LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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WHAT'S ON CONGRESS'S EMPLOYMENT LAW PLATE?

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Over 20 employment bills were introduced in the last session of Congress. Some of these bills passed one in the House but failed to pass the Senate, and some of the bills did not leave their respective committees. It is too early in the new term of Congress to summarize current legislative activity since Congress just began a new term on January 1, 2009. As a result, only a few bills have actually been introduced, to date. Nonetheless, it is anticipated that the legislative agenda on the employment law front will be active and controversial. This summary highlights many of the key employment law initiatives in Congress which appear likely to be on the horizon or have already been introduced. (Bills not covered by this summary are those focused on tax, social security, unemployment benefits, ERISA, OSHA, government contracts and immigration issues.)

I. NLRA Related Initiatives

1) The **Employee Free Choice Act** passed the House (HR 800) in March 2007, but there were not enough votes to end a Senate filibuster or override a Presidential veto. This bill is organized labor's Number 1 priority and it hopes that with the outcome of the last round of elections the bill's fate will be more favorable this term. On March 10, 2009, the bill was reintroduced before the current Congress (HR 1401, S 560). House passage is assured, but it is unclear if the bill will get through the Senate.

Under the bill, the current way unions are recognized - a secret ballot election - will be rarely used. Instead, employers will be required to recognize any union which gathers union authorization cards from more than 50% of their workers.

Also, under current rules, even if a union gathers those cards, an election is still often held. Those cards are often signed because of peer pressure or to get the organizer off of the employee's back. Employees often do so because they know that they will have they opportunity to vote later, by secret ballot. Also, cards can be collected over many months, so what may have inspired an employee to sign it may not be an issue or concern months later. And finally, when an employee is asked to sign the card, the employee only hears the organizer's side of the story. If an election is held, there is an opportunity for the employer to state its side of the story so that when there is a vote, employees can make a more informed decision.

The EFCA will not only eliminate the election process and have unions recognized without any assurance that the employees have made an informed choice, but also (i) if a contract is not agreed to in 90 days, the parties will have to submit to 30 days of mediation, and (ii) if mediation is not successful, the initial contract will be submitted to an arbitrator, who will then impose a 2 year contract on the parties.

2) The **Labor Relations First Contract Negotiations Act of 2009** (HR 243) was introduced on January 7, 2009 to amend the NLRA to require the arbitration of first contracts between employers and newly certified unions if an agreement is not reached after 60 days after certification and 30 days of a mediator's appointment.

3) The **Secret Ballot Protection Act** (HR 1176, S 478) was introduced on February 25, 2009. Under the bill, which was introduced by Republicans, the NLRA would be amended to make it an unfair labor practice to cause, or attempt to cause, an employer to recognize a union through any means other than a secret ballot election.

4) The **Public Safety Employer-Employee Cooperation Act of 2007** (S 2123, HR 980) was introduced during the recently completed congressional session, and would have required states which do not provide collective bargaining rights to public sector emergency service personnel (e.g., law enforcement officers, firefighters, and EMTs) to have such rights (but not the right to strike) under federal law. The bill passed the House by a vote of 314-91, but the bill stalled in the Senate. On January 9, 2009, Rep. Dale Kildee (D. Mich.) reintroduced the bill as the **Public Safety Employer- Employee Cooperation Act of 2009** (HR 413) before the current Congress.

5) The **Re-Empowerment of Skilled and Professional Employees and Construction Tradesworkers Act (RESPECT Act)** was proposed in the last session of Congress to redefine the term "supervisor" under the NLRA. Under the new definition, the term would be narrowed making it possible for many employees who cannot organize due to their supervisory status under current case law to organize or become included in existing bargaining units. The functions of "assigning duties" and "responsibly directing" other employees would be eliminated from the current definition. President Obama supports this bill and so it is likely to be reintroduced during the current session of Congress.

6) Repealing right-to-work laws is on labor's agenda for the current Congress. Such a bill was proposed last term (HR 6477). It is therefore expected that a bill will be introduced to amend the NLRA to prohibit right-to-work laws as currently allowed.

7) During the last session of Congress, bills were introduced to prohibit the practice of "salting," and thereby allow employers to refuse to hire employees of unions who seek employment for the primary purpose of organizing the employer's workforce. (HR 2670, S 1570)

8) The **Government Neutrality in Contracting Act** (S 90) was introduced in January 2009 to prohibit federal construction contracts or their specifications to consider a contractor's union status in the awarding of a contract.

II. EEO Related Initiatives

1) The **Paycheck Fairness Act** (HR 12) would amend the Equal Pay Act to revise remedies for and enforcement of prohibitions against sex discrimination in the payment of wages by: (A) adding non-retaliation requirements; (B) increasing penalties; and

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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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(C) authorizing the Secretary of Labor to seek additional compensatory or punitive damages. It would also limit the pay differentials to be only based on such factors as education, training and experience. In addition, the bill would authorize the creation of a program on "Negotiation Skills Training for Girls and Women," and establish an annual award for "Pay Equity in the Workplace." The bill was originally tacked onto the Lilly Ledbetter Fair Pay Act and passed the House via an expedited rule by a 256-163 vote. The Senate passed the Ledbetter Bill without this bill tacked on, and so this bill will have to be considered independently by the Senate at a later date this session. (S 182)

2) The **Title VII Fairness Act** (S 166) was introduced in early January 2009 to amend Title VII, the ADA and ADEA to redefine (or clarify) the limitation periods to commence when a "person aggrieved has, or should be expected to have, enough information to support a reasonable suspicion of such discrimination."

3) The **Equal Remedies Act** was introduced during the last congressional term by Senator Kennedy, but it did not leave the Committee. The bill is expected to be reintroduced during the current term. The bill would amend Title VII and the ADA by eliminating the $300,000 cap on compensatory and punitive damages. This bill was introduced during the last congressional term by Senator Kenney (with then Senator Obama co-sponsoring it), but the bill never left the Senate.

4) The **Civil Rights Tax Relief Act** (S 1689, HR 1540) as introduced during the prior term of Congress would reverse the IRS rules requiring settlements involving non-wage damages to be taxed, and to also allow for wages to be taxed via an income averaging approach (as opposed to the taxing the lump sum received at the rate applicable to the lump sum). It is not clear that the bill will be reintroduced this year.

5) The **Employment Non-Discrimination Act** ("ENDA") was proposed by Rep. Frank during the last session of Congress (HR 3685). The bill was initially written to protect both gay and transgender workers from discrimination in the workplace, under Title VII. A revised version was later introduced carving out transgender workers from its protection, due to political difficulties in having the bill pass if this group is included. A separate bill was to be introduced to address transgender protection. The House passed ENDA in November 2007 by a 235-184 vote, but the bill did not move in the Senate. It is expected to be reintroduced during the new session of Congress.

6) The **Fair Pay Act of 2007** (S 1087, HR 2910) was introduced in 2007 by Senator Harkin, with co-sponsors including Senators Obama and Levin, to require equal pay for equivalent jobs without regard to sex, race or national origin. The bill did not leave committee. A similar bill may be introduced this session.

III. FMLA Related Legislation

1) The **Family Leave Insurance Act of 2008** as proposed during the last session o f Congress would have allowed 8 weeks of **paid** FMLA leaves, to be funded by a trust fund akin to unemployment insurance. Under the bill, employers would have to pay 100% of an employee's wages for employees earning less than $20,000, with the percentage sliding to 40% for those earning just under $100,000. The bill was introduced in 2007 (Senate) and 2008

(House) but hearings were never held and it never left the respective committee. Its concept is endorsed by President Obama and is likely to be reintroduced during the current session of Congress.

2) A more likely concept to get traction in Congress is Senator Kennedy's **Healthy Families Act,** which is sometimes referred to as Senator Kennedy's Legacy Act. In the last Congress, the bill was S 910, HR 1542 and cosponsored by Senators Obama and Levin. President Obama supports the concepts of the bill and it may be reintroduced in the current congressional session. Under this bill, **paid** sick leave would be required to be provided by employers with 15+ employees at the rate of 7 days per year for employees working 30+ hours per week, with that rate to be prorated for part-time employees. Earned but unused sick leave days would carry-over from year to year. The bill would allow private right of action. The bill would also allow for intermittent leave, but not an obligation to provide prior notice unless the absence is for 3+ days. In addition, the bill would prohibit employers from disciplining employees for using paid sick leave, and would also prohibit paid sick days from being considered under a no-fault attendance policy. Leave for care of those who are in "close relation" to employee, akin to a family member, but may include boyfriends, girlfriends, same sex partners and perhaps roommates would also be required. And finally, employers will not be allowed to adjust current leave policies to accommodate statute. As a result, PTO time will not count toward days available; only sick time will count.

3) In December 2007, the **Working Family Flexibility Act** (S 2419, HR 4301) was introduced. The bill did not become law and hearings were not held. Under the Act, if passed, employees (who worked at least 1,000 hours during the year) of employers with 15 or more employees would have the right to request flexible work options in order to balance the demands of their jobs and home life. If reintroduced and passed: A) an employee may request a modification of his or her hours, schedule, or work location once per 12 month period; B) employees and employers will have to engage in an interactive process to discuss the employee's needs and how to address them with no or minimal disruption to the employer's business, and the employee may have a representative of his or her own choosing at such meetings; C) employers who deny a request must explain the grounds for the denial; and D) denials will have to be documented and may be reviewed by the government or a court; and employees who make requests are protected from retaliation.

4) The **Family and Medical Leave Inclusion Act** was introduced in the House in June 2007, but did not leave committee. The bill would have amended the Family and Medical Leave Act to provide for employee leave to care for a same-sex spouse as determined under applicable state law, domestic partner, parent-in-law, adult child, sibling, or grandparent (as well as for a spouse, child, or parent), if such person has a serious health condition. The bill would have also amended federal civil service law to apply the same leave allowance to federal employees. In addition, it would allow FMLA leave to be used to transport a family member to a doctor's appointment or to visit a family member at a nursing home. It is likely that this bill will be reintroduced this year.

5) The **Family and Medical Leave Enhancements Act** was introduced last year and it was reintroduced this year as HR 824. This law would amend the FMLA by decreasing the number of employees an employer would have to employ in an area in order for the employees to be covered. The reduction would be from the current 50 employees to 25 employees. In addition, the bill would eliminate the current 1,250 hours of work in a year requirement for FMLA coverage, and thereby expand the Act's scope to cover part-time employees. The amendments would also allow employees to take up to 4 hours of leave per month, up to a total of 24 hours per year, for the purpose of attending a school or community activity of the employee's child or grandchild. HR 389, the **Family Fairness Act of 2009,** was introduced in the current session of Congress on January 9, 2009. This bill, if passed, would eliminate the 1,250 hours of work eligibility requirement for FMLA leave and thereby make FMLA leave available to part-time and full-time employees who have worked for the employer for at least one year.

6) The **David Ray Ritcheson Hate Crime Prevention Act** (HR 262) would provide various protections to victims of hate crimes including the right to take FMLA leave "because an employee is addressing a hate crime and its consequences... [and] is unable to perform the functions of the position of such employee." A hate crime is defined as "a criminal offense in which the prosecutor has determined that the defendant intentionally selected a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." The phrase "addressing a hate crime and its consequences" means "(A) seeking medical attention for or recovering from injuries caused by being a victim of a hate crime; (B) seeking legal assistance or remedies, including communicating with the police or an attorney, or participating in any legal proceeding related to being a victim of a hate crime; (C) attending support groups for victims of hate crimes; and (D) obtaining psychological counseling related to the experience of being a victim of a hate crime."

7) The **Servicemembers' Access to Justice Act** (S 263) would amend USERRA to: provide enhanced the remedies for those who prove that their USERRA rights were violated including jury trials, equitable relief and attorneys fees, as well as a minimum of liquidated damages for willful violations and punitive damages for violations committed with malice; and clarify that USERRA prohibits employers from paying lower wages because of one's status as a servicemember, veteran or applicant to be a servicemember. The bill would also make agreements to arbitrate USERRA matters, whether under a private agreement or a union contract, inapplicable and invalid, and also provide the USERRA claims have no statute of limitations. This bill was also introduced by Senator Casey (D. Pa.) during the last session of Congress. Senator Kennedy and then Senator Obama were the bill's only two cosponsors.

IV. WARN Act Amendments

The **Forewarn Act of 2007** (S 1792, HR 3662) was introduced in the Senate last term, but it did not leave the Senate Committee. A similar bill was also introduced in the House (HR 3796). The bills ultimately got folded into the Trade and Global Assistance Act of 2007 (HR 3920), which passed the House by a 264-157 vote. Under the bill, employers would be required to: (A) give 90-day written notice (under current law, 60-day) to employees and appropriate state and local governments as well as the applicable members of Congress before ordering a plant closing or mass layoff; and (B) notify the Secretary of Labor within 60 days of such closing or layoff (including the number of employees involved). The bill would also delete the "1/3 of the workforce requirement" for mass layoffs to be covered, and thereby make any layoff resulting in a job loss to 50 employees covered under the WARN Act. In addition, the bill would make an employer who violates these notice requirements liable to the employees for double the back pay (under current law, for back pay) for each day of the violation for up to 90 days (under current law, 60 days). Notices of employees' rights would have to be posted in each workplace. In addition, the

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bill would authorize the Department of Labor to bring civil actions on behalf of employees for certain relief under the Act and would require the Department to make educational materials concerning employee rights and employer responsibilities available to the general public and employers. The house bill was referred to the Senate but it never left the Senate Committee. The bill is expected to be reintroduced this term.

V. Arbitration

The **Arbitration Fairness Act of 2009** (HR 1020), which was introduced last session but failed to leave committee, was reintroduced on February 12, 2009. Under this bill, pre-dispute arbitration agreements will be invalid or unenforceable if they require arbitration of: (A) employment, consumer, or franchise disputes; or (B) disputes arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power. The Act will also require questions as to the validity or enforceability of an agreement to arbitrate to be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. Collective bargaining agreements would have been exempt from the Act.

VI. Independent Contractors

Late last term, bills were introduced in the Senate (cosponsored by then Senator Obama) and the House to heighten the scrutiny of individuals denied coverage under the FLSA and unemployment benefits by being misclassified as independent contractors. (S 3648, HR 6111) The bills would require employers to formally designate each individual's status, to provide each individual notice of their status and to reflect their status in the employer's formal records, and in those notices provide them with contact information to the government for further information regarding the rights of employees. Non-employees would have to be told: "Your rights to wage, hour, and other labor protections depend upon your proper classification as an employee or non-employee. If you have any questions or concerns about how you have been classified, contact the U.S. Department of Labor." Liquidated damages would be allowed for misclassified employees. The bills did not leave their committees last year, but they are expected to be reintroduced this year.

VII. Fair Labor Standards

Family Friendly Workplace Act (HR 933) was reintroduced on February 9, 2009. A similar bill was introduced last year, but never left committee. Under this bill, private sector employees will be allowed to accrue up to 160 hours of compensatory time. Unused accrued time would be cashed-out at the end of each calendar year. The bill also will prohibit an employer from intimidating, threatening, or coercing an employee in order to: (A) interfere with the employee's right to request or not to request compensatory time off in lieu of payment of monetary overtime compensation; or (B) require an employee to use such compensatory time. In addition, the bill would require an award of liquidated damages in the event of a violation of these protections in the amount of the compensation rate for each hour of compensatory time accrued, plus an additional equal amount as liquidated damages, reduced for each hour of compensatory time used. ■

THE LEGAL STATUS OF THE TWO-MEMBER NLRB

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In 2008, the National Labor Relations Board issued over 300 decisions in both representation and unfair labor practice cases.[1] All of these cases were decided by only two members, Peter Shaumber and Wilma Liebman. The statutory language included in the Taft Hartley Act that created a five person Board suggests that the Board is only authorized to delegate its powers to groups of *three or more* members. Therefore, there is a strong legal argument that the two-member Board did not possess statutory authority to issue decisions and orders.

Background of delegation of authority

On December 16, 2007, Chairman Robert Battista's term expired, leaving four members: Schaumber, Liebman, Peter Kirsanow and Dennis Walsh. Effective December 28, 2007, the remaining four members delegated all of the Board's powers to Members Liebman, Schaumber and Kirsanow, acting as a three-member group. The Board made this delegation with full knowledge that a few days later the group would shrink to only two members, when the terms of Kirsanow and Walsh expired on December 31, 2007. With Congress blocking any recess appointments, it was clear at that time, and for the foreseeable future, the Board would have only two members.

Labor practitioners are familiar with a footnote contained in each of the two-member decisions, which states that Schaumber and Liebman "constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act." The Board, therefore, justified the delegation of its powers to only two members by relying on statutory language providing that two members are a quorum of a three-member group. In a 2003 memo from the Office of Legal Counsel (OLC), U. S. Department of Justice, relied upon by the Board, the OLC opined that the Board could form a "group" that could exercise all the Board's powers as long as it had a quorum of two members.

In at least 10 cases, parties have challenged the Board's authority in different U.S. Courts of Appeals.[2] The D.C. Circuit Court of Appeals, where most of the appeals have been filed, has held all challenges in abeyance pending resolution of a case involving Laurel Baye Healthcare. It seems likely that the Laurel Baye decision will apply to all challenges pending in that Court. In total, approximately 70 of the two-member Board decisions are on appeal throughout the country. If the courts determine that the two-member Board did not have authority to act, we assume that only those cases on appeal would need to be reheard, and not all 300+ decisions.

The NLRA Does Not Authorize A Two-Member Group To Issue Decisions

The Board's position with respect to the delegation is premised on Section 3(b) of the NLRA, which provides in part:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise . . . A vacancy in the Board shall not

> impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.

For ease of reference, Section 3(b) contains the following provisions:

- Delegation: "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise."
- Vacancy: "A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board"
- General Quorum: "[T]hree members of the Board shall, at all times, constitute a quorum of the Board"
- Group Quorum: "[E]xcept that two members shall constitute a quorum of any group pursuant to the [Delegation provision]."

Under the plain language of the Act, the permanent two-member Board of Schaumber and Liebman is not empowered by Section 3(b) to issue decisions and orders. When the Board delegated its authority to three members in December 2007, it did so without any pretense that the three members would issue a single decision or order. The Board created a temporary three-member group solely for the purpose of delegating all the Board's powers to a two-member group.

No one, not even the Board, argues that Section 3(b) permits delegation of powers to a two-member group. Yet, the NLRB attempts to leverage the Group Quorum provision of Section 3(b) to justify its disregard for the Delegation provision. The Group Quorum provision is designed to permit a three-member panel hearing a case to issue its decision even if the panel loses one of its members to, say, illness, recusal, resignation or death.[3] It is not designed to permit the Board to delegate all authority to a panel of two. In other words, if the Board is not authorized to delegate its powers to a two-member group, then it is likewise not authorized to delegate its powers to a three-member group that it knows will become a permanent two-member group within days of the delegation.

Section 3(b) establishes that the Board is permitted to place all its powers in a group of *three or more* members, pursuant to the Delegation provision. The Group Quorum language provides only that a group of *three or more* members has a quorum requirement of two members. The Group Quorum provision does not override the Delegation provision. To assert as much verges on the absurd, yet this is in reality what the NLRB contends. The NLRB argues that its December 2007 procedural maneuver satisfies the Delegation provision, solely because at the moment of delegation (and for another two days) a group of three members existed to receive the delegated powers. The NLRB's ploy satisfied the Delegation provision only for a brief period of time, however. Once the three-member group ceased to exist (upon the departure of Member Kirsanow), the group ceased possessing the powers delegated to it by the Section 3(b) Delegation provision. The Group Quorum provision does not imbue a permanent two-member group with the powers that, under the Delegation provision, only a group of *three or more* members can exercise.

The NLRB's construction of Section 3(b) relies on the Group Quorum provision to the exclusion of all other language and consequently renders the Delegation provision meaningless. Why would Congress limit the NLRB's authority to delegate powers to groups of *three or more* members in the Delegation provision, if it intended to allow a delegation to two members via an expansive interpretation of the Group Quorum provision? The answer, of course, is that Congress did not intend the Group Quorum provision to nullify the three-member minimum requirement of the Delegation provision.

Stripped down to its essence, the NLRB's contention is that because the Group Quorum provision permits two members of a three-member group to issue decisions and orders, Members Schaumber and Liebman were authorized to issue decisions indefinitely. The glaring deficiency in this argument, of course, is that Schaumber and Liebman were not part of a three-member group. They were at all times in 2008 and to date, a two-member group. Such a tortured contstruction of the Act does not reflect the plain meaning of the statutory language and would interpret the Delegation provision of Section 3(b) to allow concentration of the Board's powers in a two-member group.

Two-Member Decision-Making Distorts The NLRB's Decisional Processes

The failure of the Board's current scheme is exacerbated because two-person Board decisions have been released while the Board purportedly continues to follow policies which distort the decision-making process of the two-person Board in other ways.

For the past several decades, at least, serving Members have adhered to a policy by which the Members have agreed not to change major or significant precedent without the presence of a full five member Board.

The problem with this policy in the two-member context is facially apparent, *i.e.*, because the scope of "major" or "significant" is clearly subject to interpretation. When this informal commitment to the non-reversal of significant precedent is coupled with Board procedures which allow a single Board member to require that any case be heard by the full Board, along with the concomitant ability of any member to hold a case in the decision process until there is a full five person Board, it is plainly apparent that the attempted delegation is inconsistent with the intent of Congress in enacting the Taft-Hartley Act, which expanded the Board membership from three to five. In addition, when more than three members are serving, members of the Board who are not part of the initial panel of three, have the right to opt onto the case or to designate the case as one that should be decided by a full Board. The implemented Board processes are then improperly altered and distorted when only two persons purport to decide cases.

A 1995 Article in the Cornell *Industrial Labor Relations Review* accurately describes the Board's procedures for reaching a decision and highlights the complexity of this process. *See* William N. Cooke, et al, *The Determinants of NLRB Decision-making Revisited*, 48 Indus Labor Rel Rev 237, 239-240 (1995). Professor Cooke explains that appealed cases are initially assigned on a rotating basis to three-member panels of the Board, at which point one panel member is designated as the "originating board member." Each member relies heavily on his or her staff to evaluate ALJ recommendations and exceptions filed and to draw up recommendations. (Except on rare occasions, no hearings are held by the

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Board.) Prior to making recommendations to members, the staff representatives assigned to a case by each member of a given panel usually meet to discuss the recommendations that each intends to make to the panel members he or she serves. These meetings are not intended for the purpose of reaching consensus among the assigned staff. The discussion of any opposing views, nevertheless, may influence the recommendations made by staff representatives to the members they serve. Some cases are simple enough that even before the panel members' staff meet to discuss cases, staff representatives of the originating Board member prepare drafts of recommended decisions for circulation to other Board members. All five Board members receive a copy of the panel's proposed decision and proposed dissents, if any, for every case. There is no formalized step or practice in which members discuss cases with one another before rendering individual decisions; however, some Boards have engaged in informal discussions prior to making decisions. *Id*.

Cooke further explains that when disputes appear to be especially important or complex ones, all five members normally vote. It is Board policy that any member may request that all members vote if a case is novel, if the nature of the dispute requires a new interpretation of the law, or if members of the Board seek to redefine policy or set new policy.[4] In cases involving the full Board, staff representatives of each member meet to discuss the case and jointly prepare a memorandum, which, without making recommendations, discusses the applicable facts and law and the implications of alternative resolutions. *Id*.

The current Board has utilized super panels to a greater extent than earlier Boards, but a review of the various voting steps underscores the importance of the checks and balances incorporated in the textual language that Congress used in creating the five member Board which also required that a quorum of the five members be three or more. The language and legislative history, as implemented by the Board's actual decisional practices, clearly demonstrate that the statute, as written by Congress, never intended that decisions be made by only two members.[5]

The Two-Member Board Has Resulted in the Abdication Of the Statutory Obligations of Board Members

The imbalance of the two-member Board has resulted in repeated instances in which both members have sacrificed their obligations to intrepret the law for institutional efficiency.

The NLRB is a quasi-judicial body that is largely free from the constraints of stare decisis. A member's obligation is to intepret the Act as he or she believes it applies to facts presented in a particular case. As a consequence, Board law changes from time to time. It is common that regulatory agencies seek to be both faithful to the regulatory policies enacted by prior Congresses and responsive to the legal, economic and political changes that have altered the nature of their regulated marketplaces. As a result, agencies may well engage in a process of updating statutory meaning as part of their policymaking role and construe statutory text dynamically.[6]

It is generally understood that NLRB decision-making is influenced by the particular philosophy and background of the individual Board members. That is to say, Board members bring a political and policy framework to deciding ULP cases before them.[7] In this context, a member of the Board has an obligation to decide cases based on his or her view of the law, not to avoid stalemates or "institutional" problems. The doctrine of stare decisis does not restrict a Board member from deciding cases based on what the law ought to be as opposed to whether a wrongly decided issue is settled. If, for example, a Board member views a decision as wrongly decided, at a minimum the member may issue a dissenting opinion. Chairman Liebman has issued countless dissents in recent years. Because the NLRB has no direct enforcement powers, decisions and orders of the Board are ultimately subject to approval, modification or rejection by the courts. As a result, dissenting opinions are expressed forcefully to persuade the courts to consider that viewpoint seriously.[8]

The two-member Board has by necessity modified its practices in light of its choice to issue decisions without a three-member group. Liebman stated that the two-member Board's "primary objective is to try to operate as close to normal operations as possible."[9] She stated further that she would "acquiesce in the fact that there is new law which was just created that I don't like and there's old law, or new law, that Member Schaumber doesn't like and might otherwise have changed but acknowledges is the law." *Id*.

Schaumber admits that the two-member board can be viewed as "stymied and dysfunctional."[10] He acknowledged that the current board is unable to reverse precedent because the Board traditionally does not do so unless at least a three-member majority agrees. He stated further that "this aspect of the board's paralysis deprives us of the ability to fulfill our statutory role, it undermines government in general in my view and the board in particular in the eyes of those who we are charged with protecting and regulating." *Id*.

The two-member Board has openly departed from longstanding Board decision-making norms for the sake of institutional convenience. In over a dozen cases in 2008, for example, Schaumber or Liebman set aside their policy positions for "institutional reasons." This has resulted in parties being denied an effective remedy or defense because of the Board's desire to avoid a tie-vote stalemate.

In *AM Property Holding Corp.*, 352 NLRB No. 44 (March 27, 2008), the two-member Board reconsidered the dismissal of an unlawful-recognition allegation by a prior three-member panel of Chairman Battista and Members Liebman and Kirsanow. The two-member Board granted the motion for reconsideration and found that the employer had violated the Act. The union sought special remedies against the employer, who had violated the Act four times in similar circumstances. In the underlying case, Member Liebman dissented in part, stating that she would grant the special remedies. However, she denied the request in this case: "In her view, the additional violation found here would further support granting those remedies. However, for institutional reasons, she concurs with Chairman Schaumber in denying the motion." *Id*., fn. 9.

In *Northeastern Land Services*, 352 NLRB No. 89 (June 27, 2008), the two-member Board found that the employer violated the Act by maintaining an overbroad employee confidentiality policy. The Board further found that an employee who was disciplined pursuant to the policy was "necessarily unlawful." Schaumber disagreed with the doctrine supporting the Section 8(a)(3) violation, but nevertheless found a violation. He noted that he "questions the theory that an employer's imposition of discipline pursuant to an unlawfully overbroad rule is necessarily unlawful, such as in

situations where the discipline imposed is for a lawful reason albeit under an overly broad, unlawful rule. Nonetheless, he applies precedent for institutional reasons for the purpose of deciding this case." *Id*., fn. 9.

In many more cases, either Schaumber or Liebman disregarded his or her view of what the Act requires for "institutional reasons" of issuing a two-person decision.[11] Had these cases been held in abeyance until the Board had a properly-constituted and statutorily-authorized group of three or more members, the views of each member of that group might have coalesced into a decision reaching a different result. Perhaps a ruling would have issued that departs from what is considered extant Board law. All of these cases were deprived of that process. In case after case, Schaumber and Liebman were forced by circumstance to put aside their policy positions for institutional reasons.

It is clear that two-person decision making compromises the stated views of what Board law requires in order to move cases out the door. Many parties who came before the two-member Board witnessed their dispute resolved not by principle, but rather by institutional expediency. The reason for this outcome was the perhaps well-intentioned, but fatally-flawed, decision by the Board to attempt to delegate its powers to a two-person group, which concedes that avoiding stalemate rather than informed analysis was the paramount consideration. The adjucatory function of the Board, thus, ceased to exist in many instances in favor of avoiding delay. This result is repugnant to the fundamental mission of the Board.

— END NOTES —

[1]The two-member Board has continued to issue decisions in 2009. At the time of submission of this article, 25 decisions were issued to date in 2009.

[2]The authors of this article represent a party challenging the two-member Board. The opinions expressed in this article, however, are solely those of the authors.

[3]In *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121 (9th Cir. 1982), a case relied upon by the Board and OLC to justify its present two-member group, a five-member Board in 1981 assigned the case to a three-member panel (Fanning, Jenkins, Panello). Before the panel's decision was announced, Member Panello submitted his resignation, which was effective the day the decicion was issued. The Employer argued that the decision was not issued by a properly constituted three-member panel. The court disagreed, noting that all three panel members concurred in the decision and that, by operation of the Group Quorum provision, even if Penello's resignation "precluded his participation in the Board's decision, . . . a decision by two members of the panel would be binding." *Id*., at 122. In that case, unlike all of the Schaumber-Liebman decisions, the Board at all times had three or more members.

[4]If a member requesting review by the full Board is part of the three-member panel assigned to the case, this request may be made at any time. If the request for a full Board decision is made by a member who is not part of the panel assigned to the case, the request is heard when the full Board reviews the panel's proposed decision and any dissenting opinions. *Id*.

[5]In instances where the Member's term expired or if there was a death subsequent to the case being decided, the three person minimum requirement is complied with because, when the decision was rendered, a legal quorum existed.

[6]*See* James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future*, 26 Comp. Lab. L. & Pol'y J. 221, 224 (2005).

[7]Professor Cooke argues that political decision-making at the Board is not necessarily undesirable. Through the election of new Presidents, the public expresses desired changes in the direction taken by regulatory agencies, including the NLRB. Because the Act leaves wide latitude for intrepeting what is an unfair labor practice, the shift in public sentiment represents legitimate guidance to Board members. Therefore, a Board member's reflection in his or her decision-making of the President's preferences serves the useful purpose of making the Board responsive to public sentiment. William N. Cooke, et al, *The Determinants of NLRB Decision-making Revisited*, *supra* at 255-256 (1995)

[8]Cooke, *supra*.

[9]Susan J. McGolrick, *NLRB Enters New Year With Three Vacancies, Two Members Issuing Decisions*, Daily Lab. Rep. (BNA) at S-9 (January 30, 2008).

[10]Susan J. McGolrick, *Schaumber, Liebman Discuss Dynamics Of Two-Member Board; 'Bush Board' Legacy*, Daily Lab. Rep. (BNA) at C-1 (September 18, 2008).

[11]*Essex Valley Visiting Nurses*, 352 NLRB No. 61 (April 30, 2008); *The Lorge School*, 352 NLRB No. 17 (February 19, 2008); *Medco Health Solutions*, 352 NLRB No. 78 (May 30, 2008); *Magic Beans, LLC*, 352 NLRB No. 107 (July 18, 2008); *Local One-L, Almagamated Lithographers*, 352 NLRB No. 114 (July 31, 2008); *Alcoa, Inc.*, 352 NLRB No. 141 (August 29, 2008); *Mashantucket Pequot Gaming Enterprise*, 353 NLRB No. 32 (September 30, 2008); *Atrium at Princeton, LLC*, 353 NLRB No. 60 (December 5, 2008); *Hamilton Sundstrand*, 352 NLRB No. 65 (May 19, 2008); *McBurney Corp.*, 352 NLRB No. 112 (July 23, 2008); *Fluor Daniel, Inc.*, 353 NLRB No. 15 (September 25, 2008); *Kingsbridge Heights Rehab.*, 353 NLRB No. 69 (December 24, 2008). ■

THE USE OF THE "TEMPORAL PROXIMITY" ARGUMENT IN RETALIATION CLAIMS: CLARIFYING THE STANDARD

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At the summary judgment phase of a retaliation claim under Title VII, the plaintiff must prove causation. Invariably at this stage, plaintiff will argue that the "temporal proximity" of the plaintiff's adverse action in relation to her protected activity is sufficient to prove causation. In Michigan, under the Whistleblower's Protection Act and Elliott Larsen Civil Rights Act, "temporal proximity" alone is never sufficient to show causation. In federal Title VII claims, however, whether temporal proximity alone is sufficient to send a case to trial has been unsettled. But, recent federal case law, including *Arendale v. City of Memphis*, 519 F.3d 587 (6th Cir. 2008), has clarified the issue. The rule from these cases is essentially that temporal proximity alone will not be sufficient to meet a prima facie case of retaliation, unless the adverse employment action occurs very close in time after an employer learns of a protected activity. Harmonizing the available case law, it appears that, without additional evidence, any time span of over two months between a protected activity and adverse action is insufficient temporal proximity to demonstrate a prima facie case of retaliation.

To demonstrate a prima facie case of retaliation a plaintiff must first show that he engaged in a protected activity, for example filing a complaint with the Equal Employment Opportunity Commission. Second, an employee must show that the defendant had knowledge of the Employee's protected conduct. Third, the employee must show that the defendant took an adverse employment action towards the employee. Finally, the employee has to show that there was a causal connection between the protected activity and the adverse employment action. *Mickey v. Zeidler Tool and Die Co.*, 516 F.3d 516, 523 (6th Cir. 2008) *(citing Weigel v. Baptist Hosp. of E. Tennessee*, 302 F.3d 367, 381 (6th Cir. 2002). The temporal proximity argument is commonly utilized when trying to show the fourth element of the prima facie case of retaliation, causal connection.

Is Temporal Proximity Alone Sufficient to Meet a Prima Facie Case?

As the Court in *Zeidler* recently noted, there has been some "confusion in the case law" Regarding the temporal proximity argument. This confusion stems from the fact that some cases hold temporal proximity alone is insufficient to prove causation;[1] whereas, other courts have allowed temporal proximity to meet a prima facie case as long as the timing between the adverse action and protected activity was "close."[2]

(Continued on page 8)

THE USE OF THE "TEMPORAL PROXIMITY" ARGUMENT IN RETALIATION CLAIMS; CLARIFYING THE STANDARD

(Continued from page 7)

The U.S. Supreme Court shed further light on the sufficiency of the temporal proximity argument in the 2001 Title VII case of *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). There, the Court referenced cases that have accepted temporal proximity alone in a showing of causal connection, noting that those cases uniformly hold that the adverse employment action must occur "very close" in time to the employee's protected activity. *Id.* at 273.

Finally, the Sixth Circuit seemed to harmonize the issue with its decision in *Mickey v. Zeidler Tool and Die, Co.*, 516 F.3d 516, 525 (6th Cir. 2008), holding:

> Where an adverse employment action occurs very close in time after an employer learns of a protected activity, such temporal proximity between the event is significant enough to constitute evidence of a causal connection for the purposes of satisfying a prima facie case of retaliation. But where some time elapses between when an employer learns of a protected activity and the subsequent adverse employment action, the employee must couple temporal proximity with other evidence of retaliatory conduct to establish causality.

How Close is Close?

Zeidler involved an adverse employment action occurring the same day the employer learned of his employee's protected activity.[3] But the temporal proximity argument doesn't seem to be limited to this "same day" time span and the case seems to leave open the question of "how close is close?

The Sixth Circuit has been uniform in holding that time periods over six months are insufficient proof of temporal proximity.[4] It is around the two to three month time span where the confusion lies. A majority of the cases have held where an adverse action is taken up to two months after a protected activity the temporal proximity argument alone may be sufficient to establish causal connection.[5]

In 1999, the Sixth Circuit held that disciplinary actions occurring two to five months after a protected activity are "insufficient to create a triable issue." *Hafford v. Seidner,* 183 F.3d 506, 515 (6th Cir. 1999). But, in 2004, the Sixth Circuit, without citing *Hafford,* held that a three month period may be sufficient to show causation. *Singfield v. Akron Metro Housing Authority,* 389 F.3d 555 (6th Cir. 2004).

In 2008, though, the two month standard was reaffirmed in the case of *Arendale v. City of Memphis,* 519 F.3d 587 (6th Cir. 2008).[6] In *Arendale,* a white police officer claimed, among other things, that he was retaliated against after he filed an EEOC charge relating to disparate treatment by his African American supervisor. The alleged retaliatory action occurred two months after the officer filed his EEOC charge. The officer could present no other evidence of retaliation except temporal proximity. The Court, however, held that the two month time frame was insufficient and upheld summary judgment.

Thus, *Arendale* is the most recent published Sixth Circuit opinion regarding whether temporal proximity alone is sufficient to create a triable issue of fact as to retaliatory causation. Under *Arendale,* an adverse employment action taken up to two months after a protected activity, by itself, may be sufficient to send a retaliation case to the jury. Given, however, the uncertainty seen in the Sixth Circuit decisions, there is no guarantee an appellate panel will follow *Arendale.*

— END NOTES —

[1]*See, e.g. Nguyen v. City of Cleveland,* 229 F.3d 559, 566-567 (6th Cir. Ohio 2000); *Cooper v. City of North Olmstead,* 795 F.2d 1265 (6th Cir. 1986).

[2]*See* discussion in *Parnell v. West,* 1997 U.S. App. LEXIS 12023 (6th Cir. 1997); *see also Hamilton v. Starcom Mediavest Group,* 522 F.23 623 (6th Cir. 2008) (noting two lines of cases — the cases that suggested temporal proximity alone, in some instances, could satisfy the causation element and the cases that suggested temporal proximity is never sufficient by itself).

[3]*See also, Schocker v. Guardian Alarm Co. of Michigan,* 2008 U.S. Dist. LEXIS 59160 (E. D. Mich. 2008) (next day is sufficient); *Cole v. Tenn. Watercraft, Inc.*, 2008 U.S. Dist. LEXIS 54231 (E.D. Tenn. 2008) (next day is sufficient); *Howlington v. Quality Rest. Concepts, LLC,* 2008 U.S. App. LEXIS 220003 (6th Cir. 2008) (two day span is sufficient).

[4]*Parnell v. West,* 1997 U.S. App. LEXIS 12023 (6th Cir. 1997) (holding over six months was insufficient); *Hamilton v. Starcom Mediavest Group,* 552 F.3d 623 (6th Cir. 2008) (holding that a span of nine months was insufficient); *See also, Matthews v. Tenn. Bd. of Prob. & Parole,* 2008 U.S. Dist. LEXIS 52315, 53-55 (E.D. Tenn. July 7, 2008) (nine months was insufficient).

[5]*See Asmo v. Keane, Inc.,* 471 F.3d 588 (6th Cir. 2006) (holding two months is sufficient); *Graham v. Best Buy Stores, L.P.,* 2008 U.S. App. LEXIS 22224 (6th Cir. 2008) (holding the time span from February 2005 to April 2005 is sufficient);

[6]Several unpublished opinions, however, have not followed *Arendale. See, e.g. Goller V. Ohio Dept. of Rehab and Corr.,* 285 Fed. Appx. 250 (6th Cir. 2008) (holding two months is sufficient and favorably citing the *Singfield* three month standard); see also the unpublished district court decision of *Kalia v. Robert Bosch Corp.*, 2008 U.S. Dist. LEXIS 57044 (E.D. Mich. 2008) (holding time span of just over a month is sufficient for a Title VII retaliation prima facie case). ■

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For information, contact *Lawnotes* editor Stuart M. Israel 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.

"GENETIC INFORMATION" DISCRIMINATION LAW CERTAIN TO CREATE CONFUSION

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This year, the EEOC will take on responsibility for a newly created category of employment discrimination: Discrimination or retaliation based on "genetic information."

President Bush signed the legislation, entitled the Genetic Information Nondiscrimination Act (GINA), on May 21, 2008. Its employment provisions became effective November 21, 2009. The EEOC is to issue regulations by May 21, 2009.

The employment provisions parallel much of Title VII, prohibiting employees from failing or refusing to hire, or from discharging, or from otherwise discriminating against any employee in the areas of compensation or other terms, conditions, or privileges of employment because of genetic information, or from limiting, segregating, or classifying employees so as to deprive or tend to deprive them of employment opportunities because of genetic information.

Like Title VII, GINA prohibits retaliation based on protected activity. It also prohibits the acquisition of genetic information except under limited circumstances and for limited purposes. As with Title VII, similar prohibitions apply to labor unions and employment agencies.

Unfortunately, GINA's definitional provisions are rife with ambiguity. For instance, GINA broadly defines "genetic information" as including not only information about an individual's genetic tests, but those of his or her family members as well. Family members, for purposes of the statute, include dependents and other relatives up to "fourth degree" familial relationships. Even more certain to generate confusion is the statute's categorization of any "manifestation" of a genetically related disease or genetic disorder in a family member as protected "genetic information."

An example of how the vague contours of the statute may create liability can be found in one of the exceptions to the prohibition on acquiring genetic information. This exception applies when an employer "inadvertently requests or requires" family medical history of the employee or his or her family member. But what is an "inadvertent request?" Consider this common casual exchange: An employee mentions to her boss she is stopping off at the hospital on her way home to visit her aunt, and the boss offers the cordially routine follow-up, "Oh, what's wrong?" If the answer is breast cancer or some other genetically linked disease, is this an acquisition of "genetic information," and if so, is it a prohibited acquisition or is it "inadvertent?"

Other exceptions in the statute are equally prone to confusion. Employers may legitimately acquire genetic information if needed to comply with Family and Medical Leave Act certification provisions, but there is no similar exemption for participation in the interactive process under the Americans with Disabilities Act. Similarly, employers are authorized to acquire genetic information to administer wellness programs and to monitor biological effects of toxic substances in the workplace, but only if numerous technical criteria are satisfied.

GINA creates an enforcement scheme virtually identical to Title VII's. An individual claiming to have been wronged must first file a timely charge with the EEOC before suing in Federal Court. Like Title VII, GINA imposes a cap of $300,000 (or less, depending on employer size) on compensatory and punitive damages. But, unlike Title VII GINA does not allow for disparate impact claims, though it does provide that this question will be studied by a commission Congress will appoint in 2014.

The statute also amends the Employee Retirement Income Security Act and the Public Service Health Act to impose similar prohibitions on group health plans and health insurance issuers. However, as emphasized in a recent report by the Congressional Research Service, these prohibitions pertain only to health insurance and, at least at present, do not impact long-term care insurance, life insurance, or short-term or long-term disability insurance.

Because there has been virtually no reported litigation arising out of existing state laws prohibiting genetic discrimination, business groups opposed GINA's enactment as "a solution in search of a problem." Impetus for the law lies primarily with a widely publicized EEOC settlement with Burlington Northern Railroad for allegedly requiring certain employees to submit to genetic testing. In addition, advocacy groups cited anecdotal evidence of individuals refusing potentially life-saving genetic screening, purportedly out of concern that insurers and employers might someday use the test results against them. Regardless of the rationale for this new statute, we can be sure that its contours will become clear only through future regulatory action and litigation. ■

NEW LOOK *LAWNOTES*

You will have noticed the new look of the *Lawnotes* back cover. It is not due to the aesthetic advice of the best graphic minds of our generation. Rather, it is due to new U.S. Postal Service regulations about placement of the postal permit box. Is this the change we've been hoping for? We at *Lawnotes* think not.

Nonetheless, at *Lawnotes* we are all about following the law. So, the ever-popular Inside *Lawnotes* box will now be on the bottom half of the back cover.

– Stuart M. Israel

THE SUPREME COURT BROADENS THE COVERAGE OF TITLE VII'S ANTI-RETALIATION PROVISION

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On January 26, 2009, the United States Supreme Court issued its opinion in *Crawford v. Metropolitan Government of Nashville and Davidson County* ("*Crawford*"). This decision effectively expands the class of individuals who will now be able to state a claim of retaliation pursuant to Title VII of the Civil Rights Act of 1964. In pertinent part, Title VII's anti-retaliation provision now protects not only those who actually initiate a complaint of discriminatory conduct, but also those individuals who simply identify discriminatory behavior while responding to an investigator's inquiries. The precedent set in *Crawford* reshapes the landscape of how management will conduct investigations into claims of discrimination and harassment.

Background and Procedural History

Vicky Crawford was terminated after 30 years of employment with the Metropolitan Government of Nashville and Davidson County ("Metro") in January of 2003. The incidents leading up to her termination began in May of 2002, when an attorney for Metro approached Ms. Crawford to discuss a complaint of sexual harassment against the employee relations director, Gene Hughes. When asked if she had ever witnessed "inappropriate behavior" on the part of Hughes, Crawford told the investigator that Hughes had sexually harassed her and other employees.

Crawford informed the investigator of Hughes' sexually explicit comments and gestures toward her since his hire in 2001. At the close of the investigation, Metro's attorney concluded that Hughes had engaged in inappropriate and unprofessional behavior, although not to the extent of Crawford's allegations. Ultimately, no disciplinary action was taken against Hughes. Subsequent to her involvement in the Hughes investigation, Crawford was accused of embezzlement and drug use, and was later suspended and ultimately terminated. In June 2003, Crawford filed a charge of discrimination with the EEOC alleging retaliation under Title VII. After receiving a notice of right to sue, she brought the instant lawsuit.

Crawford alleged in her complaint that she was discharged in retaliation for responding to Metro's inquiries during the Hughes sexual harassment investigation, and for asserting that Hughes had also sexually harassed her. Metro moved for Summary Judgment, arguing that Crawford had not participated in a "protected activity" under Title VII and therefore could not establish a retaliation claim. The Court granted Metro's motion for summary disposition, opining that Crawford's responses to questions during the investigation were not a "protected activity" under the anti-retaliation provision of Title VII. The Sixth Circuit Court of Appeals agreed with the District Court and affirmed the dismissal. Crawford then appealed to the United States Supreme Court.

Issue Before the Supreme Court

In order for a Plaintiff to make a sustainable retaliation claim, the Plaintiff must at the outset of her claim, establish that she has engaged in some sort of protected activity, by meeting one of two definitions of "protected activity" under the Statute. Title VII has enumerated these "protected activities in two separate clauses, making it "an unlawful employment practice for an employer to discriminate against any of its employees…[1] because the employee has *opposed* any practice made an unlawful employment practice by this subchapter, or [2] because the employee has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this subchapter."[1] The first is known as the "opposition clause" and the other is known as the "participation clause."

The District Court summarily dismissed Crawford's claim, finding that the mere answering of questions during the investigation did not rise to the level of "opposition." Furthermore, the District Court also dismissed Crawford's claim under the "participation clause," relying upon Sixth Circuit precedent which holds that an employee's "participation" in an employer's internal investigation is only protected activity where that investigation occurs pursuant to a pending EEOC charge.[2] There was no pending EEOC Charge in *Crawford,* and Metro's internal investigation was a result of another employee's internal complaint.

In seeking appeal to the Supreme Court, Crawford argued that her revealing of Hughes' sexually harassing behavior was in essence "opposition" to unlawful discriminatory conduct. As a result of a conflict in the Circuits regarding the application of the "opposition clause," the Supreme Court granted certiorari to determine whether an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation is afforded protection under the "opposition clause" of Title VII's anti-retaliation provision.

The Supreme Court's Opinion

The Supreme Court reversed the decision of the Sixth Circuit, holding that an employee who asserts his or her opposition to unlawful discrimination, not on his or her own initiative, but in responding to an employer's inquiries is protected under the "opposition clause." Since the term "oppose" was left undefined within Title VII, the Supreme Court went on to examine the ordinary definition of the term. According to the Court, pursuant to Webster's Dictionary, "oppose" means "to resist or antagonize…; to contend against; to confront; resist; withstand." Additionally, per the Random House Dictionary, "oppose" means "to be hostile or adverse to, as in opin-

ion." Crawford's responses to Metro's questions during the investigation were very detailed and explicit in outlining the harassing behavior of Hughes. The Supreme Court found that Crawford's description of the "louche goings-on" at Metro would certainly qualify in the minds of reasonable jurors as "resistant or antagonistic" to the unlawful treatment, and therefore in "opposition."

Furthermore, the Court relied upon the EEOC's guidelines in determining whether Crawford's statements were protected by the "opposition clause." The Sixth Circuit had not followed the guidance provided by the EEOC on this issue. The EEOC's guideline states, "When an employee communicates to her employer a belief that the employer has engaged in …a form of employment discrimination, that communication" virtually always "constitutes the employee's *opposition* to the activity."[3]

The Sixth Circuit's reasoning for dismissal was that Crawford's mere answering of questions fell far short of what is required by the "opposition clause," which demands active, consistent "opposing" activities to warrant protection against retaliation. Moreover, Metro argued that in order to be afforded protection, an employee must "initiate" or "instigate" the complaint.

Although the Supreme Court acknowledged that consistent "opposing" activities, as well as "initiating or instigating" a complaint, are commonly understood to exemplify opposition, these terms do not set the limits of opposing activity. By way of example, the Supreme Court noted that an employee can "oppose" an employer's discriminatory conduct without instigating or initiating a complaint, by standing pat, and refusing to follow a supervisor's orders which would result in discrimination or harassment. Similarly, an employee can "oppose" unlawful conduct by responding to someone else's question, just as surely as by provoking the discussion.

Metro proffered the argument that without the "active" and "consistent" opposition by the employee as an element for protection under the "opposition clause," the bar will be set to low for retaliation claims. Accordingly, Metro submitted that employers will be less likely to investigate and raise questions about possible discrimination in the workplace. The Supreme Court found this argument unconvincing, as it underestimated the employer's incentive to investigate and correct possible discriminatory conduct derived from the Supreme Court's *Ellerth* and *Faragher* decisions.[4]

Pursuant to the decisions in *Faragher* and *Ellerth*, an employer is subject to vicarious liability for an actionable hostile work environment.[5] Furthermore, an employer is afforded an affirmative defense if it exercised reasonable care to prevent and correct promptly any discriminatory conduct and the plaintiff employee unreasonably fails to take advantage of the corrective opportunities provided by the employer. In sum, there is a strong inducement for employers to investigate, identify, and correct discriminatory or harassing activity to reduce potential liability. In underscoring this point, Justice Souter stated, "the possibility that an employer might someday want to fire someone who might charge discrimination traceable to an internal investigation does not strike us as likely to diminish the attraction of an *Ellerth-Faragher* affirmative defense."

Ultimately, the Court held that "oppose" goes beyond "active, consistent" behavior in ordinary discourse, and may be used to speak of someone who has taken no action at all to advance a position beyond disclosing it. Moreover, a person can "oppose" by responding to someone else's questions just as surely as by provoking the discussion. After reversing the Sixth Circuit regarding Title VII's "opposition clause," the Supreme Court did not examine Crawford's claim under the "participation clause."

Impact of Decision

Certainly, the decision to extend the coverage of the anti-retaliation provision to employees who are simply responding to an employer's inquiries places an additional burden on employers. Even more so than in the past, employers will now have to be even more cautious in conducting investigations of harassment and discrimination. The employer must be cognizant that an employee's responses to questions during the investigative process may lead to a retaliation claim at some later date.

In summary, employers must continue to conduct a reasonable investigation into any alleged discriminatory or harassing conduct, and adequately document the sources of information. Additionally, prior to any adverse action taken against any employee, a review should be undertaken by the employer to identify any involvement the employee has had in previous investigations or conversations, where his or her statements may be considered "opposition," to unlawful conduct, thereby creating an environment ripe for a retaliation claim.

— END NOTES —

[1]42 U.S.C. §2000e-3(a).

[2]*Abbot v Crown Motor Co., Inc*., 348 F.3d 537 (6th Cir. 2003)

[3]Volume 2, EEOC Compliance Manual §§8-II-B(1), (2), p. 614.0003 (Mar. 2003).

[4]*Burlington Industries, Inc. v Ellerth*, 524 U.S. 742 (1998); *Faragher v. Boca Raton*, 524 U.S. 775 (1998).

[5]*Id.* ■

WRITER'S BLOCK?

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COURT REINFORCES JOB GUARANTEES FOR RETURNING MILITARY PERSONNEL

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An August 2008 decision of the U.S. Court of Appeals for the Sixth Circuit, *Petty v. Metropolitan Government of Nashville-Davidson County*, 583 F3d 431 (CA 6, 2008), is a good reminder that returning military personnel are essentially guaranteed reemployment by their former employers upon their return from service. In that case, the Court ruled that despite Petty's admitted misrepresentations in the reemployment process, his former employer (Metro) violated his reemployment rights under the Uniformed Services Employment and Reemployment Rights Act ("USERRA") when it (1) failed to "promptly rehire him" due to its return-to-work-process, and (2) failed to place him into the position to which he was entitled.

Petty had been employed as a police officer with Metro since 1991, and was promoted to the rank of sergeant in 2000. Throughout his employment he was in the Army Reserves. In 2003 he was called to service and eventually deployed to Iraq. While in Iraq, it was discovered that Petty was manufacturing wine in his quarters and he admitted giving alcohol to an enlisted soldier – violations of General Order 1A. In lieu of going forward with court martial proceedings, Petty requested to resign "for the good of the service." The Army accepted his request and formally dismissed the charges against him in January 2005. His discharge was characterized as "under honorable conditions" and Petty returned to the States on February 1, 2005.

On February 28, 2005, Petty visited Metro to request reinstatement. He was required to go through a return-to-work process that applied to all police officers who had been away for an extended period of time. This included completing a personal history questionnaire, a medical examination, a computer voice stress analysis, a drug screen, and a debriefing with a police department psychologist. The stated purpose was to ensure that police officers were physically, emotionally, and temperamentally qualified.

Metro returned Petty to work three weeks later on March 21, 2005. But the position to which he was returned was not the same position he had left – it was an office job in which he answered phone calls and took police reports. Metro had learned during its investigation that Petty had redacted part of the Department of Defense form that described his separation as being "in lieu of trial by court martial" – a clearly deceptive act on his part. Metro had traditionally placed officers facing discipline (or otherwise "disempowered") in office jobs.

Petty filed a lawsuit alleging violations of USERRA. The Trial Court granted Metro's motion for summary disposition and dismissed Petty's claims that Metro violated his rights by delaying his rehire and by not placing him in his former position.

The Appeals Court reversed and ordered that summary judgment be entered in Petty's favor. The Court noted that Petty had met the statutory prerequisites to qualify for USERRA's reemployment guarantee (*i.e.*, advance notice, less than five years of military service, a timely request for reemployment, proper documentation, and an "honorable" discharge), and held that Metro was not permitted to delay or require him to comply with its own return-to-work process. Importantly, the court found inconsequential Metro's asserted obligation to ensure that returning police officers met certain qualifications for the position, noting Congress' clearly expressed view that a returning veteran's reemployment rights take precedence over such concerns. Since Petty had met USERRA's prerequisites, Metro had no legal basis for questioning his honesty or qualifications or for placing him in the desk position. ■

UNITED STATES SUPREME COURT UPDATE

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Butzel Long

A QDRO Is Not Necessarily Required to Waive Pension Benefits in a Divorce Decree.

On January 26, 2009, the Supreme Court ruled in *Kennedy v. Plan Adm. for DuPont Savings and Inv. Plan*, No. 07-636, that even though a waiver of pension benefits in a divorce decree need not be a Qualified Domestic Relations Order ("QDRO"), a plan administrator of a pension benefit plan subject to the Employee Retirement Income Act of 1974 ("ERISA") has a duty to follow plan documents when faced with a discrepancy between a waiver and a plan beneficiary designation. In *Kennedy*, William Kennedy worked for E. I. DuPont de Nemours & Company ("DuPont") and was a participant in its savings and investment plan ("SIP"). William had been married to Liv Kennedy and had designated her as his sole beneficiary under the SIP. The couple divorced in 1994, and pursuant to the divorce decree, Liv waived all rights and interests in William's retirement plans. However, the couple did not execute a Qualified Domestic Relations Order ("QDRO") regarding the waiver. Moreover, by the time of his death, William had not executed a document removing Liv as the SIP beneficiary. The SIP specifically required all authorizations, designations and requests concerning the SIP to be made in the manner prescribed by the plan administrator; in this case the plan administrator provided forms for designating or changing a beneficiary. William's daughter, the estate executrix, demanded that the SIP funds be distributed to the estate. Instead, the plan administrator relied on the beneficiary designation form on file and paid William Kennedy's balance in the SIP to Liv Kennedy.

The estate executrix sued DuPont and the plan administrator, arguing that the plan administrator violated ERISA by paying the SIP benefits to William Kennedy's designee, in derogation of the waiver in the divorce decree. The trial court granted summary judgment to the estate, but the Court of Appeals for the Fifth Circuit reversed on the grounds that the divorce waiver constituted an assignment or alienation in the SIP benefits to the estate, and thus could not be honored without a QDRO. The Supreme Court disagreed with the Fifth Circuit's ruling. The Court reasoned that a QDRO, by definition, creates the existence of an alternate payee's right to a portion of a participant's plan benefit. As a result, a waiver need not be a QDRO because a waiver does not contain any succeeding designation of an alternate payee (a participant's estate not being an alternate payee). Nevertheless, the Court ultimately ruled in favor of DuPont and the plan administrator on the grounds that the plan administrator was not required to honor the waiver. Rather, the plan administrator had a duty under ERISA to pay benefits in conformity with the plan documents. In this case, the plan documents provided that the plan administrator will pay benefits to a designated beneficiary, with designations and changes to be made in a particular way. The Court concluded that because William Kennedy's designation to Liv Kennedy was made in the way required, and Liv Kennedy's waiver was not, the plan administrator acted accordingly.

Answering Questions in an Employer's Strictly Internal Sexual Harassment Investigation Can Be Protected Activity under Title VII

Also on January 26, the Court issued its opinion in *Crawford v. Metro. Gov't. of Nashville & Davidson County, Tenn.*, U.S., No. 06-1595. In that case, the plaintiff Vicky Crawford had worked for the defendant for 30 years. In 2001, Crawford provided a statement during the defendant's internal investigation into alleged sexual harassment by the defendant's employee relations director. Well over one year later, the defendant terminated Crawford allegedly due to embezzlement and drug use. Crawford sued claiming that the defendant actually terminated her employment because of the statement she provided in the defendant's internal sexual harassment investigation.

The district court granted summary judgment in favor of the defendant, and the Sixth Circuit affirmed. The Sixth Circuit held in an unpublished decision that Crawford's participation in her employer's strictly internal investigation, where no Equal Employment Opportunity Commission proceeding had been initiated, did not rise to the level of protected "participation" or "overt opposition" activity under Title VII. The Sixth Circuit affirmed summary judgment for the defendant and opined that to expand Title VII coverage to protect employee participation in strictly internal employer investigations would be to discourage employers from conducting investigations in the first place.

In an opinion drafted by Justice Souter, in which Justices Roberts, Stevens, Scalia, Kennedy, Ginsburg and Breyer joined (Justice Alito filed a concurring opinion, in which Justice Thomas joined), the Court held that Title VII's antiretaliation provision can extend to an employee whose only "opposition" to alleged harassment is answering questions during her employer's internal investigation. The Court found that there was "no reason to doubt that a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question." As it relates to Crawford's case specifically, the Court found that the information Crawford provided during the defendant's internal investigation, which included a description of sexually harassing behavior that she witnessed, certainly met the ordinary meaning of the word "oppose," that is "to resist or antagonize . . . ; to contend against; to confront; resist; withstand."

The Court rejected the defendant's argument that widening the scope of protected activity under Title VII to include answering questions in an employer's internal investigation would discourage employers from conducting investigations. The Court reasoned that the defenses in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998) should be sufficient inducement to cause employers to continue to investigate and put a stop to discriminatory activity. The Court did not reach the issue of whether Crawford's conduct was protected under the "participation" clause of Title VII's antiretaliation provision. ■

FMLA ISSUES KEEP ON PERCOLATING

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Here are some Family and Medical Leave Act (FMLA) highlights from the past year.

FMLA Protection For Alcoholism Starts When Treatment Begins. In *Darst v. Interstate Brands Corp.*, 512 F.3d 903 (7th Cir. 2008), the employee claimed his FMLA rights were violated when he was terminated for absenteeism after returning from a leave for alcoholism treatment. Prior to arranging for treatment or being admitted, however, he had missed three days of work, which the employer treated as unexcused. He nonetheless submitted a medical certification form stating that he had a serious health condition that covered the unexcused absences. The U.S. Court of Appeals for the Seventh Circuit noted that "treatment" is a defined FMLA term that does not include actions such as calling to make an appointment. Because the employee produced no evidence that he actually received any treatment as defined by the FMLA on the three days in question, he was not entitled to FMLA leave for those days, and his employer was free to terminate him.

Disclosing FMLA Diagnosis Can Create ADA Liability. After receiving an HIV diagnosis, an employee enrolled in a medical study and asked his manager for a work schedule that would accommodate his weekly blood draws. The manager told the employee that he would need a specific diagnosis so the manager could evaluate the request, and the employee reluctantly informed the manager of his HIV diagnosis. The manager disclosed the employee's HIV diagnosis to the employee's supervisor, who, in turn, informed two of the employee's coworkers. To determine whether an employee qualifies for FMLA leave, an employer may ask questions related to the need for leave – but such information is entitled to confidentiality under the ADA, which strictly limits the inquiries an employer may make regarding medical conditions and the manner in which information can be used. In *EEOC v. Ford Motor Credit Co.*, 531 F.Supp.2d 930 (M.D. Tenn. 2008) the Court rejected the employer's defense that the employee had voluntarily disclosed the information (voluntarily disclosed information is not protected by the ADA), and declined to dismiss the employee's ADA lawsuit.

Honest Belief About Leave Abuse Precluded FMLA Claim. In *Vail v. Raybestos Products Co.*, 533 F.3d 904 (7th Cir. 2008) the employer undertook surveillance because it suspected that an employee, while on intermittent FMLA leave for migraine headaches, was actually working for her family's lawn care business. The surveillance revealed that, shortly after the employee had visited her doctor and received instructions not to return to work for 24 hours, she called off work but then proceeded to mow a lawn. The Seventh Circuit affirmed the dismissal of the employee's FMLA lawsuit, holding that the employee must show she took leave "for the intended purpose" and that the employer can defeat an FMLA interference claim by showing that she did not. The court concluded that the employer did not violate the FMLA due to its "honest suspicion" that she was abusing her leave.

Handbook Language Created Additional Rights. Employers should be cautioned about what they say in employee handbook regarding FMLA leave. In *Peters v. Gilead Sciences, Inc.*, 533 F.3d

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FMLA ISSUES KEEP ON PERCOLATING

(Continued from page 13)

594 (7th Cir. 2008), the Court held that an employee could proceed with state law breach of contract and promissory estoppel claims based on handbook language that granted employees leave commensurate with that provided by the FMLA – despite the fact that the employer had less than 50 employees within 75 miles of the employee's worksite and was therefore not subject to the FMLA. The Court held that these representations in the handbook (which were repeated in letters to the employee) could create enforceable state law rights apart from the FMLA.

Staffing Firm And Client-Employer Are "Joint Employers." In *Grace v. USCAR and Bartech Technical Services*, 521 F.3d 655 (6th Cir. 2008), the Sixth Circuit held that a staffing firm and its client were "joint employers" for purposes of the FMLA, thereby triggering potential FMLA liability for both. While a Bartech employee assigned to USCAR was on an approved FMLA leave, her position was eliminated and her job was not restored upon her return. She sued both entities alleging they had interfered with her FMLA rights. Relying on a DOL regulation, the Sixth Circuit rejected USCAR's argument that it was not her "employer" – *i.e.*, that it was merely Bartech's client and Bartech was the "employer." The court found that USCAR directed the day-to-day work of the employee and controlled her salary and hours. Consequently, they were joint employers and equally liable for alleged FMLA violations relating to her non-reinstatement. Although only the primary employer (the staffing firm) is responsible for giving required notices and providing FMLA leave under the DOL regulations, when an eligible employee takes leave both the primary and secondary employers must honor the decision and not engage in retributory action. The secondary employer argued here that it had legitimate reasons for eliminating the employee's position, but the Court held that she had produced sufficient motivational evidence to warrant a trial on whether the restructuring would have occurred regardless of her FMLA leave.

Calculation Of Hours For FMLA. In *Staunch v. Continental Airlines*, 511 F.3d 625 (6th Cir. 2008), the Sixth Circuit addressed a recurring question regarding whether an employee (a flight attendant) had the requisite 1,250 hours for FMLA eligibility. The airline ran a calculation based on its records and found that she fell short; the employee calculated her time based on her own recollection and concluded she had worked well over 1,250 hours. The DOL regulations direct courts to follow the rules for calculating hours under the Fair Labor Standards Act, and note that if the "employer does not maintain an accurate record of hours worked by an employee. . . , the employer has the burden of showing that the employee has not worked the requisite hours." The Sixth Circuit found that the airline did not maintain a record of the *actual* hours spent performing some of the flight attendant's duties, and it therefore had the burden of proving that she did not work the requisite 1,250 hours. However, the Court went on to conclude that the airline met this burden by compiling pay registers detailing each flight she worked and adding time required by the applicable collective bargaining agreement for work performed outside of flight time. It rejected the employee's attempts to refute these calculations with an undated generalized list she compiled strictly from her own recollection. ■

SIXTH CIRCUIT UPDATE

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Mere Knowledge of Past Racial Animus Insufficient to Show Pretext Under "Cat's Paw" Theory of Liability

In *Clack v Rock-Tenn Co*, Docket No 07-6134 (December 22, 2008) (per curiam), Rock-Tenn's general manager fired Plaintiff Clack when he refused to clean up his work area as ordered by his supervisor. Clack subsequently sued his employer, alleging that the reason offered for his termination was a pretext for race discrimination. In support of his claim, Clack introduced evidence that his supervisor made racial remarks in the past and had long harbored racial animus towards African-Americans. Clack then argued that his racist supervisor improperly influenced the decision. Other than informing him of the incident, however, the supervisor played no role in the general manager's decision to discharge Clack. Rejecting Clack's "cat's paw" (or "rubber-stamp") theory, the Sixth Circuit explained that, although "the substance of [the supervisor's] remarks and purported actions are certainly indicative of animus based on race…[t]he more pertinent question is whether [the supervisor's] racist attitude 'influenced' or 'otherwise caused' the undisputed decisionmaker [] to terminate Clack." According to the Court, that the general manager "may have known" about the animosity between Clack and his supervisor and of the supervisor's racial comments is, alone, not enough to show that the general manager's independent investigation and decision were tainted with the supervisor's racial animus.

Suspended College Professor Entitled to *Public* Name-Clearing Hearing

In *Gunasekera v Irwin et al*, Docket No 07-4303 (January 8, 2009), the Sixth Circuit, in a case of first impression, held that an Ohio University professor of engineering, who was notified of his suspension by way of press conference, was entitled to a public name-clearing hearing. The University had investigated allegations of, and eventually uncovered, widespread plagiarism in graduate students' theses. Its Provost held a press conference to reveal findings that Plaintiff Gunasekera, who was responsible for supervising the thesis work, "ignore[ed] [his] ethical responsibilities and contribut[ed] to an atmosphere of negligence toward issues of academic misconduct." The University suspended Gunasekera's status as a Graduate Faculty member for three years. He sued alleging that the University violated his due process rights by failing to provide him with a name-clearing hearing adequate to protect his liberty interest in his status as a Graduate Faculty member. The Sixth Circuit agreed. Although "a name-clearing hearing need only provide an opportunity to clear one's name and need not comply with formal procedures to be valid," according to the Court, only a *public* hearing would adequately protect Plaintiff's due process rights because the University "inflicted a public stigma" that could be cured with nothing less than additional publicity. "The exact nature of that publicity depends on a fact-intensive review of the circumstances attending [the] case," which the Sixth Circuit left to the district court to examine on remand.

ERISA Class Certification Requires "Rigorous Analysis" of Facts Related to Causation

In *Romberio et al v UnumProvident Corporation, ERISA Benefit Denial Actions*, Docket No 07-6404 (January 12, 2009), the Sixth Circuit reversed a district court's decision to certify a class of ERISA plan participants who alleged that Unum breached its fiduciary obligations by denying or terminating benefits under a practice and policy aimed at improving profits. The Sixth Circuit explained that, "[w]here, as here, the alleged breach purportedly results in the wrongful denial or termination of a participant's benefits, the exis-

THE LATEST AT THE NLRB

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On January 20, 2009, President Obama designated Board Member Wilma B. Liebman as Chairman. Ms. Liebman has served on the Board since November 14, 1997. She, together with Member Peter C. Schaumber, will continue to constitute a Board quorum of a three-member panel until the President nominates, and the Senate confirms, three more members to bring the board to its full complement.

Despite the reduced number of sitting Board members, field operations have continued in normal course. A recent summary of operations for fiscal year 2008 (ending September 30, 2008) released by the Agency reflected that:

- 95.1% of all initial elections were conducted within 56 days of the filing of the petition
- initial elections were conducted in a median of 38 days from the filing of the petition
- a 96.87% settlement rate was achieved by the Regional Offices in meritorious unfair labor practice cases
- Regional Offices won 90.8% of board and Administrative Law Judge unfair labor practice decisions in whole or in part
- a total of $70,000,594 was recovered on behalf of employees as backpay or reimbursement of fees, dues and fines, with 4,564 employees offered reinstatement

This record of performance was achieved with a field staff of 34 fewer employees than the previous year (821 v. 855). The Board continues to issue decisions where Chairman Liebman and Member Schaumber agree. Obviously some cases will remain at the Board level until a full Board is constituted, which will also allow for a three-member panel to decide cases. With the addition of three members and the possibility of some form of labor law reform, the upcoming year should prove somewhat "exciting" at the Agency.

SIXTH CIRCUIT UPDATE

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tence of a causal link between the breach and the harm is particularly dependant upon the equities of the participant's claim," and the determination of whether benefits were *wrongfully* denied "depends on a number of factors peculiar to the claimant's case." Thus, the district court's limited focus on the plaintiffs' common allegation that Unum denied claims based on a uniform, profit-driven practice and policy, without examining whether any one of the putative class member's benefits may have been *properly* denied for medical reasons under the same practice and policy, was error. "That a uniform scheme is alleged…does not mean that a class is easily identified or that a class action is necessarily appropriate," the Court added. By failing to engage in the requisite, individualized fact-finding to determine whether each claimant's benefits were wrongfully denied because of the alleged improper practice, according to the Sixth Circuit, the district court did not engage in the "rigorous analysis" necessary to certify a class under Rule 23. ■

MICHIGAN SUPREME COURT UPDATE

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Brackett v. Focus Hope, Inc., 482 Mich. 269 (2008) Ms. Brackett (Claimant), an African-American, was employed by Focus Hope (the Employer), a large not-for-profit community service organization whose fundamental mission is to seek racial equality and reconciliation. Claimant, like all new hires, was explicitly advised of this mission by Employer's CEO at the time she was hired. She was also advised the Employer's most important function of the year was the Martin Luther King, Jr. birthday celebration, and that employee attendance was mandatory. Thereafter, Claimant declined to attend to attend the King Day event for the reason that it was held in Dearborn, a city which Claimant believed had an objectionable racial history.

For her failure, the Employer's CEO docked Claimant two days pay, removed some of her responsibilities and overtly expressed displeasure with her in two separate meetings. Claimant ultimately filed a claim for workers compensation benefits, indicating the Employer's actions and comments toward her caused her disabling emotional trauma and depression. The Employer defended this claim by presenting expert medical testimony that she was not disabled and arguing Claimant was disqualified from benefits, in any event, since her refusal to attend the King Day celebration constituted intentional or willful misconduct under MCL 418.305. The Magistrate, the Workers' Compensation Appellate Commission and the Michigan Court of Appeals each found for Claimant, holding that while objectionable, Claimant's refusal to attend the celebration did not rise to the level of disqualifying misconduct under the statute.

The Supreme Court reversed. Applying an "obstinate and perverse opposition to the will of the employer" standard, the Court rejected any requirement that misconduct under the statute be accompanied by "moral turpitude." *Brackett, supra, 482 Mich at 277-79*. In finding Claimant's conduct satisfied the requisite standard, the Court emphasized the lengths to which the Employer and its CEO had gone to impress upon Claimant and her co-workers the importance of the Employer's mission and the King Day celebration attendance requirement. Citing the Court's earlier decision in *Daniel v. Dep't. of Corrections*, 468 Mich 34 (2003), the Court applied the statutory disqualification because Claimant's "mental disability flow[ed] directly from the employer-imposed discipline for misconduct." *Brackett, supra, 482 Mich at 280.*

There is some question, however, as to the ongoing viability of *Brackett* following the 2008 elections. The case gave practitioners yet another view of the often fractious Court under then-Chief Justice Taylor, who concurred in Justice Corrigan's Majority Opinion with Justices Young and Markman. Almost half that Opinion was devoted to a scathing rebuttal of Justice Weaver's Dissenting Opinion, joined in by Justices Kelly and Cavanaugh. Practitioners are advised to be careful in relying upon the case in any subsequent matter that may wind its way back to the current Court. ■

GOING HOME: THE REMAND OF *SPRINT V. MENDELSOHN*

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Employment practitioners anticipated that the US Supreme Court would provide definitive guidance with respect to the treatment of "me, too" evidence when it granted Sprint's petition for a writ of certiorari to the 10th Circuit. The decision, however, is more in line with what would be expected in an evidence case than in an employment discrimination case.[1]

The U.S. Supreme Court stated the district court virtually is always in a better position than an appellant court to assess the admissibility of evidence in the context of the case before it.[2] The court also referenced the district court's greater experience in evidentiary matters and further stated that an appellate court should give broad discretion, especially with respect to Federal Rule of Evidence 403 rulings. Since the district court makes on the spot balancing a probative value in prejudice, the court ordered that the case be returned to district court to clarify its basis for its ruling. The district court's underlying decision consisted of a minute order.

On remand, what may be viewed as an evidence case became a procedure case. After the Court's remand, the plaintiff filed a motion to hold a pre-trial evidentiary hearing and a motion to enforce a conditional settlement agreement. In what can best be described as an interesting strategy, plaintiff suggested that without a pretrial evidentiary hearing, the proceeding would be a "pre-ordained sham proceeding that will again rubber stamp the 100% exclusion of other-supervisor evidence."[3]

Explaining the basis for its decision to exclude the "me, too" evidence, the district court noted that plaintiff's arguments in support of a motion for the hearing "bares scant relation to the court's recollection and the official record of the relevant events."[4] The court stated that as the case progressed to the 10th Circuit and then to the Supreme Court, plaintiff's rhetoric at each step was further removed from what actually occurred in this proceeding. As a result, the court felt compelled to briefly review the procedural and factual history of the proceeding before it.

The focus of the court's discussion was the pretrial order submitted by the parties. The court noted that in the final pretrial order, the plaintiff did not suggest that the reduction in force was part of a company wide pattern and practice of age discrimination and further did not assert that the reduction in force was other than a legitimate cost cutting measure. The plaintiff's theory in her final pretrial order was that her termination was inconsistent with the reduction in force criteria and/or Sprint manipulated her evaluation under those criteria. The court noted that the pretrial order complained almost interchangeably about plaintiff's termination, the reassignment of work to younger employees, and the fact that Sprint did not offer her other positions. Nevertheless, the basis of her complaint was wrongful termination.[5] In responding to defendant's motion for summary judgment, the plaintiff cited the reassignment of job duties as evidence of pretext but did not identify any individuals who refused to employ her in other positions, nor allege that Sprint denied her specific new positions on account of her age.

The court stated that the pretrial order controlled the course of the proceedings before it and that throughout all stages of the case, it looked to the pretrial order as an accurate statement of the plaintiff's claims and legal theories. The court further noted that at some point after the proceedings before it plaintiff apparently reinvented the theory of the case and claimed that Sprint generally used reduction in force as a mask to get rid of older workers under the pretext of the company explaining they were keeping the better employees. Indeed, in dealing with an evidentiary issue at trial, the court proposed to resolve the issue by telling the jury that there is no claim in the case that the reduction in force was inherently discriminatory on the basis of age. Plaintiff did not object or inform the court that plaintiff's theory was not the same as the courts understanding.

In the motion in limine, plaintiff argued that evidence would be admissible even if other employees did not work in her department and had the same supervision as her. Plaintiff did not explain how the testimony would be relevant to the theory of the case, namely Sprint discriminated against her by eliminating her position. The court stated that she had every opportunity to present such evidence. The court excluded the "me, too" evidence because plaintiff failed to identify any such evidence which was relevant to her theory of her case as articulated in the pretrial order, and further noted that plaintiff did not suggest she could establish a basis for admissibility under either Federal Rule of Evidence 401 or 403.

With respect to the trial, the court noted that it was its intent at trial to exclude anecdotal evidence that defendant's managers outside of the chain of command of the plaintiff. Specifically, the court stated that it excluded the proposed testimony of the five employees who were not in the same chain of command as plaintiff. Plaintiff failed to tie the evidence of how any of the five employees were treated to the decision to terminate her employment. With respect to evidence, proffered as to age related remarks, plaintiff failed to show a connection between any such remarks and the decision to terminate her employment. The court noted that the evidence cited in the motion for a new trial took "great liberty" with evidence as cited in the trial proffer.[6] In discussing its reasons for disallowing the "me, too" evidence, the court stated that plaintiff had not submitted any evidence that any supervisor who allegedly discriminated against the five witnesses had any connection to plaintiff's chain of command or that Sprint had a company wide practice of age discrimination, which affected the entire culture. The court stated that even if the proffered testimony had some probative value, its limited value was out weighed by the fact that the testimony of the five witnesses would create mini trials leading to confusion and waste of time and would have opened the door to contrary evidence from the company from hundreds to tens of thousands of employees who would testify that they did not claim to be victims of age discrimination. The court concluded its discussion by noting that it had considered the contrary view of the 10th Circuit with respect to whether the reduction in force itself was a pretext for age discrimination and stated that it continued to be that the proffered evidence of discrimination by other supervisors was not admissible to establish that Sprint's termination of plaintiff was a pretext for age discrimination and that it was properly excluded under Federal Rules of Evidence 401 and 403.[7]

Certainly, the lesson from the remand is that parties will be held to what they put in their final pretrial order. The district court repeatedly referred to plaintiff's claims and theories as contained in the final pretrial order. The district court's opinion serves as a reminder to attorneys that failure to carefully consider including the entire

basis of the claim or defense may lead to the exclusion of the claim or defense and supporting evidence.[8]

In the Eastern District of Michigan, the joint final pretrial order is addressed in Local Rule 16.2. The rule provides that the joint final pretrial order contain plaintiff's claims, including legal theory; defendant's statement of defenses with legal theory; and the identification of issues of fact and law to be litigated. Local Rule 16.2(b)(7) requires the parties to identify evidentiary problems likely to arise at trial and requires the parties to list all motions in limine.

After review of the district court's opinion on remand, and in light of Federal Rules of Evidence 401 and 403, one may wonder how a fairly straight forward the case of a party attempting to insert claims and facts not contained in the final pretrial order could reach the Supreme Court. The case is one where the factual and procedural record did not support the issue which was presented to the Supreme Court.

After the 10th Circuit had treated the district court's minute order as a *per se* rule that evidence from employees with other supervisors was irrelevant in an age discrimination case and reversed the case for a new trial, Sprint filed its petition with the Supreme Court. Obviously, Sprint did not want another trial and its options to overturn the decision were limited. The question presented to the court was identified as a recurring question of proof in discrimination cases concerning whether the court must admit "me, too" evidence by non-parties alleging discrimination at the hands of persons who played no role in the adverse decision challenged. The briefs filed with the court did not discuss the procedural status of the case specifically the issues for trial as set forth in the final pretrial order.

The first indication on how the Court might treat the case became apparent during oral argument. Justice Breyer questioned plaintiff's attorney as to whether the 10th Circuit second guessed the district courts all of the time, and when told no, questioned why they did so here. Justice Breyer stated that the waste of time depends upon the facts of the specific case.[9] Justice Souter asked plaintiff's attorney, somewhat rhetorically, whether the last hour of questions from the court indicated that the proper outcome was for the case to be remanded for a 401 balancing by the district court.[10] Chief Justice Roberts asked how on remand, which counsel conceded necessary, the issue would be addressed— in the context of a motion in limine rather than at trial.[11]

The district court's discussion of the reasons why it excluded the "me, too" should be sufficient to end this case. Parties should now understand that they will be held to what is set forth in the final pre-trial order. That is the way it is supposed to work. The trip to the Supreme Court and back did not change what the district court understood all along—you live with your final pretrial order.

— END NOTES —

[1]*Law Notes*, Volume 18, No. 2, p. 4 (Summer 2008)

[2]*Sprint/United Management Co. v Mendelsohn*, U.S. 128 S.Ct. 1140, 102 FEP Cases 1057 (2008).

[3]*Mendelsohn v. Sprint/United Management Co.* F.Supp.2d, 2008 WL 4822509, 104 FEP Cases 1269 (D.Kan.2008)

[4]*Mendelsohn*, 2008 WL 48 22509, p. 8

[5]*Mehdelsohn*, at p.2

[6]*Mehdelsohn*, p. 15, n.21

[7]*Mehdelsohn*, p. 10

[8]*Jones v. Rent-A-Center*,F.Supp 2d, 2003 WL 365966 (D.Karn.2003)

[9]Transcript of oral argument, p.48

[10]Transcript, p. 56

[11]Transcript, p.57 ■

EEOC ADVISES ON RELIGIOUS DISCRIMINATION

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On July 22, 2008, the EEOC released a new section of its Compliance Manual regarding religious discrimination under Title VII. According to EEOC statistics, religious discrimination charges have doubled in the past 15 years to a record level of 2,880 in 2007. The new section was, at least in part, a response to this rise. It does not purport to change the law, and the EEOC's existing regulations on religious discrimination remain in effect.

The EEOC states in the new section that "religion" includes certain "non-theistic 'moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.'" Employers are required to reasonably accommodate employees' sincerely held religious beliefs when they conflict with a work requirement, as long as the accommodation does not constitute an undue hardship. Although the "reasonable accommodation" and "undue hardship" language is similar to that of the ADA, the reasonable accommodation of religion required under Title VII involves a more limited standard than under the ADA. The examples and "Employer Best Practices" set out in the accommodation section of the Compliance Manual contain many common scenarios and may serve as a useful resource.

The EEOC Compliance Manual also contains a religious harassment section, including guidance on balancing anti-harassment obligations with accommodation obligations. This tension often arises where an employee's religious beliefs require him or her to "proselytize," and co-workers complain that this is harassment.

The EEOC only addresses federal law, and state anti-discrimination laws may vary. The Compliance Manual can be found on the EEOC's website at **www.eeoc.gov/policy/docs/religion.html**. ■

GVSU WEB SITE ADDS NON-UNION ARBITRATION AWARDS

Maris Stella (Star) Swift
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Grand Valley State University's arbitration web site has provided the full text of public sector union arbitration awards for quite some time now. Thanks to the donation of some employers who use arbitration for non-union employees' the site now also has the full text of non-union arbitration awards. Many of these awards involve discussion of terminations and discrimination claims in the non-union setting.

The site will soon also have private sector uion arbitration awards, donated by both unions and employers.

Please note that the university has deleted the names of all parties and the awards are categorized by the arbitrator's last name. All awards are summarized by issue(s).

If you would like to visit this free web site go to:
http://www.gvsu.edu/arbitrations/

SHEL STARK – DISTINGUISHED SERVICE AWARD RECIPIENT

Megan P. Norris
Miller, Canfield, Paddock & Stone

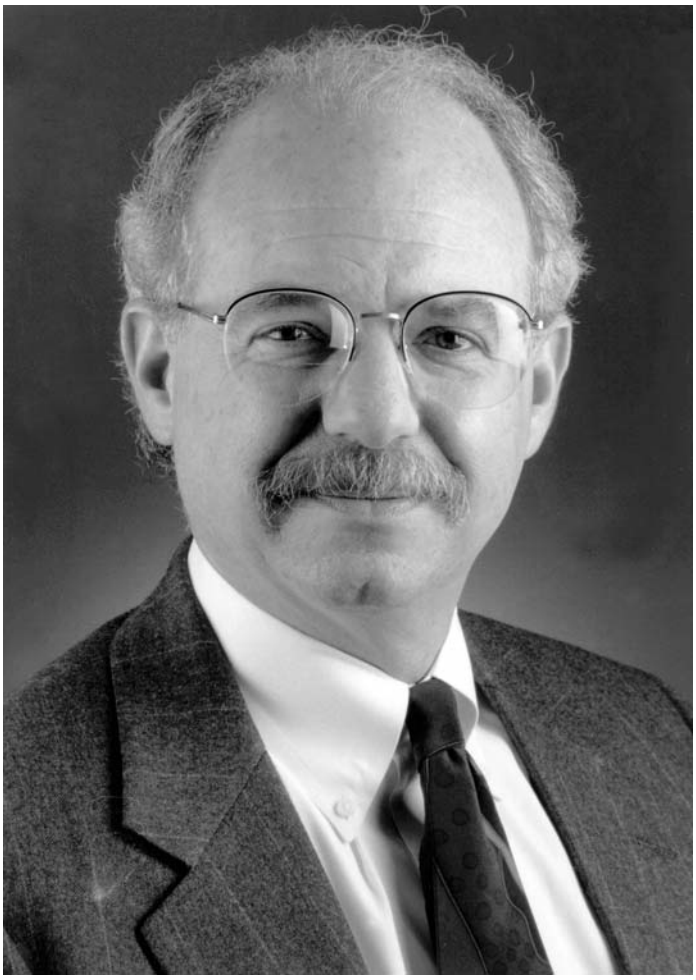
As most of you know, the Michigan plaintiff's employment bar is the best plaintiff's bar in the country. While most states have firms with fine defense lawyers, their plaintiff's attorneys, although certainly excellent lawyers, only dabble in employment law. That is not true in Michigan, where our plaintiff's counsel specialize in employment law and can go head-to-head with defense counsel.

When I started practicing law, the dean of the plaintiff's employment bar was Shel Stark. Shel began his career in 1973 at Kelman, Loria. He went out on his own a few years later, then joined Deb Gordon at the famed Stark & Gordon. Throughout the 1980's and 1990's, Shel was extremely successful. He made lots of money. He received many accolades, including being voted one of the 25 most influential lawyers in Michigan by *Michigan Lawyers Weekly* readers. He wrote a number of publications and was given fancy appointments, such as teaching at the Harvard Law School trial advocacy workshop since 1988.

But that's not all. In addition, Shel contributed to his community and our profession through a number of civic and professional associations, such as the ACLU, the American Trial Lawyers Association, the Attorney Grievance Commission, the National Lawyers Guild, the Fund for Equal Justice, and Wayne County Neighborhood Legal Services.

But Shel's contribution has not been just through his own practice and his involvement in professional associations. Shel shaped the law. In addition to helping to write the law by chairing the Michigan Supreme Court Sub-Committee for employment law jury instructions, Shel appeared in front of the Michigan Supreme Court on virtually every major employment case, either representing individuals or appearing as amicus on behalf of the Michigan Trial Lawyers Association. Sometimes he won and occasionally he lost, but in every case, Shel was in the game. When you cite *Herweyer v Clark Highway Services* regarding shortening the statute of limitations in an employment case, you are citing a Shel Stark case. When you cite *Heurtabise v Reliable Business Computers* on the effect of employee handbooks, you are citing a Shel Stark case. *Matras v Amoco Oil*, which we all cite in every age discrimination case – Shel Stark. *Radtke v Everett*, which sets the standards for every sexual harassment case – Shel Stark. *Champion v Nationwide Security*, which is cited in *quid pro quo* sexual harassment cases – Shel Stark. The rivers, hills, valleys, and meadows of the landscape on which we all practice our craft were formed by Shel Stark.

Then, in 1999, that landscape was rocked by shockwaves. Back in the days before e-mail allowed word to spread like wildfire in minutes, the entire legal community learned by the old fashioned telephone grapevine within hours that Shel Stark was retiring. He wasn't just leaving Stark & Gordon – he was giving up the practice of law altogether. We all reacted with disbelief. It was hard to believe that Shel would give it all up at the height of his legal career.



Shel then became the Education Director at the Institute of Continuing Legal Education. Not only was he going to design seminars in the employment area, or even the arguably related areas of general litigation and alternative dispute resolution, Shel soon began speaking intelligently in foreign languages, like probate, criminal law, and real estate.

Once Shel moved to ICLE, we all learned that Shel doesn't just love the law, and he doesn't just love our profession; Shel loves lawyers. Anyone who has spent time with Shel has engaged in lively discussions about our members. Shel knows all of us, he knows about our families, he knows our strengths, and he loves to hear what we are doing.

Shel's love for us is exceeded, however, by his love for Rita and their children. You cannot spend ten minutes with Shel without hearing about their latest adventures.

The criteria for the Distinguished Service Award, which does not have to be awarded every year, are set forth in your program. It is not enough to be a successful lawyer, although you must achieve success. It is not enough to work to enhance our profession, although that is required. It is not enough to influence the law. And it is not enough to be a nice guy, although that is certainly necessary. No, to receive the Distinguished Service Award, you must meet all of those tests. And nobody embodies the Award more than Shel.

Therefore, it is with tremendous pleasure that I present the Labor and Employment Law Section of the State Bar of Michigan 2009 Distinguished Service Award to Shel Stark. ■

DISTINGUISHED SERVICE AWARD RECIPIENT SHEL STARK'S REMARKS

From the bottom of my heart, thank you!

It's been nearly a decade since I left practice. It's taken 10 years for you to forget that dealing with me was a pain in the ass!

Receiving this award means a lot to me. I've brought my whole family here to be witnesses.

After 40 years of marriage, my wife Rita is here. Those of you who know me, know that this is a dinner she has rarely missed.

She has always been there for me. In the trial lawyer phase of my life, Rita was my secret weapon. If I could persuade Rita about one of my cases, no jury stood a chance!

I am so proud that my kids are here, as well. Though only the Atlantic and Pacific Oceans prevent them from living any further away, I am overjoyed that Julian and Molly came to share this evening with me. Thank you both!

And my kid sister, too! She's here tonight with her husband Steve Pollack. This proves she's forgiven me a long list of grievances that include: leaving her stuck in the mud and attempting to blow her up with my chemistry set. Thank you for being here with me tonight.

To Lynn Chard and those hard working and dedicated people at ICLE who took me in, put up with my jokes and made me welcome, thank you for giving me the opportunity for a second act in my life. Let me take you behind the curtain at ICLE – When I applied for this job they didn't just check references; they checked if I got my course materials in on time!

To this day, the Labor & Employment Law Section has been essential to any success I've experienced.

It's been the source of lifelong friendships

Provided visibility and leadership opportunities

Mentoring and guidance

Been a source of business

And, helped me practice better through networking and education programs.

After 35 years as a lawyer, because of your help, the "attaboys" at long last outweigh the "oh shits!"

I am honored and humbled to join that list of amazing lawyers – so many of them models to whom I looked for inspiration.

None of us ever reaches a place like this on our own. I have many people to thank and acknowledge:

Those who taught me the value of giving back to our profession – people like Bill Goodman and Janet Cooper.

Those who showed me kindness by reaching out to a young lawyer on the opposite side of the "v" to offer respect and good advice. People like Bill Saxton and John Scott.

Those who taught me the importance of keeping my word and being honest – people like Don Loria and Beverly Clark.

Those who taught me to choose my cases carefully or they'd hand me my head – people like Tom Schwarze and Joe Ritok – and too many others I'd name tonight at the risk you'll take it all back!

Those who taught me about collegiality, sharing and cooperation – people like Kathy Bogas, Rhett Pinsky and Mike Pitt.

Those who exemplify civility, how to be an adversary without being adversarial. People like Don Miller and David Calzone.

Those who taught me that adherence to principles and standing for something matters. People like George Roumell and John Runyan.

Those who didn't give up their sense of humor to practice law. People like Stuart Israel and Lucy Franco.

Those who taught me the power of thorough preparation and hard work. People like John Brady and Stan Moore.

Those who taught me how to try cases with sizzle and drama. People like Ed Stein and Fatima Ismail.

Those who model how to be gracious and civil. People like Ted St. Antoine and Andrea Dickson.

Those who taught me that adherence to the highest ethical standards doesn't interfere with effective representation of our clients. People like Megan Norris and Val Simmons.

And those who taught me the value of practicing with someone who's got your back. People like Deborah Gordon and Ron Reosti.

If I meet the criteria for this award, it is because dealing with all of *you* made *me* a better person.

In the words of Jane Wagner in Lily Tomlin's *The Search For Intelligent Life In The Universe:* "All my life, I … wanted to be somebody. Now I see that I should have been more specific."

Thank you for this unforgettable night! ■

Shel Stark and Megan Norris

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

I know. "When you have the law, pound the law. When you have the facts, pound the facts. And when you have neither the law nor the facts, pound the table." I learned it in law school the same as you.

On the other hand, there is the observation Sam Spade (Humphrey Bogart) makes to Wilmer the gunsel (Elisha Cook, Jr.) in *The Maltese Falcon*. Wilmer says, "Keep riding me pal and you'll be picking iron out of your liver." Bogart smiles indulgently and says. "The cheaper the crook the gaudier the patter."

So who is right, your law professor or Bogart? If you have a crummy case should you crank up the histrionics to make up for it? Or does all that chewing on the scenery just telegraph that you're all hat and no cattle?

I'm going with Bogey.

Maybe I'm getting jaded. I used to get a kick out of hyperventilating advocates. There was one union representative I remember most fondly who used to stand during closing arguments and declaim as if he were speaking to the Roman Senate.

The problem with this kind of thing is that it wears thin. If you are "outraged" and "appalled" every time you speak, it doesn't take long before people stop paying attention to you. Then when your opponent really does something outrageous or appalling you can't get anybody to listen to you. There is a fairytale on the subject.

I'm not saying there's anything wrong with a little raising of the voice and a few rhetorical flourishes. It keeps everybody awake, and it impresses clients. But the really good stuff is done quietly.

There is another way lawyers overplay their hands. If you represent unions, you probably remember that some law professor told you there are seven tests of just cause. You figure if you can make an argument that the employer violated all seven, then you've got a lock, right? Um, no.

Of course you can make an argument that the employer violated all seven tests. You're a lawyer. You can make up an argument to explain anything! You've been doing it since your were four years old. That's why your family said you should go to law school.

First of all, it's time to give the seven tests a rest. Secondly, in the real world it is very rare for an employer to violate all seven. The best course of action is to find the one or two things the employer really did do wrong and build your case on those.

If you represent employers, there is a different way you are tempted to overplay your hand. You know that arbitrators are trying to follow the contract and the law of the shop, but you sense that they are also trying to do what's right. So you figure if you can show that the grievant is a Bad Man they you've got a better chance of having your discipline upheld, even if there were "a few minor procedural irregularities."

So, as a lawyer did in a case before me not long ago, you bring in the guy's ex-wife to testify about what a rotten bum he is.

I can understand the temptation to present this kind of evidence, and it can be quite amusing, but its value is substantially limited. I am prepared to take arbitral notice of the fact that many people have former spouses who hold them in low esteem. Evidence that the grievant is a Bad Man does nothing for your case.

Neither does its corollary, the Give-the-Nice-Man-Some-Money theory of jurisprudence.

Sorry, I know this is taking some of the fun out of the practice of labor arbitration. No pounding on the tale, no ginned-up seven tests, and no Bad Man evidence, What is left to do? Hardly any choice but to try the case you've got.

I'm confident you'll think of something.

TAWDRY TEXT-MESSAGING AND LAWSUITS IN THE AGE OF KWAME KILPATRICK

"Attorneys representing ex-Mayor Kwame Kilpatrick on Tuesday filed a civil suit against Detroit's former communications provider demanding $100 million from SkyTel." *CrainsDetroit,* March 10, 2009 (on-line article). The ex-mayor sued under the Stored Communications Act (SCA), 18 U.S.C. §§ 2701-2712, which generally prohibits unauthorized access to certain electronic communications and places restrictions on a service provider's disclosure of certain communications.

In his 100 million dollar lawsuit, Kilpatrick claims his SCA "rights" were violated by defendant SkyTel (the provider of electronic communication service and/or a remote computing service to the public) when it "intentionally and willfully violated Plaintiff's rights as protected by 18 U.S.C. §§ 2702, by the unlawful releases of the Beatty text messages, which include messages to and from Plaintiff." The mayor must have forgotten about the City's email policy that he issued. *Flagg v. City of Detroit,* 252 F.R.D. 346, 355 -356 (E.D.Mich. 2008) (The City "acknowledged that at least some of these communications are public records, both through a policy directive promulgated to its employees-a directive which," among other things, cautions "users of the City's electronic communications system" to "bear in mind that, whenever creating and sending an electronic communication, they are almost always creating a public record which is subject to disclosure.").

The lawsuit shows that the ex-mayor still has, among other things, "[c]hutzpah, to wit: a defendant who, about to be sentenced for murdering his parents, begs the mercy of the sentencing court because he is an orphan." *Bachus v. West Traverse Tp.*, 122 Mich.App. 557, 559 (1983). Perhaps his 'expertise' in text-messaging helped him land a job with Compuware!

– John G. Adam

A NEW DEPOSITION OBJECTION

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

In my book, *Taking and Defending Depositions* (ALI-ABA 2004), which no lawyer should be without, I discuss whether, why, when, and how to object during depositions. I identify 11 deposition objection types and suggest when to use them. I list 32 objections to "curable defects."

My list is intended to arm deposition defenders with tools to protect clients and witnesses within the strictures of Rules 30 and 32 and their state equivalents. On my list are the usual suspects — "vague," "foundation," "unintelligible" — and more. Objection 32 is "unfair," recommended "when the questioner asks an unfair question or otherwise is unfair to the deponent and you can't immediately think of a more precise objection."

I thought my list covered the territory. Not so. I have a new deposition objection. It came to me in the heat of battle. It may be called for rarely, but when the circumstances are right, it is just the way to go.

We were at that late stage of a lengthy deposition, far from the morning donuts, having skipped lunch, when low blood sugar crankiness dominates. My client-the-deponent was being questioned about portentous events a year or so in the past.

The deposer asked a summary question, combining in one inquiry the fruits of the last few minutes of interrogation. Asking summary questions is good technique, but the deposer's execution was objectionable.

The deposer leaned across the table in an aggressive posture. His tone was accusatory and skeptical. He asked something like this:

> Q. So, within a 25-minute period you talked to the plaintiff and bam, you talked to the two witnesses and bam, you talked to the supervisor and bam, you read the records and bam, you wrote your report? All this within 25 minutes? And you say you did a "thorough" investigation? Is that your testimony?

Each time the deposer said "bam" he slapped the conference table. He was loud. He was forceful. He rattled the water pitcher. He caused my felt tip pens to bounce and roll. *Bam, bam, bam, bam!*

I was concerned that my client might give vent to his own crankiness. He, too, was hours past the donuts. My intercession was necessary.

I thought about my list of available objections. I wanted something more assertive than "compound." I needed something more technical than "hey, wait a minute!" "Badgering the witness!" seemed not quite right.

Then I had an epiphany, and gave it voice: "Objection! Illegal use of onomatopoeia!"

My objection gave my client support and needed breathing room. It was assertive, but not too pugnacious. It made the point about the impropriety of table-slapping but, at the same time, diffused the tension with levity. Or so I thought.

I expected smiles. I anticipated the deposer's humble acknowledgment that he'd gone too far. I thought maybe he'd express admiration for my erudition. Instead: silence.

Dead silence. Impassive silence. No one spoke. No one moved. Not my client. Or the deposer. Or his client. Or the court reporter. The silence was as thick as Campbell's pea soup before you add water.

I suffered self-doubt. Had I mispronounced onomatopoeia? Had I misused the word? No, I was close enough. So why was the deposition room in suspended animation?

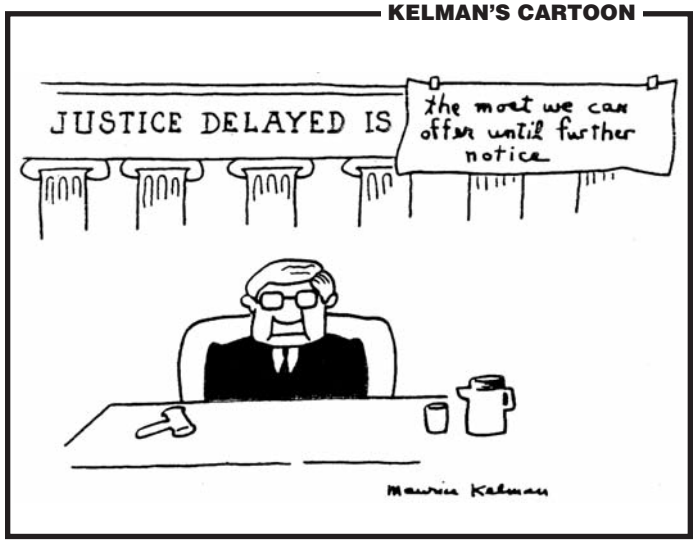
Seconds passed in abject silence, seeming like minutes: *tic, tic, tic, tic, tic . . .*

At last the deposer spoke. He said: "I'll rephrase the question." And he did. He left out the "bams." He moderated his tone. He eschewed table-slapping.

My client answered. The court reporter recorded. It was business as usual. It was as if everyone had eaten a fresh donut. No one in the room mentioned my objection. Ever.

So, lessons were learned. First, sixth grade English wasn't a total loss. Second, object on any ground that makes sense, even if that objection wasn't covered in evidence class, or in my book, which no lawyer should be without. And, third, in particular, when an opposing lawyer gets low blood sugar and goes all onomatopoeic on your client-the-deponent, put your foot down. *Bam!* ■

KELMAN'S CARTOON



Editor's Note: This Kelman Cartoon originally appeared in *Legal Times* and is reprinted with permission.

MERC CORNER

Ruthanne Okun, Bureau Director,
Bureau of Employment Relations,
Michigan Department of Labor and Economic Growth

MERC Solicits "True Neutrals" or Applicants with Labor Backgrounds for its Panels of Neutrals. In a *MERC Corner* that was prepared and distributed in 2006, we explained that the Michigan Employment Relations Commission was seeking applications from persons interested in and qualified for membership on one or more of its panels of neutral decision makers – Act 312, Fact Finding, and Grievance/Arbitration. We noted the fact that an individual currently represents or has previously represented labor or management and would be considered an "advocate" per the definition in MERC Rules should not dissuade a qualified person from applying. The article explained that if the name of someone who is an "advocate" appears on a list of prospective panel members, either party has the right to object (without providing a reason) to that individual, and a replacement name will be provided. Finally, we concluded by stating that many persons who are labor relations attorneys or who have otherwise advocated at one time for either management or labor have had successful careers - or at least side careers - as MERC panel members.

In response to our plea, we were inundated with applications from many very qualified persons. Most of them were advocates, or had advocated at one time, for management. As a result, we have received complaints from our constituents that our panel roster is heavily weighted in favor of management personnel. In spite of our yeoman efforts over the past few years to solicit applications from qualified persons with labor backgrounds, thus far we have been unable to achieve a balance on our panels. Nor have we been able to attract a substantial number of persons who are truly members of the neutral community to serve on our panels of arbitrators.

For this reason, we are using this publication to make it known that MERC continues to actively solicit applications for its panels of neutrals from persons with labor backgrounds or those who indeed meet the definition of a true neutral. If you meet this criteria, please contact Bureau Director Ruthanne Okun, at okunr@michigan.gov or (313) 456-3519. At this time, the rate paid to our neutrals is $650 per day. Although this rate is somewhat low relative to the rate charged by most arbitrators in other arenas, we hope to seek a rate increase once the current budget crisis is behind us.

MERC Continues to Seek Support for its Proposed Open Meetings Act Amendment. As explained in a previously-issued *MERC Corner*, under Michigan's Open Meetings Act (OMA), MCL 15.261, et seq., all MERC case-related action must be taken at an open meeting. Because the Commission is considered to be a "public body" under the OMA, it is subject to the law's requirement that its business must be conducted at an open meeting that has been properly noticed. Thus, when two members of the three-member Commission want to discuss the merits of a pending case, their discussions must take place in an open meeting convened in accordance with OMA requirements.

To correct an apparent oversight by the original drafters of the statute, the Commission has proposed an amendment to the OMA to include MERC in the listed agencies that are exempt from that law "when deliberating the merits of a case." That amendment has received only limited legislative consideration, and it appears that it will not move forward without citizen input and support. We continue to encourage your support of the amendment and welcome any comments you might have concerning it. Again, please submit them to Bureau Director Ruthanne Okun at okunr@michigan.gov, and we will ensure that your comments are forwarded to our department's legislative affairs office and/or to the legislation's sponsors.

Amar Appointed Lansing Mediation Supervisor. Jim Amar, a long-time mediator in the Detroit office of the Bureau of Employment Relations, has accepted the position of Division Administrator and Supervisor of the mediation staff in the Bureau's Lansing office. In this capacity, Jim is responsible for the efficient operation of and for managing, planning, and directing mediation functions for that office. At the same time, he handles a case load and mediates collective bargaining and grievance disputes, often of a high profile nature. Jim is completing his active Detroit area cases while he assumes his responsibilities in the Lansing office.

Cameron Moves from USW to Mediation Staff. Miles Cameron joined the Lansing office of the MERC mediation staff in early July. Many of you are acquainted with Miles from his good and hard work as a representative of the United Steel Workers of America. Miles joined the USW at the age of 18 and since that time, has dedicated himself to working collaboratively to resolve labor issues. Since joining the Union's staff in 1995, his goal has been to assist members to better their employment environment by the amicable resolution of labor disputes. Miles works out of his home office, in Coleman, located in the center of the "mitten" - not far from Clare and Mt. Pleasant.

Strassberg Promoted to Labor Mediator. In January, Robert (Bob) Strassberg, was promoted to the position of Labor Mediator, working out of the Detroit office. For the past 14 years, Bob has worked tirelessly for the Bureau as an Elections Officer, assuming a key role in facilitating some of our Agency's largest elections. Bob came to MERC with both labor and management experience in the labor relations arena. He previously served as a personnel director, a management labor relations representative, and, as a union representative for the Service Employees' International Union, Local 79. Sitting on both sides of the table has given Bob a unique and well-rounded perspective on labor relations and collective bargaining relationships. He is a graduate of Wayne State University.

MSU Library Seeks Old and Current Collective Bargaining Agreements for its Collection. You may not be aware that the Labor and Industrial Relations (LIR) Library at Michigan State University collects and posts many expired and current collective bargaining agreements on its web-site located at http://www.lib.msu.edu/coll/main/lir/ Where possible, the contracts are linked to related Act 312 awards and Fact Finding recommendations that have also been posted. Michigan State's Head LIR librarian, Laura Leavitt, continues to solicit your former and current labor contracts for posting and for their collection. Please assist to embellish this invaluable resource by sending her an electronic version of any collective bargaining agreements you might have at Leavitt9@msu.edu. Laura, who is an excellent resource librarian, will gladly assist you in navigating the web site or in locating a needed labor contract or other document. ■

LILY LEDBETTER ACT WILL ALLOW OLDER CLAIMS FOR DISCRIMINATION

Stacy A. Hickox
Assistant Professor
Michigan State University
School of Labor and Industrial Relations

The Lilly Ledbetter Fair Pay Act will clarify the requirement that any discrimination claim under Title VII of the Civil Rights Act of 1964 be filed within 180 or 300 days of the discriminatory employment practice.[1]

In equal pay cases, these filing deadlines can affect a claimant's damages. The U.S. Supreme held in its 2007 decision of *Ledbetter v. Goodyear Tire & Rubber Co.*,[2] that an employee could not recover damages based on any decisions regarding her pay made more than 180 days prior to the filing of her claim with the EEOC. Her discrimination claim was barred even though she had continued to receive unequal pay within the 180 day filing period.

This decision has meant that if an employee waits to file a complaint with the EEOC or the state agency handling discrimination claims for more than the 180 or 300 day period after his or her salary is set, that employee may not be able to recover back pay based on that salary decision.

The *Ledbetter* decision has been applied beyond equal pay cases. For example, an African American employee of the City of Chicago was not allowed to include his claim about discriminatory denial of training opportunities with his claim about the denial of promotions, because the denial of the training opportunity occurred more than 300 days prior to his filing of the claim.[3] The training claim was barred even though he alleged that the denial of training affected his ability to be promoted.

The Lilly Ledbetter Fair Pay Act was adopted based on Congress's finding that the *Ledbetter* decision "undermines" statutory protections against discrimination in compensation "by unduly restricing the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices." The Act will amend Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Rehabilitation Act to allow an employee to file a claim within the filing period. That period will begin whenever an employee is affected by the application of a discriminatory compensation decision or practice.

Specifically, the Act states that an unlawful employment practice occurs, with respect to discrimination in compensation, at any of these times:

- when a discriminatory compensation decision or other practice is adopted
- when an individual becomes subject to a discriminatory compensation decision or other practice, or
- when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

Note that the phrase "or other practice" may expand the coverage of the Act to discriminatory employment actions which do not affect compensation, such as the denial of training case discussed above.

The Act also provides that an employee may recover back pay for up to two years preceding the filing of the charge. Such damages can be recovered where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

The Act takes effect on the day before the *Ledbetter* decision, May 28, 2007, so it will apply to pending as well as future discrimination claims.

— END NOTES —

[1]The 180 limit applies if the claim is filed with the Equal Employment Opportunity Commission (EEOC), and the 300 day limit paplies for claims filed with a state agency accepting claims for the EEOC.

[2]127 S. Ct. 2162, 167 L.Ed.2d 982 (2007).

[3]*Jackson v. Chicago*, No. 07-3772, 2009 U.S. App. LEXIS 411 (7th Cir. Jan. 13, 2009). ■

COMMUNITY LEGAL RESOURCES UNVEILS EMPLOYMENT LAW MANUAL FOR NONPROFITS

Sara Jean Baker,
Office Manager/Program Associate
Community Legal Resources

Community Legal Resources announced the release of the most current employment law manual designed specifically for Michigan nonprofits. The manual is a go-to guide for understanding the employment legal issues and requirements that Michigan nonprofits may encounter, especially in the face of the current economic climate.

Topics covered in the manual include hiring; employment status; employer policies; wage issues; discrimination and retaliation; and discipline and termination. The manual is available free to any interested nonprofit in the state of Michigan, and it is also available for free download on Community Legal Resources' website: www.clronline.org.

The project was made possible through the support of the Michigan State Bar Foundation.

Community Legal Resources, a nonprofit in Detroit, is a legal assistance provider and educational resource to nonprofit organizations that serve low-income or disadvantaged communities in Michigan. Since its inception ten years ago, Community Legal Resources has served over 750 nonprofits located across Michigan and provided over $7.5 million in donated legal services.

Involved in the creation manual were Sarida Scott, CLC Legal Director, Rebecca Simkins of Barris, Sott, Denn & Driker, Tiffany A. Buckley of Dickinson Wright PLLC, Linda G. Burwell of Nemeth Burwell P.C., Amy J. Durant of Bodman LLP, and George K. Pitchford of Floyd E. Allen & Associates.

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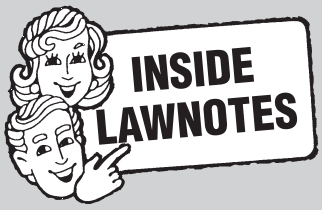

INSIDE *LAWNOTES*

- Rob Boonin reviews the congressional employment legislation agenda.
- Dennis Devaney and Jeff Wilson opine on the legal status of the short-handed NLRB.
- Brett Miller and Shannon Brander look at "temporal proximity" in discrimination cases.
- Gary Francis, Regan Dahle, Mark Jane and Dick Hooker write about various Supreme Courts while Jennifer Zinn and Scott Eldridge write about the Sixth Circuit.
- Shannon Loverich outlines FMLA developments, John Holmquist updates *Sprint v. Mendelsohn*, and Julia Turner Baumhart writes about "genetic information."
- Stuart Israel and Barry Goldman study the nuances of table-pounding.
- 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 Sara Jean Baker, Robert A. Boonin, Shannon L. Brander, Julia Turner Baumhart, Regan K. Dahle, Dennis M. Devaney, Scott R. Eldridge, Gary W. Francis, Barry Goldman, Stephen M. Glasser, Stacy A. Hickox, C. John Holmquist, Jr., Richard A. Hooker, Stuart M. Israel, Mark W. Jane, Maurice Kelman, Sonja L. Lengnick, Shannon V. Loverich, Brett J. Miller, Megan P. Norris, Ruthanne Okun, Sheldon J. Stark, Maris Stella (Star) Swift, Jeffrey D. Wilson, Jennifer A. Zinn, and more.