continues with ALI-ABA's Spring 2008 publication of his book, *The Science of Settlement: Ideas For Negotiators.* Information is available at ali-aba.org.

EASTERN DISTRICT UPDATE

Jeffrey A. Steele
Clark Hill, P.L.C.

Harassment Dating Back Eight Years Admissible as "Background Evidence"

Judge Cohn ruled in *Smith v Caro Carbide Corp,* 2007 US Dist LEXIS 90486, that conduct that occurred up to eight years before the plaintiff filed suit helped create a jury submissible harassment claim. Noting that the Michigan Supreme Court eliminated footnote 14 from its original opinion in *Garg v Macomb Co Community Mental Healty Sys,* 472 Mich 263 (2005), Judge Cohn agreed with *Ramanathan v Wayne State Univ Bd of Governors,* 2007 Mich App LEXIS 28416, and ruled that courts have discretion to admit, as "background evidence," harassment that took place outside the limitations period.

Duty to Accommodate Does Not Require Employers to Provide Leave Until the Plaintiff Can Return to Work

The plaintiff in *Peterson v General Motors Corp,* 2008 US Dist LEXIS 783, argued that the employer should have kept him employed until he had and recovered from a third back surgery. Judge Steeh disagreed, ruling in part that the duty to accommodate does not "require 'granting the plaintiff a medical leave until such time as he would be able to perform the requirements of the job.'" Nor does it "extend to new job placement or vocational rehabilitation efforts."

$500 Refundable Arbitration Fee "Unreasonable"

Judge Cohn ruled in *Mazera v Varsity Ford Services, LLC,* 2008 US Dist LEXIS 7498, that it is unreasonable to require an employee, who made slightly more than minimum wage, to deposit $500 to commence arbitration proceedings. The predispute agreement had a waiver provision, but "the fact that Varsity Ford has the sole authority to determine whether the $500 will be waived raises a question as to the genuineness of the waiver program."

The "Direct Evidence" Standard Remains High

In *Scott v Hemlock Semiconductor Corp,* 2007 US Dist LEXIS 88012, the African-American plaintiff alleged that a supervisor 1) once referred to him as "boy," 2) once said, while debating who could do a job faster, that he would "put his white hood on" and "whip" the plaintiff, and 3) once said, while discussing the large amount of land the employer had just acquired, that he could hang the plaintiff on the new land without anyone finding him. Judge Ludington initially ruled that this was direct evidence of race discrimination. He reversed that ruling on reconsideration, because the comments predated the termination decision by at least seven months and "none of the supervisor's comments explicitly express a connection between any racial bias and the employment action taken against Plaintiff."

Periodic Tantrums and a "Disrespectful Attitude" is Not Actionable Harassment

The plaintiff in *Hashem-Younes v Danou Enterprises, Inc,* 2008 US Dist LEXIS 3897, alleged that a subordinate acted disrespectfully toward her, once responded to her criticisms in an inap-

propriately heated manner, and once yelled at the plaintiff and jabbed his hand in her face at a meeting. Although the plaintiff believed the subordinate's disrespectful attitude stemmed from sexism and his cultural bias against women, the subordinate never actually said that he had a low opinion of women. Judge Cleland ruled that this conduct "falls far short of actionable harassment." It was episodic and, at worst, involved an employee losing his temper. "Harassment jurisprudence requires that the court distinguish between harassment and discriminatory harassment" and courts "are not arbiters of proper workplace behavior." Because the plaintiff did not allege any discriminatory conduct, her complaints to management that the subordinate was being disrespectful to her could not sustain the "protected activity" element of a retaliation claim.

Judge Cleland also dismissed the plaintiff's various discrimination claims, in part, because the Muslim plaintiff was replaced by a Muslim, the "same actor inference applied," and the plaintiff's claim that she was performing satisfactorily "is merely a disagreement with Defendants' business judgment, which is an improper basis by which to establish pretext."

Questioning How to Document and Respond to Plaintiff's Diabetic Episodes, Combined with a Statement About Plaintiff's "Dependability," Helped Create a Triable "Regarded As" Claim

In *Johnston v Mid-Michigan Medical Center-Midland,* 2008 US Dist LEXIS 1125, the plaintiff's manager 1) twice asked human resources how to document and respond to the plaintiff's diabetic episodes; 2) maintained a chart tracking performance concerns about the plaintiff, including episodes of apparent incoherence that, in deposition, the manager linked to the plaintiff's diabetes; 3) once inquired whether to link a specific incident of misconduct (a failure to answer a page while "on call") to a diabetic episode that had occurred the day before and affected the plaintiff's performance; 4) expressed a concern about the plaintiff's "dependability" in light of his continuing diabetic episodes; and 5) listed the plaintiff's non-responsiveness (which was allegedly due to a low blood sugar episode) as one of the three reasons for discharging the plaintiff. "While a jury may reasonably believe Plaintiff's manager was responsibly seeking to accommodate Plaintiff," Judge Ludington ruled that this evidence could support a conclusion that the "manager may have erroneously relied on his perception of Plaintiff's purported disability." The ruling was supported by the fact that the employer chose not to exercise its right require the plaintiff to undergo a medical examination designed to test his ability to perform job-related functions.

The plaintiff's claim that he was fulfilling job requirements, combined with his post-termination email suggesting that he could continue doing the job with only minor accommodations, created a factual question whether he could perform the essential functions of his job – "despite Defendant's chronologue of Plaintiff's deficiencies."

Employer Did Not Concede Activity Was "Protected" By Not Arguing the Point in its Summary Judgment Brief

The former employee in *EEOC v Rocket Enterprises, Inc,* 2008 US Dist LEXIS 5818, claimed she was retaliated against for complaining of alleged sexual harassment. The EEOC sought to preclude evidence designed to show that a hostile environment did not actually exist, and that the plaintiff could not have reasonably believed otherwise. The EEOC argued that that employer was estoped from making this point at trial, because the employer did not contend at summary judgment that the plaintiff's complaint did not constitute "protected activity." Judge Cox disagreed, ruling that the employer never conceded that the plaintiff's activity was protected, and that a defendant "will not be penalized for failing to raise a particular issue in a motion for summary judgment."

Dismissal of Prior Suit for Lack of Jurisdiction Does Not Trigger *Res Judicata*

The plaintiff in *Thomas v Miller,* 2008 US Dist LEXIS 1427, could proceed with her employment-related claims, even though her prior suit alleging failure to provide COBRA benefits was dismissed for lack of subject matter jurisdiction. Even if the plaintiff could have brought other employment-based claims in the COBRA suit, dismissal for lack of jurisdiction is "not a decision on the merits, and does not have the effect of *res judicata*." Judge Cook dismissed the plaintiff's MIOSHA retaliation and Whistleblowers' claims, however, because the plaintiff failed to file her MIOSHA claim with the Department of Labor within 30 days, and failed to file her Whistleblowers' claim within 90 days.

Bad Faith Element of a Hybrid Claim Could Not Be Proved Simply With Proof That the Plaintiff Had Signed a Petition to Remove the Chief Steward

Judge Cox ruled in *Lombard v UAW International Union and Local 174,* 2008 US Dist LEXIS 8955, that the plaintiff's signature on a petition calling for the removal of the chief steward, "without more, such as evidence that [the steward] actually saw that petition or noticed Plaintiff's signature on it" cannot show that the defendants acted in bad faith in deciding not to pursue the plaintiff's grievance.

Temporally Relieving Job Functions as an Accommodation Does Not Render Them Non-Essential

In *Scott v The Detroit Medical Center,* 2008 US Dist LEXIS 4236, Judge Edmunds agreed with case law holding that employers do not a render job functions non-essential by temporally relieving employees of the functions as an accommodation. Moreover, where a function had been one of the plaintiff's duties before she became disabled, the fact that other employees could also perform the function does not render it any less essential. The fact that the plaintiff was one of only nine employees trained to perform a certain function, such that a limited number of persons could do it, served to "underscore" the fact that the function was essential to the plaintiff's job.

Similarly, Judge Borman granted summary judgment for the employer in *Barnhart v DaimlerChrysler Corp,* 2008 US Dist LEXIS 7005, because the plaintiff's showing that the employer sometimes used other employees to perform a function in an effort to reduce overtime or fill-in for employees who were unavailable did not render the function non-essential. Moreover, the plaintiff's proffered accommodation was unreasonable because it would require the employer to create a new position for the plaintiff or reallocate the plaintiff's essential job functions.

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EASTERN DISTRICT UPDATE

(Continued from page 3)

ELCRA Preempts Student's "Negligence" Claim Based on Sexual Misconduct by Teacher

Judge Ludington ruled in *Doe v Morey Charter Schools,* 2008 US Dist LEXIS 2185, that a student cannot premise a "negligence" claim on allegations that a teacher inappropriately touched and had sex with her. "Based on *McClements* [*v Ford Motor Co,* 473 Mich 373 (2005)], in which sexual harassment in the workplace was found to have an exclusive remedy under the ELCRA, Plaintiff's exclusive state law remedy must also exist under ELCRA."

Series of Anti-Arab Comments, Combined with Factual Disputes Regarding the Integrity of the Employer's Explanation, Created a Triable Discrimination Case

The plaintiff in *Eid v Saint-Gobain Abrasives, Inc,* 2007 US Dist LEXIS 91497, claimed that his supervisor derogatorily referred to the plaintiff's "cousins or whatever over in the Middle East," suggested that the plaintiff or "his people" were involved in 9/11, told plaintiff that "American males like me can't get into colleges or institutions like that because of minorities like you," and stated during a conversation about Middle East politics that, "if I had it my way, I'd deport every Arab out of this country." The comments were not direct evidence of national-origin discrimination. However, when combined with viable disputes concerning the factual integrity of the employer's performance-based explanations for discharge, the comments raised a triable question whether the decision was motivated in part by the plaintiff's national origin. The factual disputes included evidence that other salespersons' sales had also declined, evidence from customers that contradicted the employer's claim that customers had complained about the plaintiff, the employer's refusal to investigate the plaintiff's claims that his supervisor made discriminatory remarks, and the employer's failure to consider the plaintiff's written rebuttal to his supervisor's claims alleging poor work performance.

The plaintiff presented a viable retaliation claim with evidence that a whole series of adverse actions and discriminatory treatment took place within days of when the plaintiff first complained about his supervisor's discriminatory remarks.

Shortened Limitations Period in Employment Application Precluded Most of Plaintiff's Claims

Judge Feikens enforced a 6-month limitations period contained in the plaintiff's signed employment application in *Steward v Daimler Chrysler Corp,* 2008 US Dist LEXIS 7881, and dismissed claims arising outside that period. *Salisbury v Art Van Furniture,* 938 F Supp 435 (WD Mich, 1986), had rejected a shortened limitations period because the plaintiff did not receive her right to sue letter before the shortened limitations period expired, making it impossible for her to sue within the contractually shortened period. Here, on the other hand, the plaintiff received a right to sue letter just over two months after her termination, giving her "ample opportunity to file her suit within the six month contractual period."

The plaintiff's disability discrimination claim, though timely, was dismissed on summary judgment because the plaintiff failed to propose a reasonable accommodation. The plaintiff's physician testified that the plaintiff could not work on an assembly line, which had been the plaintiff's primary job function. Hiring an assistant to help the plaintiff perform the job was unreasonable, inefficient and costly. "Further, this accommodation is equal to eliminating an essential function of the job, something the ADA does not require." Plaintiff's suggestion that there were other positions she could perform lacked consequence because she "failed to propose positions that were vacant."

No Causal Link Where Protected Activity Came After Disciplinary Process Commenced

The retaliation plaintiff in *Williams v William Beaumont Hospital,* 2007 US Dist LEXIS 91853, did not register her complaint about alleged discrimination until she was already suspended and under investigation. "Because Plaintiff did not allege racial discrimination until after the machinery of her discharge already was in motion, the Court finds no causal connection between the protected activity (her complaint) and the discharge."

Evidentiary Rulings of Interest

In *Johnson v City of Pontiac,* 2008 US Dist LEXIS 2187, Judge Hood excluded two types of evidence in a disability discrimination case. First, Judge Hood granted the employer's motion *in limine* to exclude evidence that prior Pontiac police chiefs gave officers permanent light duty work – the accommodation the plaintiff sought. The policy of prior police chiefs does not make it more or less probable that the current police chief impermissibly discriminated against the plaintiff by not giving him a permanent light duty position.

Second, Judge Hood excluded evidence that the plaintiff could perform the essential duties for a nearby police department. Employers have "substantial leeway in determining what functions are essential to a position," and the alleged ability to perform for a different department "is not relevant to his ability to perform the essential functions of Sergeant Detective within the Pontiac Police Department."

In *Stokes v Xerox Corp,* 2008 US Dist LEXIS 5805, Judge Cook made several significant *in limine* rulings in a race and sex case, including: 1) excluding "me too" evidence designed to support the witnesses' personal claims of discrimination, but allowing their testimony to the extent it related to the plaintiff's theory that a supervisor gave preferential treatment to white males; 2) excluding evidence that other employees were retaliated against for complaining about discrimination, provided that such evidence would be admitted should Xerox "open the door" by introducing evidence regarding the plaintiff's failure to complain; 3) excluding evidence of a time-barred act as more prejudicial than probative, where the person who made the time-barred decision was not working for Xerox at the time the plaintiff was discharged; 4) denying Xerox's motion to exclude all evidence in the EEOC's file, and permitting the plaintiff to introduce Xerox's allegedly false representations to the EEOC; 5) excluding any portion of the plaintiff's expert's testimony or report that relied upon a "vocational opinion" by a person the plaintiff was not calling to testify; 5) excluding conclusory assertions of an alleged "good old boy network," because the ambiguous allegation was unsupported by evidence and more prejudicial than probative; 6) denying Xerox's motion to exclude evidence of front pay; 7) excluding evidence of a pending class action lawsuit against Xerox because it was more prej-

udicial than probative, except that the evidence could come in should Xerox "open the door" by proffering evidence regarding its nationwide efforts at diversity and affirmative action; and 8) excluding evidence of the plaintiff's prior employment and lawsuit against a former employer, as excessively prejudicial and as improper character evidence under Fed R Evid 404(a).

Satisfaction Contract Did Not Create "Just Cause" Employment

The plaintiff's employment contract stated that he would remain employed "as long as [he] continue[d] to perform [his] assigned tasks satisfactorily, [did] not engage in misconduct and this newspaper continues to publish." *Masck v The Herald Company,* 2007 US Dist LEXIS 91858. Judge Cohn ruled that this language created a "satisfaction" contract, that the employer could terminate if it "in good faith is dissatisfied with the employee's performance or behavior. The employer is the sole judge of whether the person's job performance is satisfactory."

A managing editor's statement "too bad you're not old enough to … take the buyout" could not itself support the plaintiff's age discrimination claim. The comment did not obviously suggest ageist animus, was made by a non-decisionmaker and did not relate to the basis for termination.

Dismissals for Failure to Establish *Prima Facie* Case

In *Conti v American Axle & Mfg, Inc,* 2008 US Dist LEXIS 8614, Judge Friedman granted summary judgment because the plaintiff's alleged comparables were not "similarly situated." "The people to whom Plaintiff compares herself have significant educational and professional experiences that Plaintiff does not share…such as engineering degrees, experiences such as Plant Manager, and other positions of heightened responsibility…."

In *Hirsch v AZ Automotive Corp,* 2008 US Dist LEXIS 1796, Judge Cohn granted summary judgment in an age case because the plaintiff, who was demoted in a RIF and not replaced, could not show he was singled-out because of age where: 1) younger workers were laid off; 2) an individual older than he was promoted around the time the plaintiff was demoted; and 3) four of the 13 people who remained in the position the plaintiff held were older than the plaintiff.

In *Saab v Rev Jimmy Womack,* 2008 US Dist LEXIS 5828, Judge Cox granted summary judgment because the series of grievances the plaintiff outlined – including complaints about her supervisors' qualifications, the failure to timely process the plaintiff's grievance, and failure to express an interest in the plaintiff's professional development – did not constitute "adverse employment action."

Discrimination Case Dismissed for Failure to Identify Claim in Bankruptcy Proceeding

Judge Duggan dismissed the plaintiff's discrimination claims on summary judgment in *McDaniel v Guaranty Bank,* 2008 US Dist LEXIS 2444, because the plaintiff had failed to disclose the cause of action in her bankruptcy proceeding. The plaintiff could not establish "mistake or inadvertence" because she had filed a complaint with the EEOC and received a right to sue letter before filing for bankruptcy. ■

SIXTH CIRCUIT ISSUES NEW ADA DECISIONS

Jay C. Boger
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The courts continue to decide novel and interesting issues related to disability discrimination law. In particular, the U.S. Court of Appeals for the Sixth Circuit has recently decided several noteworthy cases under the Americans with Disabilities Act.

Disability-Induced Misconduct. In *Macy v. Hopkins Co School Bd*, 484 F.3d 357 (6th Cir. 2007), the Sixth Circuit held that an employer may legitimately fire an employee for conduct that is the result of a disability if the behavior disqualifies the employee from the job. Macy was a phys ed teacher who threatened to kill a group of her middle school students. She claimed that this threat – as well as 31 prior complaints about her belligerent and inappropriate behavior – stemmed from a head injury she had suffered 20 years earlier. The school board was aware of that injury as well as a second accident that aggravated her post-concussive syndrome, causing her to have recurrent headaches, difficulty with attention and concentration, irritability, and outbursts of anger. Despite its recognition of the cause of Macy's symptoms and its history of trying to accommodate her, the school board thought that threatening to kill her students, and making inappropriate remarks about their family members and their sexual activity, was the last straw. The Sixth Circuit agreed, joining other circuits in endorsing the common-sense rule that the ADA does not give an employee license to engage in misconduct or criminal behavior.

Accommodating A Seriously Injured Employee. *Kleiber v. Honda of America Mfg*., 485 F.3d 862 (6th Cir. 2007), presented the Sixth Circuit with a difficult accommodation issue. Kleiber, a production associate at Honda's Marysville, Ohio plant, suffered severe head injuries when he fell from a fence while performing yard work. He underwent considerable therapy and expert evaluation of his prospects for returning to work. Ultimately, because of his decreased grip strength and finger dexterity, and his poor balance on level surfaces, Honda concluded that it was unable to accommodate him and terminated his employment. Affirming the dismissal of Kleiber's ADA lawsuit, the Court rejected his argument that he should have been accommodated through transfer to a different position, inasmuch as there was no evidence of vacancies in other positions. And even if a vacancy existed, the Court held, Kleiber had failed to demonstrate that he was qualified. While Kleiber was a sympathetic individual who had tried his best to return to work after an unfortunate injury, this could not alter the ADA's fundamental requirement that a plaintiff show he is "qualified," i.e., able to perform essential job functions with or without accommodation.

No Duty To Accommodate Based On "Association." In *Overley v. Covenant Transportation*, 178 Fed.Appx. 488 (6th Cir. 2006), the Sixth Circuit emphasized an important distinction for ADA claims based on an individual's association with a disabled person. Overley was terminated from a truck driver position because her need to care for a disabled daughter meant she could only work a limited schedule. The ADA forbids discrimination

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SIXTH CIRCUIT ISSUES NEW ADA DECISIONS

(Continued from page 23)

against an employee "because of the known disability of an individual with whom the qualified individual is known to have a relationship or association," but that provision does not require accommodation due to an association. An individual may sue under the "association" provision claiming disparate treatment, but not for alleged failure to accommodate. Yet Overley's claim was just that. She sought – based on her association with her disabled daughter – to receive the accommodation of a limited work schedule. The Court held that the ADA did not authorize the requested accommodation.

Are Controlled ADHD And Obesity "Disabilities"? In *Knapp v. City of Columbus*, 192 Fed.Appx. 323 (6th Cir. 2006), three firefighters who claimed to have attention deficit hyperactivity disorder (ADHD), which they treated with Ritalin, requested accommodations in taking promotional examinations. The Sixth Circuit rejected the claim: "When an ADA plaintiff can fully compensate for impairment through medication, personal practice, or an alteration of behavior, a disability under the Act does not exist." And in *EEOC v. Watkins Motor Lines*, 463 F.3d 436 (6th Cir. 2006), the Sixth Circuit affirmed dismissal of the EEOC's ADA suit on behalf of former employee Stephen Grindle, claiming that he was discharged from his driver/dock worker job because of his morbid obesity. During five years of employment, Grindle's weight had risen to 450 pounds. He sustained an on-the-job knee injury when a ladder rung broke, causing him to fall; he was terminated for not timely returning to work. The trial court held that non-physiologically caused obesity is not an impairment under the ADA. The Sixth Circuit agreed, rejecting the EEOC's assertion that an impairment with respect to weight can be shown either through a physiological condition or through proof of morbid obesity (i.e., body weight more than 100 percent over the norm). The Court held that a physical characteristic must relate to a physiological disorder to qualify as an ADA impairment, and refused to allow the ADA to "become a catch-all cause of action for discrimination based on appearance, size, and any number of other things far removed from the reasons [for the ADA's passage]." ■

KELMAN'S CARTOON

"My principals have enjoined and devolved upon me, as their attorney, counselor, and plenipotentiary for purposes including but not restricted to this legislative hearings, the duty to annunciate and purvey their undivided, inextinguishable, and adamantine antipathy to the Plain English Bill."

VIEW FROM THE CHAIR

David B. Calzone, ***Chair***
Labor and Employment Law Section

One of the most difficult challenges facing any professional practice organization, regardless of how vibrant that organization appears to be at any given moment, is how to remain robust and relevant through the years as membership changes and evolves. The Labor and Employment Section is o exception. At one time, our Section was comprised almost exclusively of traditional union and management labor lawyers, labor arbitrators and mediators. Educational agendas and Section publications were dominated by issues relating to unfair labor practice charges, arbitration techniques, collective bargaining strategies, representation elections, the operation of past practice and the like. Most traditional labor lawyers spent the bulk of their practice before labor arbitrators, administrative law judges at the NLRB or federal judges in Section 301 actions. Withe the exception of public sector labor lawyers, few members of the Section spent must time in state court. Few also tried cases to juries.

As the practice evolved, so did the Section. With the advent of state and federal employment legislation — Title VII, the Age Discrimination in Employment Act, ERISA, the Elliott-Larsen Civil Rights Act, the Michigan Handicappers (now Persons with Disabilities) Civil Rights Act, state and federal Whistleblower Protection Acts, the Michigan Wage and Fringe Benefits Act, the American with Disabilities Act, the Family and Medical Leave Act, the WARN Act, and common law principles such as the *Toussaint* doctrine, membership in the Section changed, as did its educational programs and publications. Section membership began to include significant numbers of trial lawyers who represented employees but not necessarily unions. Practice before state courts became a staple of Section members. Many traditional management labor lawyers began litigating non-traditional employment cases on behalf of their employer-clients, and a growing number of management lawyers focused their practices primarily, if not exclusively, on the practice of employment, not labor, law.

Throughout this evolution, our Section has continued to remain vibrant and robust. Meetings of the Section and the Section's educational programs continue to be well-attended. In fact, the 2008 Mid-Winter Meeting boasted the highest Friday evening attendance in recent years. (The record,however, continues to be held by the Mid-Winter Meeting that occurred nearly two decades ago on a particularly blustery winter evening at Ann Arbor's Weber's Inn when Jesse Jackson appeared as the Section's dinner speaker.) The Section is in sound financial shape. The Council continues to be filled with energetic, creative and committed lawyers, who willingly donate their time and considerable talents to the Section. We usually have little trouble finding speakers from among our membership for educational programs.

With all of that said, the Section cannot stand pat, or its risks becoming stagnant or, worse, listless and irrelevant. Given the current robustness of the Section, is there any real danger of that? In my view, and in the view of the Council, yes. Not this year or next. Probably not in the next five years. But 10 or 15 years downstream, will the Section remain as robust as it is today? In my view, not without some concerted effort to build the Section's base and to encourage greater involvement from the Section's newer members.

At the risk of over-generalizing based largely on anecdotal observations, when I look around the rooms at our meetings and educational programs, I increasingly see the same core cadre of Section members — people I like to refer to as "the usual suspects." As the years go by this cadre of "usual suspect," like me, seem to be getting grayer. What I am not seeing nearly enough of, in my view, are newer labor and employment lawyers. My admittedly anecdotal observations were confirmed this year by the evaluation forms filled out at the educational program during the 2008 Mid-Winter meeting. Those forms revealed that only a small handful of attendees had practiced less than 5 years and that a vast majority had at least a decade, if not considerably more, experience.

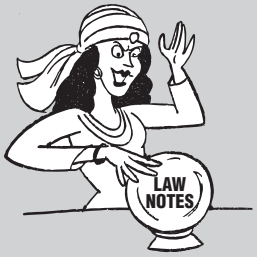
I recognize that some of that dichotomy is a function of the economic realities facing the labor and employment law practice in Michigan. It is no secret that fewer employment cases are being filed today than during the 1980s nd 1990s. Indeed, when Judge Robert Colombo, Jr. spoke on the continuing violations theory at the Mid-Winter Meeting, he remarked that he does not have as much need to address such issues as he once did because he has so few employment cases before him. The labor and employment law practice groups in large firms are not adding new associates at anywhere near the pace that they once did. Moreover, with union membership declining in many sectors of the economy, the volume of work for traditional labor lawyers has correspondingly diminished. alternative Dispute REsolution mechanisms, both pre- and post-litigation, and Employment Practices Liability Insurance has also impacted the volume of employment litigation. A year ago, Shel Stark, understandably worried about the diminishing number of newer plaintiff's employment lawyers attending ICLE's Labor and Employment Law Institute, ruefully told me that he ran into many of the at ICLE's Family Law Institute.

Yet the flattening of the labor and employment law practice in Michigan does not account entirely for why so few newer Section members are regularly attending Section events. Our membership rosters indicate that there are still healthy number of newer Section members, and large firm labor and employment law practice groups still appear to have a critical mass of newer associates, albeit perhaps not in the same numbers as they once did. So, where are they and why are they not attending Section events? More importantly, how will their absence impact the Section 10 or 15 years from now?

It is admittedly tempting to suggest that today's newer lawyers do not have the same level of interest in or commitment to bar activities as their older colleagues did when they were newer lawyers. While in some instances, there may be a kernel of truth to such an observation, I believe that it greatly oversimplifies the issue. After all, the Young Lawyers Section continues to be extremely active and puts on dynamic social, networking and educational events that are organized by today's newer attorney and well-attended.

The considerable attention that many firms place on billable hours — and the attendant decline in the value attributed by those firms to bar activities — has undoubtedly impacted Section participation by placing increased pressures on newer labor and employment attorneys. When I was a newer attorney, the leaders in my practice group — Bill Saxton, Ginny Metz, Bob Vercruysse, Bob Battista — not only regularly attended Section events and assumed leadership roles in the Section, but they made sure that newer associates also attended Section events and encouraged them to take active roles in Section activities. As did many of their contemporaries in other firms, my practice group leaders put considerable value in service to the profession and the networking opportunities that came from such service, and they made it a point to set an example for newer associates to follow. Today's emphasis on billable hours and revenue generation has, unfortunately, eroded the investment that many firms used to make in bar activities. As a result, some of the newer attorneys in those firms are not being encouraged to make Section involvement a priority.

I believe that the Section needs to make a concerted effort now to attract participation and commitment from newer members so as to build the foundation that will carry the Section forward during the next couple of decades. As a first fledgling effort to do so, the Council has asked a subcommittee consisting primarily of newer members of the Section to help design programs and events that will not only directly involve newer labor and employment lawyers but will also encourage such lawyers to participate actively in future Section events. The subcommittee, which is led by Dan Swanson and Tim Howlett, consists of Anne Marie Welch, Brett Rendeiro, Brian Koncius, Charlotte Carne, Michael Chichester, ERic Pelton, Jay Boger, John Conway, Kevin Carlson, Mike Shoudy, Phyllis Gayden, Randy Barker, Ryan Mulally, Kevin Stoops and Susan Hiser. The subcommittee is planning an exciting event for a late afternoon in early June at a restaurant to be determined in Royal Oak. The event will include both a seminar and a networking cocktail reception, with the seminar portion of the event utilizing an informal roundtable format featuring discussions about issues of interest and concern to newer lawyers, as well as their more experienced colleagues. I am very pleased that so many people volunteered to assist the Council in this initiative to increase participation in the Section by newer lawyers and hope that many of you will take the time to join them in Royal Oak in June. Details about the event, its location and a specific date will be forthcoming. I hope to see you there.



INSIDE *LAWNOTES*

- Jeff Kopp, LEL Section member and U.S. Army Major, recently deployed to Iraq as a legal officer with the 300th Military Police Brigade, begins his career as *Lawnotes'* first International and Military Affairs Bureau Chief (unpaid).
- Reagan Dahle addresses IRS expectations for settlement allocations.
- John Holmquist looks at the end of the Bush NLRB and Labor's "Popeye moment."
- Former Michiganian Ellen Dannin presents a brief for adding employment law to the bar exam.
- Thanks to the inspiration of Ted Opperwall and Noel Massie, the muse invaded the KOHP law firm: Julia Baumhart on negligent retention, Shannon Loverich on FMLA, and Jay Boger on Sixth Circuit ADA decisions.
- MSU professor Stacy Hickox also got the muse: on sexual harassment and FMLA amendments.
- Greg Bator and Brendan Frey review union-related workplace e-mail issues; Ruthanne Okun and Lynn Morison share MERC secrets; and Sam McKnight lauds LELS honoree Leonard Page.
- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, MIOSHA, MDCR and EEOC news, websites to visit, a cartoon by Maurice Kelman, and more.
- Authors Gregory J. Bator, Julia Turner Baumhart, Jay C. Boger, David A. Calzone, Regan K. Dahle, Ellen Dannin, James T. Feeney, Brendan H. Frey, Barry Goldman, Stacy A. Hickox, C. John Holmquist, Jr., Stuart M. Israel, Maurice Kelman, Jeffrey S. Kopp, Shannon V. Loverich, Samuel C. McKnight, D. Lynn Morison, Ruthanne Okun, Jeffrey A. Steele, and more.

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