LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

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U.S. SUPREME COURT HOLDS "CAT'S PAW" THEORY OF LIABILITY IS PERMISSIBLE IN FINDING EMPLOYER LIABLE FOR DISCRIMINATION

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On March 1, 2011, the U.S. Supreme Court unanimously held that an employer may be held liable for employment discrimination based on the "discriminatory animus" or bias of an employee who influenced, but did *not* make, the ultimate employment decision. Specifically, the Court held for the first time that "if a supervisor performs an act motivated by [a discriminatory] animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable . . . ." *Staub v. Proctor Hospital*, 562 U.S. ___ (March 1, 2011).

Biased Supervisor; Unbiased Decision Maker

Vincent Staub was employed as an angiography technician by Proctor Hospital. As a member of the United States Army Reserve, Staub was required to attend drill one weekend per month and to train full time for two to three weeks a year. Staub's immediate supervisor Janice Mulally, as well as Michael Korenchuk, Mulally's supervisor, were hostile toward Staub's military obligations. As a result, Mulally scheduled Staub for additional shifts without notice so that he would "pa[y] back the department for everyone else having to bend over backwards to cover [his] schedule." Mulally's hostility went so far as to ask a co-worker to help her "get rid of him."

In January 2004, Staub received a "Corrective Action" disciplinary warning from Mulally for purportedly violating a company rule requiring Staub to stay in his work area whenever he was not working with a patient. The Corrective Action also included a directive requiring Staub to report to his supervisors, Mulally or Korenchuk, whenever he had no patients and his cases were complete.

In April 2004, Korenchuk notified Linda Buck, Proctor Hospital's Vice President of Human Resources, that Staub violated the January 2004 Corrective Action by leaving his work area without authorization. Staub disputed the allegation, claiming that he notified his supervisors about leaving the work area. Buck relied on Korenchuk's accusation, however, after reviewing Staub's personnel file and discussing it with another supervisor, Buck decided to terminate Staub's employment. The termination notice stated that Staub had ignored the directive issued in the January 2004 Corrective Action.

Staub filed a grievance challenging his firing through Proctor Hospital's grievance process. Staub contended that Mulally fabricated the allegation underlying the January 2004 Corrective Action out of hostility toward his military obligations. Buck, without following up with Mulally regarding Staub's contentions, affirmed her decision to terminate Staub's employment.

Seventh Circuit's Holding: No "Singular Influence"

Staub filed a lawsuit against Proctor Hospital under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)[1], claiming that his discharge was motivated by hostility toward his obligations as a military reservist. Staub argued that while Buck (the decision maker) may not have had any hostility toward him, his supervisors, Mulally and Korenchuk (non-decision makers) did. He alleged that his supervisors' actions influenced Buck's ultimate employment decision. At trial, a jury found in Staub's favor finding his military status was a motivating factor in [Proctor Hospital's] decision to discharge him. However, the Seventh Circuit Court of Appeals reversed, awarding judgment as a matter of law to Proctor. The Seventh Circuit opined that Staub's "cat's paw" theory case could not succeed unless the non-decision maker exercised such "singular influence" over the decision maker that the decision to terminate was the product of "blind reliance." Because Buck looked beyond what Mulally and Korenchuk said, relying in part on (i) her review of Staub's personnel file and (ii) a conversation with another supervisor, liability could not therefore ensue. The Seventh Circuit held that Proctor Hospital was entitled to judgment as a matter of law because the undisputed evidence established that Buck's decision to terminate Staub's employment was not wholly dependent only on the advice of Korenchuk and Mulally. Staub sought certiorari and the U.S. Supreme Court granted review.

Issue Before the U.S. Supreme Court

The issue before the U.S. Supreme Court was under what circumstances may an employer be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision.

Under USERRA, an "employer shall be considered to have engaged in actions prohibited … under subsection (a), if the person's membership … is *a motivating factor* in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership."[2] Proctor Hospital's position before the Court was that it could not be liable unless the actual decision maker held a discriminatory animus. Staub's position against Proctor Hospital was that Proctor Hospital should be liable because Mulally and Korenchuk acted with discriminatory animus in placing an unfavorable entry in his personnel record— although Buck was not motivated by her own discriminatory animus in terminating his employment.

The Court looked to traditional principles of agency and tort law to reverse the Seventh Circuit and send the case back to the trial

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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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U.S. SUPREME COURT HOLDS "CAT'S PAW" THEORY OF LIABILITY

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court to determine whether a new trial was warranted.[3] The Court held that if a supervisor performs an act motivated by an unlawful bias that is intended by the supervisor to cause an adverse employment action and if the supervisor's act is a proximate cause of the adverse employment action, then the employer is liable.[4] The Court further concluded that an independent investigation does *not* shield an employer from liability where the investigation took into account a supervisor's biased report. In these circumstances, an "employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision."

Despite its holding, the Court provided guidance for employers trying to avoid liability in similar situations. If, prior to making its ultimate employment decision on the adverse action, an employer's investigation reveals reasons for the decision that are unrelated to the supervisor's original biased action – and the employer can prove that those reasons existed – then liability may be avoided. Although possible, this method may prove extremely difficult for employers because the supervisor's report or corrective action could nevertheless be a casual "factor" in the ultimate decision if the decision maker's investigation takes it into account. There will be liability unless it is determined— without relying on the supervisor's report or corrective action— that the adverse action was independently justified.

Conclusion

The implications of *Staub v. Proctor Hospital* are far reaching. Virtually all adverse employment decisions— failure to hire, transfers, promotions, merit increases, discipline, terminations— will be affected by this ruling. Going forward, plaintiffs may assert that any adverse employment decision was the result of a supervisor or interviewer with a bias or discriminatory animus that was a factor that led to the adverse employment action. This decision will undoubtedly lead to an increase in litigation and will place enormous pressure on ultimate decision makers to ensure that all information relied upon is "bias free" prior to taking any adverse employment action.

The burden is now squarely on employers to demonstrate that an unlawful bias or discriminatory animus was not a motivating factor in any adverse employment decision. Therefore, employers will need to re-tool their decision making procedures and adopt certain "best practices" in order to effectively meet this burden.

— END NOTES —

1 USERRA, 38 U. S. C. §4301 et seq., prohibits an employer from denying "employment, reemployment, retention in employment, promotion, or any benefit of employment" based on a person's "membership" in or "obligation to perform service in a uniformed service," 38 U. S. C. §4311(a)

2 §4311(c).

3 Justice Scalia wrote for the Court, with Justices Alito and Thomas concurring in a separate opinion. Justice Kagan recused herself from the case.

4 Although this case arose under USERRA and involved military obligations, the same theories apply under Title VII which prohibits employment discrimination "because of … race, color, religion, sex, or national origin" and states that such discrimination is established when one of those factors "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U. S. C. §§2000e–2(a), (m). ■

A PRIMER ON FRE AND *DAUBERT/KUMHO* STANDARDS FOR PROFFERING—AND CHALLENGING—PROPOSED EXPERTS AND THEIR OPINIONS

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Expert testimony is governed by Federal Rule of Evidence ("FRE") 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

These standards are derived from and explained in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). What follows is a primer on FRE and *Daubert/Kumho* standards for proffering—and challenging—proposed expert witnesses and their opinions.

I. THE STANDARDS

A. Qualifications

The proffered witness must be "qualified as an expert by knowledge, skill, experience, training, or education." FRE 702. The witness' expertise must be in the precise subject-matter of the proffered opinions; there is no general subject-matter expertise. See *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994), *cert. denied* 513 U.S. 1111 (1995) ("the key question is not the expert's general qualifications in some field, but whether the precise question on which he will be asked to *opine* is within his field of expertise"); *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 303 (6th Cir.), *cert. denied* 522 U.S. 817 (1997) ("The trial court must determine whether the expert's training and qualifications relate to the subject matter of his proposed testimony"); *Wellman v. Norfolk and Western Ry. Co.*, 98 F.Supp.2d 919, 924 (S.D. Ohio 2000), citing *Kumho*, 526 U.S. at 154-155 ("a person, although qualified as an expert in one area of expertise, may be precluded from offering opinions beyond that area of expertise").

B. Relevant to "The Task At Hand"

Proffered opinions must "assist the trier of fact to understand the evidence or to determine a fact in issue." FRE 702. The opinions must be helpful, "fit" the case, and be "relevant to the task at hand." Opinion "which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert*, 509 U.S. at 591, 597 (citations omitted). See *Harville v. Vanderbilt Univ.*, 95 Fed. Appx. 719, 724 (6th Cir. 2003) (expert testimony applying national medical standards in malpractice case excluded as irrelevant because local standards were at issue).

C. Helpful

The Advisory Committee notes to FRE 702 (citations omitted) explain that there "is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." The notes say that opinions are excluded when "unhelpful and therefore superfluous and a waste of time." See *Brd. of Trustees, SMW Nat. Pens. Fund v. Palladium Equity*, 722 F.Supp.2d 845, 852 (E.D. Mich. 2010) (expert testimony is "unhelpful" when "it merely deals with a proposition that is not beyond the ken of common knowledge"), citing *Berry*, 25 F.3d at 1350 (if "everyone knows this, then we don't need an expert").

D. "Reliable Principles" Applied "Reliably"

Proffered opinion must be "not only relevant, but reliable." *Daubert*, 509 U.S. at 589. It must be **(1)** "based upon sufficient facts or data" and **(2)** "the product of reliable principles" and **(3)** the proffered witness must have applied those principles "reliably to the facts of the case." FRE 702. The proffered opinion must rest on a "reliable foundation" and be "more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590, 597. The opinion must be "more than" the witness' "conclusory assertion about ultimate legal issues." *Brainard v. American Skandia Life Assur. Corp.*, 432 F.3d 655, 663-664 (6th Cir. 2005).

E. Not Legal Conclusion and Argument

The proffered opinion may not be legal opinion or argument. *Chavez v. Carranza*, 559 F.3d 486, 498 (6th Cir.), *cert. denied* 130 S.Ct. 110 (2009) ("expert opinion on a question of law is inadmissible"); *Woods v. Lecureux*, 110 F.3d 1215, 1220 (6th Cir. 1997) (expert "testimony offering nothing more than a legal conclusion—i.e, testimony that does little more than tell the jury what result to reach—is properly excludable under the Rules"); *Berry*, 25 F.3d at 1353-1354 ("It is the responsibility of the court, not testifying witnesses, to define legal terms. The expert's testimony in this regard invaded the province of the court."); *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1240, 1233 (5th Cir. 1986) ("the trial judge ought to insist that a proffered expert bring to the jury more than the lawyers can offer in argument").

"Expert witness at work."

F. Lawyers as Experts

See *Berry*, 25 F.3d at 1352 (improper to declare "an attorney an expert in the 'law'"; "it is a mistake for a trial judge to declare anyone to be generically an expert"; a "divorce lawyer is no more

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A PRIMER ON FRE AND *DAUBERT/KUMHO* STANDARDS

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qualified to opine on patent law questions than anyone else") and *U.S. v. Paul*, 175 F.3d 906, 912 (11th Cir.), *cert. denied* 528 U.S. 1023 (1999) (lawyer, law review author, and evidence law professor who "reviewed the literature in the field of questioned document examinations" was no "more qualified to testify as an expert on handwriting analysis than a lay person who read the same articles"). See also *Burkhart v. Washington Metro Area Transit Auth.*, 112 F.3d 1207, 1212-1213 (D.C. Cir. 1997) ("Expert testimony that consists of legal conclusions cannot properly assist the jury"; "each court room comes equipped with a 'legal expert' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards").

G. Self-Professed Experts

"[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997), quoted with approval in *Kumho*, 526 U.S. at 157. *Ipse dixit* is Latin for "he himself said it," used to describe a "bare assertion resting on the authority of an individual." *Black's Law Dictionary* (Rev. 4th. ed. 1968).

H. "Gatekeeping"

Under FRE 702 and *Daubert*, the court has a "gatekeeping" obligation "to exclude from trial expert testimony that is unreliable and irrelevant." *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 792 (6th Cir. 2002), *cert. denied* 537 U.S. 1148 (2003). The court is to ensure expert opinion "both rests on a reliable foundation and is relevant to the task at hand." *Cabaniss v. City of Riverside*, 497 F.Supp.2d 862, 878-879 (S.D. Ohio 2006), citing *Clay v. Ford Motor Co.*, 215 F.3d 663, 667 (6th Cir.), *cert. denied* 531 U.S. 1044 (2000). The court is to assess the proffered opinion's "reasoning" and determine if it "properly can be applied to the facts in issue." *Cabaniss*, 497 F.Supp.2d at 879.

I. The Proponent's Burden

The "proponent of expert opinion evidence has the burden of demonstrating by the preponderance of the proof that the evidence complies with Rule 702 and *Daubert*." *Cabaniss*, 497 F.Supp.2d at 879, citing *Daubert*, 509 U.S. at 592, n.10 and *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 250 (6th Cir.), *cert. denied*, 534 U.S. 822 (2001). The proponent must demonstrate "objective, independent validation of the expert's methodology." *Daubert v. Merrell Dow Pharmaceuticals, Inc.* ("*Daubert II*"), 43 F.3d 1311, 1316 (9th Cir.), *cert. denied* 516 U.S. 869 (1995).

J. FRE 403 Balancing

The court must apply FRE 403 to exclude evidence, even if relevant, where probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury," or by "considerations of undue delay, waste of time, or needless presentation of cumulative evidence." These dangers are heightened in the "expert" context and where proffered opinions are "non-scientific." See *Berry*, 25 F.3d at 1349 (evidentiary dangers are "exacerbated" when "courts must deal" with the "elusive concept of non-scientific expert testimony") and *Daubert*, 509 U.S. at 595 (citation omitted):

> Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403…exercises more control over experts than over lay witnesses.

II. APPLYING THE STANDARDS

FRE and *Daubert/Kumho* standards should be applied (1) to make sure your proposed experts and their opinions will pass muster and (2) as the starting point of any effort you make to show that the other side's proposed experts and their proffered opinions do not pass muster.

The process begins with newly-revised Federal Rule of Civil Procedure 26(a)(2) and (b)(4). See Gregory P. Joseph, "Expert Witness Rule Amendments" Vol. 20, No. 4 *Labor and Employment Lawnotes* 3 (Winter 2011). These rules govern disclosure and discovery of proposed expert opinion.

What follows are suggestions for testing the other side's proposed experts and their proffered opinions. You should, of course, expect the other side to subject your proposed experts and their proffered opinions to the same scrutiny.

A. Disclosures and Reports

Generally, a party must disclose each proposed expert witness' identity and provide for each a "written report—prepared and signed by the witness." Each report is to include, under Rule 26(a)(2)(B):

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
>
> (ii) the facts or data considered by the witness in forming them;
>
> (iii) any exhibits that will be used to summarize or support them;
>
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
>
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
>
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

Once the other side's report is produced—and you have subjected it and the proposed expert's qualifications, exhibits, previous appearances as an expert, and publications to microscopic critical analysis, ideally with the assistance of Westlaw or Lexis and Google and your own expert—the next step is to prepare to take the proffered expert's deposition.

B. Discovery

Rule 26(b)(4)(A) provides: "A party may depose any person who has been identified as an expert whose opinions may be presented at trial." For proposed testifying experts, "the deposition may be conducted only after the report is provided."

As newly-revised, "Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded" and "protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B)," except for (1) communications that relate to compensation or (2) that identify "facts or data that the party's attorney provided and that the expert considered" in forming opinions, or (3) that "identify assumptions" provided to the expert by the attorney that the expert "relied on" in forming opinions. Rules 26(b)(4)(A), (B) and (C)(i)-(iii).

Material in the expert report may suggest follow-up discovery directed to the other side—document requests, interrogatories, admission requests, inspections or views, depositions, etc., under Rules 30 and 33-36. Follow-up discovery also may address material excepted under Rule 26(b)(4)(c)(i)-(iii). Or the report might suggest more third-party discovery under Rule 45, or additional investigation and research. Once needed follow-up is done, the deposition of the other side's proposed expert can be set.

C. The Proposed Expert's Deposition

Your deposition of the other side's proposed experts will test both the witnesses and their proffered opinions. Basic deposition preparation standards apply—i.e., know everything, identify objectives, plan your strategy, etc. So do basic cross-examination rules, techniques, and strategies, informed and refined by FRE, Rule 26(b)(4)(c)(i)-(iii), and *Daubert/Kumho* standards. Areas of inquiry and objectives might include:

1. *Qualifications and background.* Objectives might be to show that the proposed expert lacks the requisite expertise altogether or, more particularly, lacks expertise on the subject matter of the proffered opinion.

2. *"Expert" history.* Objectives might be to show that the witness has more time in the witness chair than doing whatever it is that experts in that field do, or to identify and probe other occasions when the witness gave contrary opinions, or was found not to qualify as an expert, or was disciplined or disbarred or decertified or found to have committed malpractice or otherwise professionally diminished.

3. *The precise opinions.* Objectives might be to get the witness to specify and clarify exactly what the witness' opinions are, something which may not be apparent in the broadly-stated report, and to narrow the opinions, to make it clear what those opinions are not.

4. *"Facts," assumptions, data, and principles.* Objectives might include revealing that the proffered opinions are unreliable because they are based on false assumptions or inadequate information or misinformation or principles or methods that are not "expert," or are not generally-accepted, or that are inapplicable or standardless, etc.

5. *How the witness can help.* Objectives might be to have the witness endorse your side's experts or agree with your side's views of the facts and the pertinent assumptions, data, principles, terminology, standards, authoritative treatises, etc., or acknowledge that whatever the subject matter, it is something about which reasonable people (like your reasonable client or your expert) might disagree or is something that unreasonable people (like the other side) would never, or always, do.

6. *What the witness doesn't know or didn't do or have.* Objectives might include getting agreement that the expert could have presented a more reliable opinion if only the expert knew or did or had something the expert didn't know or do or have. (Your expert, you later will show, did know or do or have those reliability-enhancing somethings).

7. *What is behind the jargon.* Objectives might include showing that behind all those degrees and expert-speak is just a common sense opinion that would not be helpful to the fact-finder or, worse, would confuse, mislead, and distort, and would be unhelpful and superfluous because the fact-finder is perfectly capable of assessing the common sense question without "enlightenment" from a high-priced hired gun with a bow-tie and multiple degrees.

8. *How much opinion costs.* Objectives might include making the "hired gun" point. I once called a legal ethics expert who, in response to my question about his hourly rate, caused an audible gasp from the jury box when he responded "$600." Later, I elicited the other side's expert's hourly rate—$650. The jury again gasped, louder by $50-an-hour's worth.

Any techniques available to you, of course, are available to the other side, and so can backfire. You might emphasize your expert's Harvard Ph.D. from 1970 if the other side's expert got a community college associate's degree last year. But you might want to minimize the significance of book-learnin' and emphasize experience if your expert has the newly-minted community college degree, but got it after working 40 years in the field which, you will argue, is the *only* way to develop credible expertise.

The suggestions above scratch the surface. There are lots of books and articles offering lawyers useful advice, checklists, and examples of how to present expert witnesses, and when, and why, and offering the same on how to challenge the other side's proposed expert witnesses under FRE 403 and 702, using *Daubert/Kumho* motions, objections, and cross-examination.

CONCLUSION

Presenting expert witnesses is one more way to persuasively put on your case, and to try to diminish the other side's case. Of course, it is best to have good facts. Economist Thomas Sowell points out: "For every expert there is an equal and opposite expert, but for every fact there is not necessarily an equal and opposite fact."

When it comes to the other side's experts, question authority. Former attorney general Edwin Meese III explained; "An expert is somebody who is more than 50 miles from home, has no responsibility for implementing the advice he gives, and shows slides."

When it comes to your experts, question authority. The late Israeli prime minister David Ben-Gurion advised: "If an expert says it can't be done, get another expert." ■

WARN ACT GENERATES SIGNIFICANT FEDERAL APPELLATE DECISIONS

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Now well into its third decade, the federal Worker Adjustment and Retraining Notification (WARN) Act of 1989 has seen most of its simple yet often ambiguous provisions definitively interpreted by the courts, leaving few major issues other than the required crystal ball gazing about *exactly when* and *exactly how many* employees will have to be laid off in connection with a "plant closing" or "mass layoff." It is relatively unusual now to see significant new federal appellate court decisions interpreting the WARN Act, or applying it in new factual circumstances, but the past few months have brought three decisions of significance – from the Sixth Circuit, the Seventh Circuit, and the Ninth Circuit. The Sixth and Seventh Circuit decisions correctly apply the statute; the two-to-one Ninth Circuit panel decision is highly questionable, and, if left unreviewed, portends genuine difficulty applying the statute for employers on the West Coast.

The Sixth Circuit decision is *Bledsoe v. Emery Worldwide Airlines and CNF Corporation*, __ F.3d __; 2011 U.S. App. Lexis 2928 (6th Cir., Feb. 16, 2011). A preliminary issue in the case was whether the WARN Act confers a right to jury trial. Utilizing the familiar Seventh Amendment framework for determining whether a new statutory action resembles a suit at common law (to which the right to jury trial attaches) as opposed to an equitable claim (no right to jury trial), the court held that the rights and remedies under the WARN Act were largely equitable in nature and hence conveyed no right to a jury trial.

As to the merits, the Sixth Circuit held that the plaintiffs were not entitled to notice. The plaintiffs were initially laid off following the FAA's intervention in the certification of the airline employer that caused the airline to ground its planes. At that time, it was presumed that the layoffs would be temporary and that no WARN notice would be required. As time went by, however, it became increasingly apparent that the airline might be required to shut down. Thus, when the airline did cease operations four months later, the employees were determined not to be "affected employees" entitled to WARN notice because a "reasonable employee" would not have expected to be recalled at that point. In particular, the court noted the facts that (1) it became increasingly apparent to the airline that complying with the FAA's new operating requirements was not feasible, something the airline communicated to the employees, and (2) due to the "hurdles that had developed and the uncertainty as to whether, when, and at what cost [the airline] would secure the approval of the FAA to resume operations, a reasonable employee under the same circumstances would not have expected to be recalled when [the airline] decided to close. . . ." The WARN lawsuit was accordingly dismissed.

The Seventh Circuit decision, *Ellis v. DHL Express, Inc., USA*, 633 F.3d 522 (7th Cir, 2011), addressed an interesting legal issue that, perhaps surprisingly, had not been previously decided: Whether employees who accept a severance package and resign their employment on the eve of a plant closing or mass layoff are included in the headcount for determining whether the WARN Act's numerical thresholds are satisfied. DHL Express and its parent, Deutsche Post AG, announced on November 10, 2008 that its U.S. domestic shipping would end on January 30, 2009, signaling to certain of DHL's facilities in the Chicago area that they would be closed. The employees' union negotiated special severance packages under which employees who waived their seniority, recall rights, and rights to sue, were paid a specified number of weeks of salary and benefits. The employees who took the severance packages argued that they should not be deemed to have "voluntary[ily] depart[ed]" within the meaning of the WARN Act's exclusion because they did so under extreme economic uncertainty and pressure after it was clear that their jobs were doomed.

The Seventh Circuit determined that, while these employees had found themselves in "unenviable positions," they had nonetheless voluntarily elected to leave and hence were not counted as affected employees who had experienced job losses. Emphasizing that the severance agreements had been negotiated by their union with the employees' interests in mind, that they were unambiguously written, and that the employees had been given adequate time to consider their options, the court concluded: "In offering its workers the olive branch of severance pay, DHL was hedging its bets against WARN Act liability. Employers are permitted to 'gamble' that enough workers accept their proffered incentive packages to absolve them from potential WARN Act liability . . . , and DHL successfully tossed the dice here."

The Ninth Circuit appears to have reached the opposite conclusion in *Collins v. Gee West Seattle LLC*, 631 F.3d 1001 (9th Cir. 2011). The facts are somewhat similar, though no severance package was involved. The employer was a Seattle car dealership that had approximately 150 employees in the summer of 2007, when it was attempting to find new capital or a purchaser to allow it to continue operating (thus, in the background was WARN's "faltering business" exception that allows delayed notice to employees). The rescue effort unfortunately failed at the last moment, and the employer distributed a memo on September 26, 2007 advising the workforce that the business would have to close on October 7 unless a suitable buyer could be located by then. Between September 26 and October 5, ap-

WRITER'S BLOCK?

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

proximately 120 of the 150 employees stopped reporting for work (apparently there were plenty of other job opportunities in that industry in Seattle in 2007). In part because of the sudden departure of 80 percent of the workforce, no last-minute purchaser was located and the dealership closed.

When one of the affected employees sued under the WARN Act, the employer responded that less than 50 employees had experienced an employment loss because 120 of the 150 employees had "voluntary[ily] depart[ed]" and were therefore excluded from the calculation. The trial court agreed, but a Ninth Circuit panel reversed by a 2-1 vote, holding in extremely broad terms that "where an employee's reason for departing is because the business is closing, such a departure cannot be termed 'voluntary' under the Act." What is more, the majority opined, "[d]etermining an employee's reason for departing is a factual inquiry" – presumably turning on the subjective mindset of every employee who departs.

The second judge on the panel, who concurred in the result, relied entirely on the fact that, in post-litigation interrogatory answers, an official of the closed dealership had stated that its relationship with the employees had ended because the "business closed." In that judge's view, that statement shifted the burden to the dealership to establish otherwise. That cryptic (and perhaps ill-advised) generic phrase hardly disposes of the more complex question of statutory interpretation.

In a dissenting opinion, the third judge on the panel argued that the burden of proof is the other way around for an employee who leaves after the announcement of a likely closing. That judge observed that the plaintiff had neither argued nor presented any evidence establishing that any of the 120 departing employees had been constructively discharged or had actually left involuntarily. He also noted that the interrogatory answer was not probative of employees' mindsets, and that the majority's supposed bright-line rule created "new law" that was not consistent with the language or structure of the WARN Act. That seems rather apparent, though it may take the panel's reconsideration, or *en banc* review, or a U.S. Supreme Court decision to correct this deviation. ■

KELMAN'S CARTOON

"If he's willing to plead guilty to Pride, the People are prepared to drop the charges of Wrath, Envy, Lust, Gluttony, Avarice, and Sloth."

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

UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long

Third-Party Retaliation Claims Are Actionable Title VII

With Justice Scalia delivering the Opinion of the Court in *Thompson v. North American Stainless, LP*, 562 U.S. ___ (2011), the Supreme Court ruled on January 24, 2011 that Title VII of the Civil Rights Act of 1964 permits a party who has not engaged in any protected activity to bring a claim of retaliation based on the protected activity of a third-party.

The plaintiff and his fiancé both worked for North American Stainless (NAS). The plaintiff's fiancé filed a Charge of Discrimination with the Equal Employment Opportunity Commission and, three weeks later, NAS terminated the plaintiff's employment. The plaintiff filed his own Charge with the EEOC, and then sued NAS for retaliation under Title VII. The United States District Court for the Eastern District of Kentucky granted NAS' motion for summary judgment, holding that Title VII did not allow third-party retaliation claims. The Sixth Circuit reversed the District Court, but upon rehearing en banc, affirmed by a 10 to 6 vote. The Sixth Circuit concluded that the plaintiff had not engaged in any activity protected by Title VII prior to his termination.

In reversing the Sixth Circuit, the Supreme Court first assumed that NAS did fire the plaintiff in retaliation for his fiancé's Charge of Discrimination. With that assumption, the Court had "little difficulty" concluding that NAS violated Title VII by firing the plaintiff. The Court focused on Title VII's broad anti-retaliation provision that prohibits "any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination'" *citing Burlington N. & S. F. R. Co v. White*, 548 U.S. 53, 64 (2006). The Court thought it "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." The Court would not, however, identify specific relationships that could support a third-party retaliation claim. The Court held that while "firing a close family member" would almost always amount to unlawful retaliation, some milder adverse employment action against a "mere acquaintance" would usually not. The Court's instruction was to consider the particular circumstances when determining the significance of a given act of retaliation.

While the Court had little difficulty concluding that NAS' conduct violated Title VII, it had more difficulty determining whether the plaintiff had a cause of action. Title VII permits an "aggrieved party" to bring a civil action under the statute, and the Court's opinion hinged on who actually is an "aggrieved party." Is it any individual who suffers an injury in fact caused by a defendant that is remedial by a court, or must it be an employee who actually engages in protected activity? The Court concluded that for purposes of Title VII's anti-retaliation provision, an aggrieved person is any person who "falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." Applying that test, the Court concluded that Title VII was intended "to protect employees from their employers' unlawful actions," and that the plaintiff fell within Title VII's zone of interest. Consequently, he was an aggrieved party, and he had standing under Title VII. ■

APPLICANTS WITH CONVICTIONS: SUMMARY OF RESEARCH ON HIRING OF EX-OFFENDERS

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Employers are reluctant to hire applicants with a criminal record because of potential liability and performance issues. At the same time, employers can face liability for disparate impact discrimination given the large number of offenders who are people of color. Under a grant from the Michigan State Bar Foundation, we collected data from employers and work placement agencies in Michigan through surveys assessing the factors employers have considered in deciding to hire ex-offenders. Michigan has taken an important step for ex-offenders in providing services to offenders through the Michigan Prisoner Reentry Initiative. Our focus has been on potential liability based on negligent hiring, restrictions on using conviction information in hiring decisions, and discriminatory disparate impact concerns. This information should help employers and work placement agencies make better informed, more justifiable hiring decisions regarding ex-offenders, and is expected to promote the hiring of ex-offenders in Michigan.

Ex-Offenders Need Jobs

The most important factor in the reduction of recidivism is a person's ability to gain "quality" employment.[1] One expert has concluded: "Ex-offenders who are unable to secure jobs upon release are much more likely to re-offend than those who are employed."[2]

Approximately 17 million ex-felons were available for work in 2010. As of June 2008, incarceration rates in state & federal prisons & jails were as follows:

- 4,777 African American male inmates per 100,000 African American males
- 1,760 Hispanic male inmates per 100,000 Hispanic males
- 727 white male inmates per 100,000 white males

Among males aged 30-34, the rate of incarceration for African Americans is 6.2 times greater (11,137 per 100,000) than for whites (1.793 per 100,000).

Reluctance to Hire Ex-Offenders

Research has established that employers' unwillingness to hire ex-offenders is "widespread."[3] Over 60% of employers responded in one study that they "probably would not" or "definitely would not" hire an ex-offender.[4]

The aversion to hiring ex-offenders has been found to be even stronger than an employer's aversion to hiring other applicants who are commonly rejected, such as welfare recipients, or applicants without a high school diploma or with gaps in their employment histories.

A criminal record has been shown to have a greater effect for applicants of color. The criminal record penalty suffered by black applicants (60%) was roughly double the size of the penalty for whites with a record (30%).[5]

Examples of employers' reluctance to hire ex-offenders emerged from our survey of Michigan employers:

- "We do not hire personnel with criminal records of any kind other than minor traffic related offenses"

  —Security Firm

- "We do not hire ex-offenders that have committed a felony. We may consider ex-offenders that committed a misdemeanor, depending on the crime."

  —Tax administration firm

Despite this reluctance, 58% of the employers responding to our survey were willing at least "in some circumstances" to hire ex-offenders. In addition, employers noted some specific benefits from hiring ex-offenders, including over 40% noting the benefits of a good work ethic and the ability to follow directions.

Employer Concerns in Hiring Ex-Offenders

Federal nondiscrimination law requires that an employer show a business necessity for excluding ex-offenders if that exclusion has a disparate impact on applicants of color or with disabilities. A business necessity can be based on preserving workplace safety, or a relationship between the crime committed and the job duties.

The survey of Michigan employers found that these were the most significant concerns about hiring ex-offenders (numbers show average score given each factor out of 5):

- Sex offender registry restrictions 4.6
- Potential harm to customers or other 3d parties 4.5
- Potential harm to coworkers 4.4
- Property loss/theft 4.1

These concerns were greater than concerns about eligibility to work in the U.S., a general lack of trustworthiness, or a lack of training, work experience or education. 39% of the employers surveyed also noted the legal barriers to hiring ex-offenders in Michigan, including restrictions on hiring some ex-offenders in schools and long term care facilities. Approximately 10% of the survey respondents overstated the state restrictions on the hiring of ex-offenders.

For example, a nursing home stated that it was prevented from hiring anyone with a criminal history, when in fact state law only requires a waiting period before long term care facilities can hire many applicants with convictions. Similarly, some schools responded that they did not or could not hire any ex-offenders, whereas state law only prohibits the hiring of sex offenders by schools. Employers who overstated the state restrictions on hiring ex-offenders were significantly more likely to report that their organizations were "not at all willing" to hire ex-offenders. This finding suggests that an inaccurate understanding of the law is contributing to at least some employers' unwillingness to consider hiring ex-offenders.

Showing a Business Necessity for Excluding Ex-Offenders

Our survey of Michigan employers asked about factors that

employers consider in deciding whether to hire ex-offenders. The factors considered to be "very important" by the most employers (numbers show average score given each factor out of 5):

- Violence associated with crime 4.6
- Sex offender registration restrictions 4.5
- Level of offense (felony vs. misdemeanor) 4.4
- Relationship of crime to ability, capacity or fitness to perform job duties & responsibilities 4.3
- Total number of crimes committed 4.2
- Connection to potential to cause property loss/theft 4.2
- Time since conviction 4.1
- Evidence of rehabilitation since conviction 4.0

These factors were considered to be much more important, on average, than other factors such as lack of training or skills, lack of education, a belief that the crime shows unfavorable character traits, or a lack of general work experience.

Agencies in Michigan which assist ex-offenders in finding employment agreed that sex offenses and violent crimes were the most significant factors considered by employers.

Employer Policies

Consistent with these factors, the survey found that employers most often had policies regarding these factors related to the hiring of ex-offenders:

- Level of offense (felony vs. misdemeanor)
- Violence associated with crime
- Sex offender registration
- Relationship of crime to ability, capacity or fitness to perform job duties & responsibilities
- Connection to potential to cause property loss/theft

However, a significant number of employers considered the factors related to the crime committed (as described above) without having a formal policy about those factors.

Importance of Honesty

Employers noted the importance of disclosing convictions on an application. Even if the employer would otherwise consider hiring an ex-offender, the "dishonesty" shown by not revealing a conviction was seen as a definite bar to employment. Employers also advised that applicants should provide additional information to explain the circumstances of the criminal offense.

— END NOTES —

1 Uggen, Christopher & Melissa Thompson, "The Socioeconomic Determinants of Ill-Gotten Gains: Within-Person Changes in Drug Use and Illegal Earnings," 109 Am. J. Soc. 146 (2003).

2 Simonson, Jocelyn, "Rethinking 'Rational Discrimination' Against Ex-Offenders," 13 Geo. J. Poverty Law & Pol'y 283, 286 (2006)

3 Simonson, supra.

4 Raphael, Steven, "Should Criminal History Records Be Universally Available?," 5 Criminology & Public Policy 515, 522 (2006).

5 Pager, Western and Sugie, "Barriers to Employment Facing Young Black and White Men with Criminal Records," 623 The Annals of the American Academy of Political and Social Science 195, 199 (2009). ■

MICHIGAN SUPREME COURT UPDATE

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Debano-Griffin v Lake County and Lake County Board of Commissioners, Mich Sup Ct No 140400 (6/3/10), rev'g and remdg, Debano-Griffin v Lake County and Lake County Board of Commissioners, Ct App No 282921 (10/15/09 unpub).

In this case arising under Michigan's Whistleblowers Protection Act, MCL 15.361 *et seq*, Plaintiff had been employed by Defendant County Director of its 911 Department. After she had registered complaints with Defendants about the performance of the County's ambulance service provider and the apparent diversion to the 911 Department of ambulance service money the County's residents had authorized in an election, her position had been eliminated. She sued, claiming a violation of the Whistleblowers Act.

Defendants were denied summary disposition by the Trial Court, and Plaintiff won a jury verdict thereafter. On appeal, the Court of Appeals Panel, in a 2-to-1 ruling, found the Trial Court had erred in not granting Defendants summary disposition. Focusing on the key language of the Act, "…because the employee…reports or is about to report, verbally or in writing, a violation or *suspected* violation of a law…," MCL 15.362, the majority opined that Plaintiff had merely reported a *suspected* violation of a *suspected* law. Such activity, in the majority's judgment, was not protected under the Act. *Ct App, Slip Op at 3-4; Whitbeck, J, concurring, at 5-6.* Judge Kelly dissented, arguing there is no requirement an employee have actual knowledge of the specific law he or she believes has been violated. Judge Kelly found the key inquiry to be the employee's good faith belief an actual law had been violated. *Kelly, dissenting, at 3-4.*

The Supreme Court reversed and remanded summarily, finding that Plaintiff's reported diversion to the 911 Department of money the taxpayers had specifically earmarked for ambulance services was in fact a violation of an actual Michigan law. *See*, MCL 211.24f(2)(d) (ballot must include clear statement of purpose of millage); MCL750.489; MCL 750.490; and MCL 141.439. Hence, the difference of opinion below was irrelevant, as Plaintiff had reported a violation or suspected violation of an *actual* law and was, therefore, automatically engaged in activity protected by the Act.

In so holding, the Court expressly declined to rule on the issue volleyed back and forth by the Court of Appeals, i.e., whether the word "suspected" in Section 162 applies to both the violation and the law, or just to the violation. It is predictable, however, the Court's summary Opinion will be interpreted to mean a plaintiff will not be required to have specific knowledge of the actual law(s) at the time the complaint is made to cloak him or herself with the protection of the Act, so long as there really is such an actual law.

Note: on remand, the Court of Appeals ordered the lower court to enter a summary dismissal of the matter, finding coincidental timing alone insufficient to establish the requisite causal connection between plaintiff's protected activity and her discharge. ■

NLRB UPDATE

Stephen M. Glasser, *Detroit Regional Director*
National Labor Relations Board

This update focuses on the latest from the office of the General Counsel. Lafe E. Solomon was designated Acting General Counsel by President Obama on June 21, 2010. On January 27, 2011, the President nominated Terrence F. Flynn (R) (former chief counsel to former Board Member Peter C. Schaumber) to the Board and Lafe E. Solomon to be General Counsel; both nominations, as of this writing, pend before the Senate.

The Acting General Counsel has recently issued two casehandling memorandums to the field offices, one respecting deferral to arbitral awards and pre-arbitral grievance settlements, the other concerning remedies in first contract bargaining cases.

In GC 11-05 (January 20, 2011), it was observed that the Board's current post-arbitral deferral standards under *Olin Corp.*, 268 NLRB 573, 573-574 (1984), do not require that the arbitrator explicitly consider the rights afforded under the National Labor Relations Act. Thus, *Olin* requires only that the contract and statutory issues are "factually parallel" and the arbitrator was "presented generally with the facts relevant to resolving the unfair labor practice." Therefore, in cases involving alleged violations of employee rights under Section 8(a)(1) and 8(a)(3) of the Act, the Board will be asked to require that in order to permit deferral to an arbitral award (resulting in dismissal of the charge, absent withdrawal), it must be demonstrated that the statutory issue raised by the charge was clearly considered by the arbitrator.

The Board will also be asked to make clear that the burden of demonstrating that the statutory issue was addressed by the arbitrator is on the party urging deferral to the award. Presumably, the party seeking to have a charge deferred to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971) or *Dubo Mfg. Corp.*, 142 NLRB 431 (1963), will endeavor to have the statutory issue presented to, and considered by, the arbitrator in order to ensure that the award is "deferral worthy." The party seeking deferral to the award would be required to show that the contract contained the statutory right (e.g., union discrimination clause) or that the statutory issue was presented to the arbitrator, and that the arbitrator correctly applied the statutory principles in deciding the case. Upon such a showing, the award would withstand challenge, unless it was shown that it was not susceptible to an interpretation consistent with the Act.

The Regional Offices have been instructed as follows:

1. Upon a showing that a charge has arguable merit, defer the charge to arbitration (assuming all other deferral criteria are present). If the charge lacks arguable merit, it is to be dismissed.

2. Upon issuance of the award, determine if the party urging deferral has met its burden (and if the award is susceptible to a lawful interpretation under the Act). The case is then to be submitted to the Division of Advice with a recommendation from the Region whether to defer to the award.

3. If the arbitral award sustains the grievance (e.g., reinstatement and full backpay), a request to withdraw the charge should be approved.

Consistent with the foregoing, in respect to pre-arbitral grievance settlements the Board will be asked to require that in order for deferral to be appropriate, the evidence must demonstrate that the parties intended to resolve the unfair labor practice charge (as well as the grievance); in other words, there must be a showing that the statutory issue was addressed by the parties.

In GC 11-06 (February 18, 2011), the Acting General Counsel reaffirmed the necessity to consider special remedies in those cases where unfair labor practices were committed during the period that the parties were negotiating their first contract. It was recognized that such period is particularly significant because the employees' designation of a collective bargaining representative was entitled to the full protection of the Act in order to protect freedom of choice and labor stability.

Therefore, in those cases where bad faith bargaining has been found, the Regions are authorized to seek the following remedies, as appropriate, in addition to the standard bargaining order:

1. Extension of the certification year for a minimum of six months to ensure that the union is afforded a reasonable period of time to try to reach a contract.

2. Having the remedial notice read to the employees either by a responsible management official in the presence of a Board agent, or vice versa, at respondent's option.

3. Depending on the nature of the unlawful bargaining, Regions may seek a specific bargaining session of 24 hours per month for a minimum of 6 hours per session. If the Region believes that a more intense schedule is justified, it must consult with the Division of Advice. In cases involving especially serious bargaining violations, the Regions may consider the additional remedies of reimbursement of bargaining expenses and reimbursement of litigation expenses. These cases must be submitted to the Division of Advice for authorization to seek such remedy(ies).

The common thread to GC 11-05 and GC 11-06 is the Acting General Counsel's position that the principles and statutory protections of the Act must be honored by the parties whether in respect to grievance settlements or arbitrations, or with remedies designed to undue the effects of violations undermining or impeding the collective bargaining process. ■

RECENT JUDICIAL DECISIONS UNDER THE ADA

Jay C. Boger
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The federal courts continue to decide an array of issues under the Americans with Disabilities Act (ADA). Here are some of the more interesting recent examples.

Preemptive Fitness-For-Duty Exams. In *Brownfield v. City of Yakima*,[1] the U.S. Court of Appeals for the Ninth Circuit held that the city did not violate the ADA when it preemptively required a police officer to submit to a fitness-for-duty exam. After Brownfield suffered a closed head injury in an off-duty car accident, he began to exhibit problematic behaviors. He confronted fellow officers, made suicidal statements to a coworker, and told a coworker that he was losing control during a traffic stop. His wife also complained about domestic violence. The police department placed him on administrative leave and ordered him to undergo a fitness-for-duty exam. He refused and then sued, claiming that the demand violated the ADA. The Ninth Circuit noted the stringent "business necessity" standard for such exams and that that Circuit had yet to address whether an employer may preemptively require a medical exam (i.e., without waiting until a perceived threat becomes real or an injury results). The court reasoned that, while there is potential for abuse by employers, prophylactic medical exams can sometimes satisfy the "business necessity" standard, particularly when the employee is engaged in dangerous work. Given Brownfield's position as a police officer, and the evidence that raised questions about his ability to deal with stressful and dangerous conditions, the city had good reason to doubt his ability to serve, and hence to require a fitness exam.

Wisbey v. City of Lincoln,[2] a recent Eighth Circuit decision, also held that a preemptive fitness-for-duty exam was warranted where there was legitimate concern about the employee's ability to perform. An emergency dispatcher, Wisbey applied for leave based on depression and anxiety, stating that her condition could affect her concentration and motivation. The city then required her to submit to a fitness exam to determine whether she was qualified to continue. During the exam, Wisbey described for a psychiatrist her battle with depression and insomnia and stated that the emergency nature of her job exacerbated these conditions. The city was concerned that Wisbey could not perform her duties and terminated her. She sued, claiming the city had regarded her as disabled and lacked a proper basis to require the exam. The court dismissed the lawsuit, concluding that Wisbey had been discharged because she was found unfit for duty by a third-party physician. It also held that Wisbey was properly subjected to the exam because she played an essential emergency role and needed to be alert and able to concentrate at all times. The exam was a legitimate means of ascertaining whether she was fit to perform.

Notice Of Need For Accommodation. The Eighth Circuit also recently decided a case involving an employee's notice of his need for a reasonable accommodation. In *Kobus v. College of St. Scholastica*,[3] Kobus had been diagnosed with depression and told his supervisor at various times that he may "need time off work." But he never actually mentioned his depression or that he took anti-depressant medication. After Kobus was denied a leave, he resigned and sued, claiming a failure to accommodate. The court affirmed the dismissal of his accommodation claim on the basis that Kobus had never notified his employer of a need for accommodation. There was no evidence that his limitations were apparent at work; he repeatedly declined to reveal his diagnosis; he expressed doubt about his doctor's ability to confirm a diagnosis; and he failed to pursue FMLA leave.

Reassignment As An Accommodation. In *Duvall v. Georgia-Pacific Consumer Products*,[4] a recent Tenth Circuit decision, a paper mill employee was transferred from his shipping position to one that put him in regular contact with paper dust. He developed pulmonary problems and requested a transfer back to his old position. He was offered two open alternative jobs (at lesser pay), but was told his old position had been filled by a contractor and was therefore unavailable. He took one of the lower paying positions, and sued claiming his employer had failed to reasonably accommodate him. On appeal, the Tenth Circuit recognized that its precedent required consideration of reassignment as a reasonable accommodation, but that this obligation is not without limitation and is based on a reasonableness analysis. For example, the court held, it would be unreasonable to force an employer to create a new job, or to grant a promotion. In this instance, the court determined that the position Duvall sought was not vacant because the employer had made the business decision to staff the shipping department with temporary employees. The court reasoned that a position is "vacant" for purposes of the ADA's reassignment duty when it would have been available for similarly situated nondisabled employees to apply for and obtain.

"Total Disability" Testimony Barred Claim. In *Neview v. D.O.C. Optics Corporation*,[5] the Sixth Circuit affirmed the dismissal of an ADA claim because the plaintiff failed to establish that she was a qualified individual with a disability. Neview was discharged from her optical center manager position after several incidents of inappropriate behavior, including degrading comments about staff members, confrontations with customers, and losing her temper, kicking walls, and crying. Following her discharge, she applied for worker's compensation benefits. At a worker's compensation hearing, she testified that, at the time of discharge, her state of mind made her totally incapable of working in any job. In connection with her ADA lawsuit, Neview contended that her physician's records showed she suffered from post traumatic stress disorder and major depression. To be protected by the ADA, a person must not only be disabled, i.e., suffer from a physical or mental impairment that substantially limits a major life activity, but must also be able to perform the essential functions of her job with or without accommodation. The court concluded that Neview's ADA claim was barred by her testimony before the worker's compensation judge that she could not perform her job.

— END NOTES —

1 2010 U.S. App. Lexis 15324 (9th Cir. 2010).

2 2010 U.S. App. Lexis 13684 (8th Cir. 2010).

3 608 F.3d 1034 (8th Cir. 2010).

4 607 F.3d 1255 (10th Cir. 2010).

5 2010 U.S. App. Lexis 13083 (6th Cir. 2010). ■

NLRB PROPOSES MANDATORY NOTICE-POSTING BY ALL NLRA-COVERED EMPLOYERS

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Last year the three then-sitting members of the National Labor Relations Board (NLRB), all of them Democrats, approved for publication in the Federal Register a notice of proposed rulemaking that would, for the first time, require that all employers subject to the National Labor Relations Act (NLRA) post a standardized government-prepared notice informing employees of certain of their rights under the NLRA. The three Board members explained that the purpose of the mandatory posting would be "to increase knowledge of the NLRA among employees, to better enable the exercise of rights under the statute, and to promote statutory compliance by employers and unions."

The proposed standardized notice would be essentially the same as the notice the U.S. Department of Labor last year required federal contractors and subcontractors to post for their employees, as a condition of doing business with the U.S. government. The NLRB's notice would have to be at least 11 by 17 inches in size, printed in prescribed colors, translated into other languages if appropriate, posted in conspicuous areas of the workplace, and also distributed electronically (*i.e.*, email or intranet) "if the employer customarily communicates with its employees by such means."

The Board's proposed rule would create three "sanctions" for an employer's failure or refusal to post the notice: (1) a potential finding that the failure constituted a violation of Section 8(a)(1) by interfering with employees' Section 7 rights; (2) the possible tolling of the six-month statute of limitations in the event an unfair labor practice charge were filed late; and (3) treating "knowing noncompliance" as evidence of an unlawful motive in an unfair labor practice proceeding.

The public comment period closed on February 22, 2011. The Board received close to 6,500 responses from the full spectrum of interest groups, some supporting the proposed rule and notice requirement as long overdue, and others pointing out its infirmities. We can, of course, debate whether the Democratic Board members' assumptions about uninformed employees are correct, or are perhaps paternalistic, in this era of internet data sharing and social media. The other primary arguments identified by the commenters who opposed the proposed rule fell into three general categories.

First, while most federal labor statutes contain explicit notice-posting requirements, the NLRA conspicuously does not, and hence the Board lacks statutory authority to require such a posting through the rulemaking process. This view was articulated by the single Republican Board member (who had not yet been confirmed by the Senate when his three Democratic colleagues moved forward) in a dissent published in the Federal Register with the notice of proposed rulemaking. Some commenters noted that this objection may be especially applicable to the electronic posting requirement, as no other federal agency has gone that far. Unlike many agencies, the NLRB does not have roving authority to act on its own vis-à-vis employers – it is empowered to act only when an unfair labor practice charge is filed against a particular employer. So this jurisdictional argument is not an insignificant one.

Second, commenters pointed out that the NLRA is very specific regarding conduct declared to constitute an unfair labor practice, and the failure or refusal to post a standardized notice is not included. Whether to create a new unfair labor practice providing for potential sanctions, these commenters posited, would be a policy judgment for Congress to decide – not for the Board to declare through a rulemaking process.

Third, the language of the standardized notice itself was challenged by many commenters as unbalanced and favoring unionization. For example, they pointed out, while the proposed notice informs employees of their right to form a union, it does not mention the right to decertify a union, and it only lightly touches on an employee's right not to engage in the identified protected activities. Nor does the notice provide any explanation of an employee's right to abstain from union membership or from paying union dues (*e.g.*, "Beck" rights), or the materially different rights of employees who work in the 22 "right to work" States. Especially troubling to some commenters was the notice's statement of employees' right to "[s]trike and picket, depending on the purpose or means of the strike or the picketing" – without explaining that many employees do not have such rights or what the limitations are – creating potential for confusion, work disruptions, and negative impacts on the economy.

At this writing, it is unknown whether or when the Board will take further action. Needless to say, if adopted, the rule would undoubtedly face an immediate court challenge. If ultimately found enforceable, millions of employers would suddenly discover that they are subject to a new posting requirement and potential sanctions for noncompliance. ■

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

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

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ON BEING A LITIGATOR: "THIS IS THE BUSINESS WE'VE CHOSEN"

Stuart M. Israel
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The late Mordecai Richler wrote in the *New York Times Book Review* about being a writer. Richler wrote, in 1983, that "everybody I knew in my Montreal high school who wasn't going to be another Ted Williams or Barney Ross or Maurice (The Rocket) Richard was willing to settle for being a writer." He continued:

> As far as we could make out, Hemingway set his own hours. He seemed to go fishing whenever he felt like it. He was on first name terms with Ingrid Bergman and Marlene Dietrich. It had to be a good life.

Richler continued:

> What I find more intriguing than why anybody became a writer is how some of the boys at school grew up to be caterers or frozen chicken breast packagers or distributors of plate glass windows.

"Looking back," Richler, then age 52, wrote, "I fear that to begin with I did not so much want to write as to be a writer."

I know what Richler meant. Many of my friends and classmates, like me, wanted to "be a lawyer." You wouldn't set your own hours and you most likely wouldn't do a lot of fishing (even if you liked fishing), and you probably wouldn't be on first name terms with Hollywood icons, but there was much to recommend being a lawyer. Or, more particularly, a litigator.

You'd try cases. You'd make impassioned arguments to enrapt jurors. You'd help deserving people. You'd do good. You'd reveal the truth, like Perry Mason, or like Tom Cruise in *A Few Good Men*. You'd do justice, like Atticus Finch in *To Kill a Mockingbird*. Or, like Jack McCoy on *Law & Order*, you'd speak for victims, put away bad guys, and hang out with, or be, one of those smart, attractive, stylish, diligent, and loyal assistant district attorneys that McCoy recruited in seemingly endless supply.

Live and learn. It turns out there is more to being a lawyer than just honor and glory and truth and justice. There are deadlines and billable hours. There are rules and regulations and limitless pages of "documents." There are client needs and demands and expectations and emergencies. There are receivables. And there are benighted opponents and judges who just don't know or care or see the light. And, because you are a litigator, there are, as Harvard law professor Alan Dershowitz warns, endless tests, some of which, inevitably, you will flunk.

Dershowitz cautions—in *Letters to a Young Lawyer* (2001)—that the bar examination is not a lawyer's last exam; rather, it is the start of a professional life of perpetual tests. Dershowitz writes:

> [T]he legal profession is a never-ending series of exams that are graded by judges, juries, senior partners, clients and others. The grading system is generally "pass-fail," but unlike in those colleges and in law schools that employ the pass-fail system, in the real-life tests, "fail" is a common grade. You will lose cases, clients and face with some regularity, no matter how good you are—or think you are. Law, unlike school, is often a zero-sum game that is not graded on a curve. Moreover, there is no necessary correlation between the quality of your work and whether you pass or fail. You will lose cases in which you have done a far better job than your opponent, because your opponent has the better or easier side, or because the judge or jury is inclined in favor of his or her client.

"You win some, you lose some."

Dershowitz counsels that it "is essential that professionals who are judged by others develop internal criteria for self-evaluation of their work product," recognizing that "the legal profession" is "a lifelong series of exams by often inaccurate graders."

Dershowitz points out that there are "win-win jobs in the legal profession, but not in litigation." He advises:

> …if you're not prepared for a life of being tested and graded by others often less competent than you are, pick a win-win area of law. Prepare wills.

Or be a caterer, a frozen chicken packager, or a window distributor. Or be a writer, like Richler, and set your own hours, go fishing when you want, and hobnob with the glitterati.

Or press on. Be a litigator. Work diligently, take the tests, pass as many as you can, do as much good as you can, and take the inevitable bad with the good, recognizing that it comes with "being a lawyer." As Hyman Roth said in *The Godfather Part II*, "this is the business we've chosen." ■

WILL THE NLRB BE SCROOGE TO NONPROFITS?

C. John Holmquist, Jr.
Demorest Law Firm

There may be something missing from this year's holiday season shopping experience—the sound of ringing bells and red kettles. It may also become more difficult to find Girl Scout cookies at area supermarkets and other locations where they have traditionally been sold. Whether or not the American shopping experience becomes solicitation free depends upon how the National Labor Relations Board ("NLRB") decides a pending case.

In *Roundy's, Inc.*,[1] the NLRB will decide what legal standard will be applied in determining whether an employer violated the National Labor Relations Act by denying access to its premises by non-employee union agents while permitting various individuals, groups, and organizations to use its premises for various solicitations. The case highlights the unique relationship between the Board and the courts of appeals where the Board will not be bound, other than following a circuit court decision as law of the case, by appellate decisions which do not enforce its orders. Currently, the Board and several circuits, including the 6th, disagree whether an employer has to treat the Teamsters the same as the Girl Scouts when it comes to access to its premises.

The company maintained a broad no solicitation/no distribution policy at its store locations. When the handbillers would appear, the company would ask them to leave and call the police which would result in the handbillers leaving. At the hearing before the administrative law judge, the parties stipulated that the company had allowed widespread solicitation and distribution of literature both inside and outside the store. Groups that participated included Second Harvest, the Red Cross, the Salvation Army bell ringers, the Boy Scouts and Girl Scouts, and the VFW.

The Board found that the company had violated the Act with respect to ejecting the handbillers at those stores where the company had only a nonexclusive easement in areas where it had sought to remove the handbillers. The Board noted that the General Counsel alleged that the company's actions violated section 8(a)(1) by discriminating against the handbillers under its decision in *Sandusky Mall Co*.[2] With respect to the two stores where it did have an exclusive easement, the Board solicited the parties and interested *amici* to address three issues: should the Board continue to follow the standard articulated in *Sandusky*; if not, what standard should be adopted; and what bearing does its decision in *Register Guard*[3] have on defining the standard in nonemployee access cases?[4] Over a dozen organizations submitted briefs, and the deadline for filing briefs has now passed. The case is pending with the Board.

One of the earliest decisions dealing with the treatment of nonprofits in nonemployee access cases was *Hammary Manufacturing Corp.*[5] In *Hammary*, the Board was asked to reconsider its decision that a no solicitation rule was invalid on its face because it made an exception for the United Way campaign. The request to reconsider the decision was made by the company and the United Way. The request was supported by the US Chamber of Commerce and the National Association of Convenience Stores.

The panel majority granted the motion and revised the decision to remove the finding involving the United Way solicitation. In a footnote[6], the panel majority stated that the Board and the courts had held in prior cases that no violation occurred by permitting a small number of isolated "beneficent acts" as narrow exceptions to the no solicitation rule. Member Jenkins dissented and stated that permitting conduct to others while prohibiting it to unions is by definition discrimination. He stated, "The Act does not permit a little bit of discrimination, here and there, now and then: it forbids all of it."[7]

The issue of discrimination was addressed by the General Counsel after the September 11 terrorist attacks.[8] The memo stated that in general, where an employer enforces a no solicitation/no distribution rules against a union while permitting other similar kinds of solicitation, it violates the Act. The General Counsel noted an employer may lawfully permit a small number of isolated beneficent acts as exceptions. While the Board has not set a specific number of incidents to find unlawful discrimination, it has found three incidents of allowing solicitation was permitted. The memo concluded by noting that each case would undoubtedly be different and that the public should be advised of the current Board position on the beneficent acts exception.

In soliciting briefs addressing what standard should be applied in nonemployee access cases, the Board did not acknowledge that its current standard has not been universally accepted by the courts of appeals. In *Sandusky*, the Board found that the employer violated Section 8(a)(1) of the Act by refusing to permit nonemployee union representatives to engage in area standards handbills while allowing access for other commercial, civic, and charitable purposes. The Board acknowledged in its decision that its decision was contrary to the 6th Circuit in *Cleveland Real Estate Partners*,[9] and adhered to its view that an employer that denies a union access while regularly allowing nonunion organizations to solicit and to distribute on its property unlawfully discriminates against the union.

In its review of the Board's decision in *Sandusky*[10], the 6th Circuit stated that even if it were not bound by the decision in *Cleveland Real Estate*, which it was, it would not find discrimination as urged by the Board because the conduct of nonemployee union handbillers is not similar conduct to that of civil and charitable organizations who were permitted to use the mall in a limited way deemed beneficial. The 7th Circuit was even more emphatic about the difference in its decision in *6 West Limited Corp. v. NLRB*[11], when it stated:

> Solicitation for Girl Scout cookies, Christmas ornaments, hand-painted bottles and other examples listed by the ALJ certainly cannot under any circumstances, be compared to union solicitation as supported by the ALJ's determination that the restaurant engaged in a

> discriminatory application of its non-solicitation policy. We are at a loss to comprehend how a restaurant can maintain positive relations with its employees and customers if it failed to allow an activity as innocent as the sale of Girl Scout cookies or the sale of hand-blown Christmas ornaments during the yuletide season.[12]

Although the Board has asked for comment on the impact, if any, of its decision in in *Register Guard*, the General Counsel has taken the position that the case deals with employee access to use of company equipment as opposed to nonemployee access to property. As a result, the cases need to be determined independently. The General Counsel did note that the *Republic Guard* case should be overturned. Most of the amici took the position that the case was not applicable. While the odds are extremely high that the current Board will overturn *Register Guard*, this case will probably not be used to accomplish that.

The impact of the continuation of the *Sandusky* standard on nonprofits cannot be minimized. United Way Worldwide filed a brief[13]. It noted that the United Way is the largest non-government funder of human services in the United States, distributing approximately $ 3.4 billion to agencies and programs. While not suggesting exactly where the line between allowable and restricted conduct should be drawn, the United Way urged the Board to continue to take into consideration the character of the solicitation and the access, and should at a minimum recognize the fundamental value of charitable solicitation and the public policy in favor of workplace giving.[14]

What standard will the Board adopt? The Sandusky holding was the product of a 3-2 decision; then Board member Liebman was one of the three member majority. The panel majority stated unequivocally that an employer cannot prohibit the dissemination of messages protected by the Act on its private property while allowing substantial civic, charitable, and promotional activities. It is difficult to see how this Democratic Board will reject the decision. Employers who believe that Teamsters and Girl Scouts can be treated differently should be prepared for a trip to the 6th Circuit.[15]

— END NOTES —

1 356 NLRB No. 27 (2010).

2 329 NLRB 618 (1999).

3 351 NLRB 1110 (2007).

4 *Notice and Invitation to file briefs* (11/12/10). Found at NLRB website.

5 265 NLRB 57 (1982).

6 265 NLRB at 57, n. 6.

7 265 NLRB at 58.

8 GC 01-06(2001).

9 95 F.3d 457 (6th Cir. 1996).

10 242 F. 3d 682 (6th Cir. 2001).

11 237 F.3d 767 (7th Cir. 2001).

12 237 F.3d at 780.

13 The *amicus* briefs are available on the NLRB's website.

14 United Way brief, pp. 7-8.

15 For other appeals court decisions rejecting the NLRB's standard, see *Salmon Run Shopping Center LLC, 534 F. 3d 108 (2d Cir. 2008), Be-Lo Stores v. NLRB, 126 F. 3d 268(4th Cir. 1997), NLRB v. Pay Less Drug Stores, Pacific Northwest, Inc., 57 F.3d 1077, (9th Cir. 1995.* ■

LAWNOTES REQUESTS READERS' OPINIONS ON DEPOSITION TECHNIQUES

Below is a deposition colloquy based on actual events.

Q. [Blah, blah, blah]?

Opponent: Objection, form.

Q. What is the problem with the form, counsel?

Opponent: I do not have to educate you. There is a form problem.

Q. Please specify the problem so I can correct it. I'd like a clean record. Please explain the basis for your form objection.

Opponent: Too bad you didn't pay attention in law school. Move on. Do you have any more questions?

Q. Do you refuse to specify the ground for your objection?

Opponent: Nope, it is form. Your form is defective. That's all you get. Now move on.

Q. I object to your vague objection. All right, witness, again, [blah, blah, blah]?

A. Uh…..

Has the objector waived the right to complain about any form defect by refusing to be specific? What should the objector have responded to the request for specificity? Should the questioner have done anything different? What discovery and evidence rules are implicated, if any? Or is this a matter for judicial discretion? How does one get a judge to pay attention to this kind of stuff? Discuss and decide.

Email your advice and observations and deposition dialogues to *Lawnotes* editor Stuart M. Israel, israel@legghioisrael.com. The best responses will be selected for publication. If there are no best responses, we'll just pretend we never asked, and another generation of labor and employment lawyers will be left wondering what to do in these circumstances. Don't let this happen. It is better to light one candle than to curse the darkness.

Also, if you have discovery or litigation quandaries that may be illuminated by responses from *Lawnotes* reader-mavens, please submit them. This is how Dr. Ruth's column got started. ■

MERC UPDATE

Erin M. Hopper
White, Schneider, Young & Chiodini, P.C.

A summary of three recent decisions issued by the Michigan Employment Relations Commission follows. Decisions of the Commission may be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/merc.

Unfair Labor Practices

City of Saginaw -and- Police Officers Association of Michigan, *Case No. C09 A-009* (December 22, 2010)

On February 19, 2010, Administrative Law Judge ("ALJ") Julia Stern issued her Decision and Recommended Order finding that Respondent employer, City of Saginaw, violated Section 10(1)(a) of the Public Employment Relations Act (PERA) by disciplining an employee for engaging in protected union activity. Respondent filed exceptions, arguing that the ALJ's factual findings were not supported by the record. The Commission found the exceptions to be without merit and adopted the ALJ's recommendation.

The dispute arose when Daniel Kuhn, an employee of Respondent and the former president of Charging Party's local union and current vice-president of its state organization, sent an e-mail to union members using Respondent's e-mail system. The e-mail explained why Kuhn had decided to contribute to one vendor's deferred compensation plan over another, since participating employees could choose between the two. The e-mail stated, in part:

> I left ICMA [Retirement Corporation] because of principle mainly. To have a nickel of my fees paid to lobbyists who campaign against employees' interests, and pay people who train the likes of their new president [the city manager], bothers me. I have seen no "good faith" bargaining on behalf of our employer to date, in fact, the proposals being taken before the arbitrator are offensive and extremely unappreciative of the police officers who serve this town daily. You wonder if the risk and commitment is worth it.

In response to this e-mail, Respondent issued Kuhn a one-day suspension without pay, claiming that the correspondence violated the Saginaw Police Department General Order which states that "[e]-mail is not to be used for conflict resolution or criticism of the administration of the City or the Police Department." The violative portion of the e-mail, according to Respondent, was a reference to "the likes of" the city manager.

The ALJ found this reason for discipline disingenuous. Kuhn's statement, she found, was neither a personal attack on the city manager, nor was it disparaging of his integrity or character. Instead, the ALJ found that the discipline had been because of Kuhn's comments about Respondent's bargaining conduct. This, then, was protected union speech.

The ALJ then examined Respondent's e-mail policy, which states that "…e-mail service shall only be used for department related business." However, the e-mail system had been used by employees both for personal e-mail and for union-related e-mail in the past, Respondent was aware of this, and failed to warn or discipline employees for such conduct. The ALJ recognized Respondent's right to prohibit personal e-mail, but found that enforcement of such a policy only when union activity is involved is a violation of PERA.

The ALJ recommended that Respondent cease and desist from discriminating against protected conduct, as well as from disciplining Kuhn for the e-mail. Respondent was also ordered to remove the discipline from Kuhn's file and make him whole for any losses suffered as a result of the discipline, all of which MERC adopted.

City of Livonia -and- Michigan AFSCME Council 25, *Case No. C07 G-156* (November 18, 2010)

On November 19, 2008, ALJ Stern issued a Decision and Recommended Order finding that Respondent employer violated Sections 10(1)(a), (c), and (d) of PERA by discharging an employee because of her union activities. The ALJ found that Respondent's reasons for termination were pretextual, and that the real motivation was anti-union animus. The recommendation was for reinstatement and to make the employee whole for any losses. Respondent filed exceptions, claiming that the Charging Party's requirement for a prima facie case had not been met. The Commission agreed with Respondent, and the Recommended Order was reversed and the charge dismissed.

Ann Maria Camerella was hired by Respondent in August 2003 to work as a desk attendant. In March of the following year, she was promoted to building supervisor. In August 2004, Camerella received her first disciplinary notice: a citation for carelessness for failing to lock the building doors and failing to leave cash bags in their appropriate place. This discipline was followed by several other incidents, many of which did not lead to formal discipline. These included repeated tardiness, failure to punch in for work, failure to accurately report problems at work, parking in the wrong area, personal phone calls, taking too many cigarette breaks, and other acts of carelessness such as leaving her master key lying around and failing to properly verify cash register reports.

During the summer of 2006, Charging Party began a campaign to organize union representation for nonunionized employees of Respondent. The election ultimately failed, but Camerella had been a central figure in the initiation of the election. Respondent had a policy banning union activity during employees' working hours, excepting breaks, and Respondent took steps to ensure Camerella abided by this rule, including reviewing surveillance camera footage of Camerella at work.

In August 2006, Camerella was told by the facility manager, Tom Murphy, that "she had better be careful of what she asked for in trying to bring the union in." Although the statement was not clarified at the time, Murphy later testified that he was refer-

ring to another union which was voted out because its members were unhappy with the contract. The comment, he explained, was not meant to be threatening.

During the organizing campaign, Camerella was told by Scott Spahr, a facility supervisor, that "[b]ecause you are trying to get the union started, I was told to watch everything that you do." Spahr also frequently referenced Camerella's union activities, including calling her a "union starter" and referring to another employee as her "union buddy."

The first event that Respondent claimed led to Camerella's termination began in February 2007. The city mayor banned all sales of nonprofit items, such as Girl Scout cookies, on City property. Up until this point, Camerella had been selling home-made candles while at work. When Camerella allegedly continued this activity in violation of the mayor's ban, another supervisor complained to Murphy about this in a written note. According to another employee, Camerella got ahold of this note and suggested that the complaining supervisor, who was pregnant, should be tripped with a vacuum cleaner.

The second event that led to termination was when Camerella again parked in the incorrect area. Camerella responded that she had obtained permission to do so, and that was neither confirmed nor refuted. It was then discussed that Camerella may or may not have attempted to falsify her time cards to cover another incident of tardiness.

Camerella's termination letter of June 27, 2007, referenced past conduct and discipline, including a written warning which explained that "trust of a supervisor is extremely important …[and that] any breach of trust or confidence will result in appropriate disciplinary action up to and including discharge."

Charging Party claimed Camerella's termination was a result of anti-union animus for her role in the campaign to organize the nonunionized employees. The ALJ agreed, finding that the reasons for termination Respondent put forth in the letter were pretextual, and that Camerella would not have been terminated but for her union activity.

Under Section 10(1)(c) of PERA, Charging Party must show the following elements to establish a prima facie case of discrimination: 1. union or protected activity; 2. employer knowledge of that activity; 3. anti-union animus or hostility toward the protected rights; and 4. suspicious timing or other evidence that the protected activity was a motivating cause of the discriminatory actions. Once a prima facie case is established, the burden shifts to Respondent to demonstrate that the same action would have been taken in the absence of the protected activity.

In its exceptions, Respondent argued that Charging Party had not established a prima facie case because it had failed to show a causal connection between the union activity and Camerella's termination. MERC agreed, finding credible evidence that Camerella would have been discharged even in the absence of the union conduct. This was supported both by Camerella's subpar work record, and because those who made the decision to terminate Camerella knew of her union activity long before she was terminated. Additionally, Spahr, who made the majority of union-related comments to Camerella, had no influence on the decision to discharge her.

The Commission concluded that mere criticism or negative references to unions do not necessarily rise to the level of anti-union animus, and in this case, the record was insufficient to establish such animus or retaliation. The charge was dismissed.

Election Issues

City of Detroit –and- Police Officers Association of Michigan -and- Detroit Emergency Medical Services Association, *Case No. R10 F-065* (November 10, 2010)

The Detroit Emergency Medical Services Association (DEMSA) sought to be recognized as an independent labor organization and to replace the incumbent union Police Officers Association of Michigan (POAM) to which DEMSA is presently affiliated as the exclusive representative of an existing unit of non-supervisory emergency medical personnel. POAM was certified as the exclusive representative on June 1, 2009, and has not yet secured its first labor agreement. On June 28, 2010, members filed an election petition with a sufficient showing of interest. POAM sought dismissal of the election petition based on MERC's Act 312 election bar policy. POAM filed an Act 312 interest arbitration petition on June 11, 2010.

Under Act 312, a newly certified union is protected against rival union petitions for one year following the initial certification. Under the Commission's 1978 Act 312 election bar policy, a rival union petition may not be processed after an Act 312 interest arbitration petition has been filed. Such proceedings often last more than one year. If a binding labor agreement is reached, PERA further insulates the incumbent union for the duration of the contract, up to a maximum of three years. If the Act 312 election bar is enforced in this case, it is possible that the workforce will not have another opportunity to seek an election for four years or more.

Section 14 of PERA provides that "an election shall not be directed in any bargaining unit or subdivision within which, in the preceding 12-month period, a valid election was held." In 1976, this section was amended with the additional proviso:

> An election shall not be directed in any bargaining unit or subdivision thereof where there is in force and effect a valid collective bargaining agreement which was not prematurely extended and which is of fixed duration. A collective bargaining agreement shall not bar an election upon the petition of persons not parties thereto where more than 3 years have elapsed since the agreement's execution or last timely renewal, whichever was later.

The Act 312 election bar policy, effective in 1978, states:

> The commission will entertain representation petitions during the established filing period of 150-90 days prior to the expiration of a collective bargaining agreement even though Act 312 arbitration has been initiated or is pending but, if the collective bargaining agreement has expired and an Act 312 arbitration

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MERC UPDATE

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> proceeding is pending, the filing of a representation petition will be barred by the arbitration proceeding.

This case presents the conflicting policy considerations and legal arguments in favor of, and against, the original adoption or continued enforcement of the Act 312 election bar policy.

The Commission first noted that the fundamental function of the adoption of PERA in 1965 was to recognize and codify the right of public employees to collectively designate an exclusive bargaining agent and to then compel their employer to deal with the workforce through the employees' collectively "designated or selected" representative, rather than individually.

MERC recognized that it must treat with extraordinary care in making any policy choice which tilts the balance in favor of incumbent unions to the detriment of employee free choice. In 2009, MERC overturned a 1992 finding that a newly certified bargaining representative could not seek retroactive contractual benefits to a point in time preceding the certification date. In *Wayne County*, 22 MPER 36 (2009), the Commission held that a newly certified union possesses the same right to negotiate over any otherwise bargainable subject, including retroactivity, as would have the incumbent union.

The Commission next noted that a blanket rule or practice barring the processing of election petitions which seek to remove an incumbent union, just because an Act 312 interest arbitration petition has been filed, essentially results in the Commission coming to the aid of an incumbent union which is potentially no longer the choice of the majority of the workers it purports to represent. Doing so only exacerbates the tendency for unions to file Act 312 interest arbitration petitions for defensive or other tactical advantage, rather than for the sole legitimate purpose of resolving an otherwise unresolved bargaining dispute over substantive employment conditions.

In this case, the city faced a demand by POAM to take part in the Act 312 arbitration proceeding. At the same time, as a result of the pending election petition which asserted that POAM is no longer the chosen representative, the city is barred from continuing to negotiate with the incumbent union, POAM. *See Paw Paw Public Schools,* 1992 MERC Lab Op 375.

MERC found those two obligations irreconcilable, and that the Act 312 election bar must yield to the duty of an employer to maintain neutrality where the incumbent's majority status is legitimately in dispute. In a footnote, MERC noted that the same outcome would occur if the employer were not covered by Act 312 and were instead a fact finding proceeding. Upon the filing of a properly supported election petition, the parties would be obligated to cease bargaining, the fact finding proceeding would stop as well, and an election would be conducted.

For these reasons, MERC revoked the 1978 resolution establishing a categorical bar to the processing of election petitions during the pendency of Act 312 arbitration proceedings. As such, it directed an election to determine the appropriate bargaining representative. The Act 312 arbitration was held in abeyance pending resolution of the question concerning representation. ■

GOVERNMENT IN THE CROSS HAIRS

Barry Goldman

Oliver Sacks, in his wonderful early book, "A Leg to Stand On," discusses a neurological condition called somatoparaphrenia. Patients with this disorder experience "a denial of ownership" of their body parts. Sacks remembers being called to deal with a patient who had fallen out of bed. He came in to find the man lying on the floor with an odd look on his face. The patient reported that he had found a strange leg in bed with him. He thought it was a cadaver's leg that a nurse had put in his bed as a joke. But when he attempted to throw the horrible thing out of the bed, *he somehow came after it — and now it was attached to him.*

I've been thinking about somatoparaphrenia lately in relation to our nation's ongoing war against the public sector. Somehow we have come to think of our government the way somatoparaphrenia patients think about their arms or legs. It is not us. It just takes our money and wastes it on foolishness. It is as if the government has nothing to do with the people, and its expenditures are no more beneficial to its citizens than when a boatload of Somali pirates spends their bloody ransom on drugs and whores.

"Starve the beast," we say. "Government is not the solution, government is the problem." Cut pay and benefits for government workers, take away their right to bargain collectively, remove their right to arbitration and shrink the size of government until, in Grover Norquist's memorable phrase, we can "drown it in the bathtub."

So who is this evil occupier who extorts our hard-earned money and throws it away so thoughtlessly? The cop? The firefighter? The guy who keeps the streetlights on? The nurses in the public hospitals? The teachers in the public schools? The people who maintain the parks, inspect the food and run the sewage treatment plants? These people are the *problem?* These people are *the beast?*

In calmer moments, we know that isn't true. These people are our neighbors, our relatives and our friends. The guy down the street is a doctor in a public hospital. Your brother is married to a teacher. Your friend from college is dating a cop. if they lose their homes, our neighborhoods suffer. If they lose their benefits, our businesses suffer. If they lose their jobs, we suffer. They are us. You can't just drill holes in their end of the boat.

Look, I've been arbitrating labor cases for 20 years. I know something about incompetence. I also know something about waste, fraud, nepotism, featherbedding, laziness, corruption and stupidity. And what I know is you don't have to go to the public sector to find them. They are evident in malignant abundance in private enterprise as well. For every Department of Motor Vehicles, there is an equally infuriating private phone company. For every bloated public bureaucracy, there is an equally sclerotic corporate structure.

It is not government that is the problem; it is people in groups. And there's not much we can do about that. Bureaucracies seek to perpetuate themselves and to expand their influence. Individuals seek to improve their circumstances. This is as true of the PTA as it is of the FBI. That's why we have competing interests and a system of checks & balances.

The danger comes when one side becomes powerful enough to completely overwhelm the other. At present, in Wisconsin and elsewhere, radical conservative activities who believe that government is the enemy and who have always opposed the power of unions are attempting to use the cover of the financial crisis to dismantle public sector collective bargaining. Fair enough. Never let a good crisis go to waste. But if they succeed in kicking organized labor out of bed, our nation will find itself suddenly and painfully thrown to the floor. ■

This column originally appeared on March 6, 2011 in the Los Angeles Times.

FAMILY AND MEDICAL LEAVE ACT UPDATE

Shannon V. Loverich
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Proposed Broadening of the FMLA. In July 2010, Senator Richard Durbin (D.-Illinois) introduced the "Family and Medical Leave Inclusion Act" to be considered by the U.S. Senate. Nearly identical to a House bill that has been introduced on several occasions, this amendment would broaden FMLA coverage to permit leave to care for a same-sex spouse, domestic partner, parent-in-law, adult child, sibling, or grandparent who has a serious health condition. Passage appears unlikely in the present political climate.

Who Is A Parent Under The FMLA? The U.S. Department of Labor's (DOL's) regulations define the terms "son" and "daughter" to include children for whom an employee stands "in loco parentis" (i.e., in the place of a parent). In June 2010, the DOL issued an opinion letter broadly interpreting this regulation and opining that the definition may allow domestic partners and others without a biological or legal parent-child relationship to take FMLA leave in connection with the birth, adoption, or placement of a new child, or to care for a child with a serious health condition. The opinion letter concluded that either day-to-day care or financial support may establish the requisite relationship where the employee intends to assume the responsibilities of a parent with regard to the child. Examples of FMLA-qualifying relationships include an employee raising a same-sex partner's adopted child, and an employee raising a grandchild, deceased sibling's child, or step-child. The DOL also stated that the only documentation an employer may require to support an employee's "in loco parents" status is a simple statement asserting that the requisite relationship exists.

Employer Can Enforce Their Own Leave Procedures. In *Brown v. Automotive Components Holdings, LLC and Ford Motor Company,* the U.S. Court of Appeals for the Seventh Circuit affirmed the dismissal of a former employee's FMLA lawsuit where the employee was terminated after she failed to give proper notice for an extension of a previously granted leave. Brown had initially requested and was granted leave beginning on August 11, with a return-to-work date of August 29. By August 21, Brown knew that she would need to extend her leave because she had an appointment to see a referral doctor on August 29. But she did not follow company policy in requesting the extension, and was terminated. The court found that the DOL regulations are clear that "notice of an unforeseeable need for leave — including an unforeseeable extension of medical lave — must be given within two working days of 'learning of the need for leave,' ... not [within] tow working days of the expiration of leave." Brown also failed to respond to her employer's standard "five-day quit letter," which was sent after she failed to return to work as scheduled on August 29. The letter stated that she had five days to return to work or provide proper medical certification for her absence or she would be terminated. The court found that the employer's policies did not conflict with the FMLA, and that Brown had been properly terminated for not complying with them.

Request For Leave "To Take Care Of Things" Could Be Adequate. In *Murphy v. FedEx National LTL, Inc.,* the U.S. Court of Appeals for the Eighth Circuit held that an employee might be able to establish a viable FMLA claim where she requested continued leave to "take care of things" following her husband's death. Murphy had been on approved FMLA leave caring for her husband until he died. Although her right to FMLA leave to care for her husband ceased at his death, she then requested continued leave for herself in order to "take care of things." Murphy's supervisor initially told her that this was "not a problem," but human resources subsequently denied the request beyond the allotted bereavement period, and then terminated her for unauthorized absence. Disagreeing with the trial court, the appeals court found that Murphy's request to "take care of things" following her husband's death, along with her supervisor's awareness of her distraught mental state when she made the request, and the significant period of leave she had requested, might have been sufficient to put FedEx on notice that she was requesting FMLA leave for her own serious health condition. The appeals court accordingly sent the case back for a jury trial.

Employer's Request For Medical Certification Must Be Compliant. The FMLA gives employees seeking leave a 15-day period to provide a medical certification regarding their serious health condition. In *Branham v . Gannett Satellite Information,* Gannett terminated Branham for unauthorized absence upon receipt of a medical certification confirming that she was *not* incapacitated. But she then submitted a second certification, received by Gannett within the 15-day period, stating that she, in fact, did have a serious health condition and needed several months of leave. The U.S. Court of Appeals for the Sixth Circuit held that Gannett was not necessarily entitled to rely on the initial "negative certification" because its request for medical certification did not comply with all of the requirements in the DOL's regulations, nor was Braham given the full 15 days to comply before she was terminated. Gannett's request for medical certification had not been made in writing, it did not inform her that she had 15 days to comply, and it did not tell her the consequence of failing to return an adequate certification. The court concluded that Gannett's oral request did not trigger Braham's duty to provide a medical certification. Consequently, Gannett was not entitled to deny leave and Braham was permitted to proceed to trial on whether she had been entitled to FMLA leave instead of being terminated.

Eligibility Requirement Of 1,250 Hours Not Tolled By FMLA Leave. The employee in *Bailey v. Pregis Innovative Packaging, Inc.*, had not worked the requisite 1,250 hours in the 12-month period preceding her request for leave, but claimed that she should nevertheless be deemed eligible. Her theory was that she should be allowed to "toll" the 12-month period for time she had been on approved FMLA leave (56 days) because, otherwise, she would effectively be penalized for taking FMLA leave. The U.S. Court of Appeals for the Seventh Circuit rejected her novel argument, finding "no hint in the statute or elsewhere that Congress envisaged and approved such a circumvention of the requirement that an applicant for FMLA have worked 1,250 hours in the preceding 12 months." The court also rejected Bailey's retaliation claim that she was improperly fired for absenteeism after receiving more than eight "points" for absenteeism during a 12-month period (the termination threshold under the employer's no-fault attendance policy). An absenteeism point under policy was removed after 12 months, but time spent on leave (including FMLA) did not count toward the 12 months. The court found that wiping a point off the absenteeism slate was an employment benefit, and that Bailey could not, while on leave, accrue a benefit that accrues only by actually working (i.e., absenteeism forgiveness).

FMLA Is No Refuge For Performance Deficiencies. In *Schaaf v. Smith-Kline Beecham Corp.*, the U.S. Court of Appeals for the Eleventh Circuit reaffirmed the principle that the FMLA's right to reinstatement after leave is not absolute and that an employer may deny reinstatement if it would have taken adverse action against the employee regardless of FMLA leave. Schaaf was a vice present who seemingly met her performance objectives and improved her region's performance and sales figures. However, despite her sales accomplishments, the company received complaints that she had an antagonistic and inflexible management style, poor communication skills, and a harsh demeanor with subordinates. When directed to complete a performance improvement plan to address her deficiencies, Schaaf announced that she would be taking FMLA-protected maternity leave. The deadlines in the improvement plan were extended until she returned from leave, but while she was on leave, several other deficiencies surfaced and her subordinates reported improved productivity, morale, and communication in her absence. Upon her return from FMLA leave, she was given a choice — either accept a demotion or leave the company. She accepted the demotion, but then sued, claiming it was related to her FMLA leave. The court disagreed, concluding that she had been demoted strictly because of her ineffective management style, and she had offered no evidence to the contrary. ■

CLASS-WIDE ARBITRATION: A FRONT-BURNER ISSUE

Noel D. Massie
Kienbaum Opperwall Hardy and Pelton, P.L.C.

On the subject of arbitrating class claims, the year 2010 has witnessed major developments in two different seats of power in Washington, D.C.: the U.S. Supreme Court and the National Labor Relations Board (NLRB).

U.S. Supreme Court Decisions. In a case decided last spring, *Stolt-Neilsen S.A. v AnimalFeeds International Corp.*, The Supreme Court applied the Federal Arbitration Act (FAA) in a way that was welcomed by the business community. In an antitrust action that pitted a charterer of cargo space against a global shipping conglomerate, the Court held that the FAA does not permit arbitration of a class-wide claim *unless both parties have expressly consented to it* in the arbitration agreement. Hence, agreements that are silent on this issue (as many are) do not permit arbitration of class claims.

As a rule, businesses want to avoid arbitration of class-wide claims because (1) they expect courts to be more cautious than arbitrators about certifying plaintiff classes; (2) appellate review of a court's class certification decision will likely be more exacting than for an arbitrator's decision; (3) a business entity's overall exposure is greatly reduced if it can be liable only to the individual employees (or customers) who request arbitration; and (4) many small claims will not be deemed worthy of pursuit by attorneys unless they have class-wide potential.

The *Stolt-Neilsen* decision prevents employees who have signed pre-dispute arbitration arguments that exclude arbitration of class claims (or are silent on the subject) from asserting class claims against their employers in arbitration, or from accessing the courts to bring such claims.

Meanwhile, the Supreme Court will soon decide another arbitration case that, although also arising in a commercial context, may have far-reaching consequences for employers and employees. A number of States have recently attempted to preserve the potential for class-wide arbitration by enacting statutes that declare class arbitration waivers in certain form contracts to be *per se* unconscionable. In *AT&T Mobility LLC v. Concepcion,* the company is arguing that the FAA preempts such state law restrictions on waivers of class arbitration. If the Supreme Court agrees, that result will fulfill the forecasts of employees and consumer advocates that access to either arbitration or the courts for class action claims will be essentially eliminated — as one business after another adopts arbitration agreements that, through silence or expression, withhold consent to arbitrate class-wide claims.

NLRB General Counsel's Memorandum. In June 2010, the General Counsel of the NLRB issued a memorandum that gave his perspective, as well as guidance to his subordinates, on the enforceability of employee waivers of the right to bring class actions through signing an employer's mandatory arbitration policy.

The memorandum attempts to walk a fine line. It emphasizes, on the one hand, that Section 7 of the National Labor Relations Act (NLRA) guarantees employees the right to engage in *concerted* activities for the purposes of mutual aid and protection, including attempts to improve their working conditions (even in non-union workplaces) by bringing claims in administrative and judicial forums. On the other hand, it acknowledges that the U.S. Supreme Court established in *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20* (1991) and its progeny that an employee can be required, as a condition of employment, to submit his individual employment claims for resolution through arbitration.

In the General Counsel's view, when two or more employees act together to bring a collective or class action lawsuit regarding employment issues, that is protected concerted activity under Section 7. Yet, under *Gilmer,* an employee may be required to waive the filing of class or collective claims both in court and within the arbitration procedure. That waiver, says the General Counsel, will be enforceable if the employee is acting alone and not in concert with others. But if two or more employees join to file a class or collective action to protect statutory employment rights (apparently of any nature), then, in his view, the NLRA protects such activity and the employee cannot be disciplined or discharged on account of it. The employer may, however, seek dismissal of the class claims by presenting to the tribunal the individual waivers of each of the would-be class representatives.

The General Counsel also takes the position that a mandatory arbitration agreement that could reasonably be read by an employee as prohibiting him or her from joining with other employees to file a class action lawsuit is unlawful. He recommends that employers modify their mandatory arbitration agreements to: (1) assure employees that the agreement does not constitute a waiver of their Section 7 rights; (2) inform employees that the employer recognizes their right concertedly to challenge the validity of the form waiver agreement; and (3) advise employees that no one will be disciplined, discharged, or otherwise retaliated against for exercising their Section 7 rights. More than reassuring employees, this is a telegraphed invitation to employees to characterize their grievances or other claims as shared by a class of fellow employees and to identify at least one co-claimant.

The General Counsel has directed Regional Offices to aggressively review mandatory arbitration policies that come to their attention to ensure that they comply with this view of what is lawful under the NLRA. It will be some time, perhaps years, before this view receives court scrutiny.

Michigan Court Extends Arbitration Clause. A September 21 decision of the Michigan Court of Appeals, *Cullen v. Klein et al.*, held under Michigan law that an arbitration clause in an employment agreement between a shareholder and a closely held corporation, signed by him and four of his fellow shareholders, required arbitration of one shareholder's claims against the others — even though the agreement was between each individual shareholder and the corporation that employed them.

The employment agreement they all signed provided that any dispute or controversy "arising out of or relating to" the agreement or its interpretation would be resolved by arbitration.

After the other four shareholders voted to deny Cullen a disability-related accommodation, the parties' collegial relations deteriorated and Cullen's employment was eventually terminated. He sued them in court rather than pursuing arbitration. The trial court judge refused to compel arbitration on the ground that the co-employees had not agreed to arbitrate disputes *among themselves,* but had only agreed to arbitration *with the employing corporation.*

The Court of Appeals disagreed, finding that five of Cullen's six legal theories were arbitrable under the broad language of the arbitration clause. The appeals court had in a previous case held that similarly worded arbitration clauses can even bind non-parties, and here Cullen's claims were "intimately intertwined" with the employment agreement and his relationship to his co-employees and their behaviors as officers and directors of the corporation. However, Cullen's disability discrimination claim was not ordered to arbitration because the appeals court concluded that the arbitration clause did not clearly enough waive the right to judicial determination of a discrimination claim — a conclusion that may not be consistent with its precedents addressing that question. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

I've been saying for years that the field of dispute resolution needs to become more scientific if it is going to be taken seriously either as an academic discipline or a profession. Part of becoming more scientific (the easy part) is keeping up with what scientists are doing and looking for ways to import their discoveries into our practice. An intriguing example is the emerging area of embodied cognition.

This is the idea that thinking and deciding are processes that involve not just our brains but our whole bodies. The most famous experiment in the field had subjects interview job candidates. The candidates, the questions, and the answers were always the same. What varied between the experimental condition and the control condition was the temperature of a cup of coffee the subject was asked to hold just before the interview. When subjects held a hot cup of coffee, they tended to report that the interviewee was, well, warm. And if they held a cup of iced coffee, they tended to say that the interviewee was cold.

There has been a flurry of related experiments with similar results. Putting subjects up a few steps rather than down a few steps tended to make them nicer. Subjects asked to hold heavy objects tended to think that whatever they were talking about was more serious. Negotiators sitting on hard chairs tended to be tougher than negotiators on soft ones. Subjects placed in citrus-scented rooms were nearly four times more likely to donate money to charity than subjects in unscented rooms. And when experimenters got subjects to move their heads up and down while they listened to a sales pitch, they liked the product more and were more likely to buy it.

We think with our bodies. If you hold a pencil in your lips so you can't smile, you won't think cartoons are very funny. But if you hold a pencil in your teeth so you have to smile, you will.

These and related experients have been repeated many times and the results published in reputable journals. The underlying theory has been widely accepted: our species evolved to make decisions based on physical cues long before we had language and logic, and the propensity to do so has stayed with us.

So let's suppose the theory is correct, at least broadly speaking, and the decisions of parties at the negotiation table can be manipulated using techniques developed from their results. Now what? Is this stuff *kosher?*

So far, I think the answer is yes. Let's say you have a choice between A, B and C. Let's suppose that I'm presenting the alternatives, and I want you to choose B. In what order should I present the choices? Note that the alternatives *have* to be presented in *some* order or another. If there is scientific support for the superiority of one presentation over another—and there is—what justification could a lawyer provide for failing to present the alternatives in that order?

Similarly, a negotiation has to take place someplace. Why not hold it in a well-lighted, upstairs conference room rather than a dimly-lighted, basement one? Why not seat the participants on soft chairs rather than hard ones, and serve warm beverages rather than cold ones?

Put the questions in terms of everyone's favorite topic. Let's say my goal is a successful romantic encounter. Suppose we arrange the influence techniques I might apply toward this goal along a continuum. At one end is taking a shower and brushing my teeth. At the other end is laying in a stash of GHB, the date rape drug. Somewhere in between is holding my stomach in and pretending to have read Jane Austin. Where would techniques derived from embodied cognition fall on this scale?

In terms of the culture of legal negotiation, there is nothing wrong with puffery. It's only when it shades into fraud that we have a problem. So far, experiments with embodied cognition have generated only what we might call psychological puffery, and techniques based on it therefore fall somewhere in the permissible range on our continuum. They are effective, but only incrementally and statistically. That is they slightly increase the likelihood of a modest effect. At this point, then, it is probably sufficient that lawyers are aware that these ideas exist — both for offensive and defensive purposes.

But things are going to get much more interesting as the scientists doing the brain imaging, neurochemistry and neuropsychology of persuasion get better at it. There is every reason to believe they will, and sooner rather than later. It's an area we need to watch, and something we ought to be thinking about. ■

MERC NEWS

Sidney McBride,
MERC Administrative Law Specialist/ Elections Officer

On your next visit to the webpage of the Michigan Employment Relations Commission at *www.michigan. gov/merc*, take a glance at several updated features that seek to enhance the site's user friendliness for agency constituents, labor representatives, attorneys, and the general public. As a result of feedback received from various sources, we have made the following enhancements.

ACCESS LINKS

Several access links have been renamed to clarify what they lead to beyond the click of the mouse. For instance, the "Publications" link has been renamed "MERC Guide and Rules." Additionally, versions of PERA, LMA, Act 312 and the Commission's General Rules now appear in multiple locations on the website.

FORMS

The agency is also undertaking a comprehensive review of all existing forms to improve consistency and clarity in the information needed to process a case, as well as to eliminate unnecessary or redundant fields. Two frequently used forms, the ULP Charge and the Petition for Representation Proceedings have been revised and were released for use in late January 2011. Both revised forms are available on the website under the "Forms" link. These forms can also be completed while online, then printed and signed.

Overall, the latest revisions to the ULP charge form and the representation petition are minimal, but add clarity to specific areas of information requested on the forms. For instance, the charge form now eliminates the need to denote which section(s) of the Act were violated by the alleged misconduct. Also, the "brief and concise statement" of the alleged violation is to be attached on a separate sheet and need not be squeezed into the very restricted space on the form. The revised charge form also clearly indicates the requirement for the charging party to serve the opposing party (respondent) with a copy of the charge and provide a statement of service to MERC at the time the charge is filed.

The updated representation petition expounds on the need to adequately explain the basis for a unit clarification (UC) request. It also requires the petitioner to list any pending MERC cases involving the same parties to alleviate the chance of conflicting rulings or actions.

Anticipating the possibility of changes to the composition of many state agencies, the exact timeline for complete form revision is unclear. However, always visit the "Forms" link on the MERC website to obtain the most current version of any agency related form.

MERC GUIDE

This agency's summary booklet, the "Guide to Public Sector Labor Relations Law in Michigan", provides a helpful synopsis of services and procedures provided by MERC. The 2011 revision replaces the prior version, published in 2007, and contains various clarifications and minor edits. Too numerous to list here, the revisions and updates to the MERC Guide include new and re-emphasized information such as (1) recent changes to PERA that impact the bidding process when school districts decide to outsource non-instructional support services; (2) MERC distinctions between executive, confidential and supervisory employee definitions, and (3) a clarification that a mediator lacks authority to render a binding decision during the grievance mediation process. The 2011 MERC Guide is available at no charge on the agency's website.

ON THE HORIZON

Plans are underway for other special events that will further expand service delivery to MERC arbitrators/fact finders and constituents. For instance, this year's training for Act 312 Arbitrators and Fact Finders is planned for October 2011, and will include an added instructional track for agency constituents covering public sector services, such as ULP charges, election processes (R and UC) and grievance arbitration issues. Regularly check the MERC website under the "What's Happening" link for upcoming announcements that will soon include an interactive survey form to better gauge topics of general interest.

Again, the MERC website is located at *www.michigan.gov/merc*. We hope that it provides you with helpful information. ■

MORE MICHIGAN SUPREME COURT UPDATE

Richard A. Hooker
Varnum LLP

Billings v Michigan Ability Partners, No. 141978 (Order – 3/23/11), rev'g, Ct of Apps No. 291889 (Slip Op, 7/29/10 – unpublished).

This was a case brought under Michigan's Persons With Disabilities Act, in which Plaintiff alleged her discharge from employment with Defendant had been unlawfully discriminatory based upon her vision impairment and that Defendant had failed or refused her reasonable accommodation with respect to that impairment. The Washtenaw Circuit Court granted Defendant summary disposition, but the Court of Appeals reversed and remanded the case for trial on the discriminatory discharge claim. After finding Plaintiff had made out the required prima facie showing, it opined:

> Once defendant presented non-discriminatory reasons for plaintiff's termination, the burden shifted to plaintiff to demonstrate that the stated reasons were pretext and that the motivation for termination was discriminatory in nature. The trial court concluded that defendant successfully demonstrated that plaintiff failed to present evidence of discriminatory animus. We disagree.
>
> Plaintiff attempted to create an inference of discrimination by asserting that similarly situated, non-disabled employees were treated differently than her. It is well established that such evidence can create an inference of discriminatory animus. *** As discussed above, *there is evidence that Hornfield told plaintiff and her co-workers that plaintiff was being terminated because her position would require driving in the future. Plaintiff was unable to drive due to her disability. Shaedig, plaintiff's replacement, had no such disability. The record further demonstrates that Shaedig was not required to drive after she replaced plaintiff. We conclude that the evidence could create an inference that plaintiff's termination was motivated by discriminatory animus.* Defendant falsely told plaintiff and her co-workers that plaintiff was essentially no longer capable of completing her job duties due to her disability. Then, *defendant replaced plaintiff with a similarly situated, non-disabled employee*. *When viewing the evidence in the light most favorable to plaintiff, we must accept that plaintiff was adequately performing her duties. Consequently, it could be inferred that defendant utilized plaintiff's disability as an excuse to terminate her and replace her with another individual who was no more effective in the position.* If a fact-finder reached such a conclusion, it would also be permitted to conclude that defendant's decision was motivated by discriminatory animus. Consequently, summary disposition was improper.

Slip Op at 6-7 (emphasis added).

The Supreme Court reversed summarily in lieu of granting leave to appeal. It found that even assuming plaintiff had a protected disability:

> …[S]he nevertheless failed to establish the existence of a genuine issue of material fact that the reason given to the plaintiff for her termination was a pretext for terminating her due to her disability, or that the defendant's decision was in any manner motivated by discriminatory animus.

Aside from possibly revealing the political shift in the Court's majority, this terse reversal could signal the Court's refusal to accept the lower court's reliance on the mere "possibility of inference" to which the Court of Appeals alluded, and that something more substantial than Plaintiff's bald factual assertions coupled with the fact of plaintiff's replacement by a non-disabled individual is required to demonstrate pretext. ■

THOMAS J. BARNES, DISTINGUISHED SERVICE AWARD RECIPIENT

David E. Khorey
Varnum LLP*

Tonight, it is my distinct honor and privilege to introduce this year's recipient of the Distinguished Service Award, my partner and our friend, Tom Barnes.

Tom's distinguished service to the Labor Section and its members is well known and recognized by many of us. It has been my distinct honor and privilege to witness it first hand, and repeatedly, as his partner at Varnum for over 20 years, and before that, as an associate in the distinguished labor group he then chaired. Back then, all of us in the group were in awe of, and indebted to, his energy and enthusiasm. He seemed to know so many people throughout the state, and was so willing to open doors to and for them, and to build bridges through relationships, at all times treating everyone, new lawyers, older lawyers, opposing counsel, some of the biggest names in the business, and some who were not, like nothing less than his professional colleagues and peers, with respect, and with a sincere interest in them and their practices.

Years later, I would come to understand all this as a product of Tom's service in and for the Labor and Employment Law Section of the State Bar. In serving the lawyers who make up the Section, by helping them grow as lawyers, through making a personal connection with so many of them and their practices, Tom saw his own practice grow and thrive in a professionally and personally rewarding way. I don't think it is too much to say that Tom is a model member of the Section, because it is hard to imagine the Section without him.

Tom Barnes

The world has changed in the time that I have known Tom, but Tom, in his qualities, has not. Tom is fond of reminding his friends that after over forty years he is still at the same firm, still a member of the same political party, and still married to the same wife. This is all very fitting, as his friends know, because they do not have to be reminded that after all these years he is still the same Tom Barnes: positive, interested, thoughtful, generous with his time and spirit.

Tom has talked to me about what he considers the lost art of reflection. In reflecting on Tom's being a mainstay of the Section for nearly forty years, it occurs to me that he is in a way a personal cross-section of the Section. He is a management labor lawyer, and a Democrat. A native and life-long resident of Grand Rapids, where he grew up close enough to the railroad tracks to hear the trains driven by his first generation Polish immigrant father, Tom was and is just as much at home in Lansing, in the shadows of his beloved MSU, where he graduated with two bachelors degrees, one in political science and the other in accounting, or in Detroit, where he taught in the public schools for a year before going on to Wayne State Law School, where he served as editor-in-chief of the Law Review.

Once he even carried a Teamsters card; today he makes his home in Lowell, on 40 acres that he shares with his wife Lynn and a stable full of horses. Tom actually began his career as a consultant and negotiator for the nurses union, and it was in that capacity that he would meet, on the other side of the table, the Varnum partner who would hire him, Carl VerBeek, another Distinguished Service Award recipient. Tom is comfortable in these paneled halls of the DAC, but when I first accompanied him many years ago to the NLRB office here in Detroit for an intense meeting with the late Bernie Gottfried, Tom made sure that afterward we stopped for lunch, for a burger, in what he considered to be the equally hallowed halls of the Lindel AC.

Somehow, no place is foreign to Tom, and no people are strangers. Tom Barnes likes people. He is proof that the truth is nice guys don't finish last; they actually do pretty well. He has a way, if you've noticed, of introducing you to people you don't know by saying to the person you are being introduced to , "You know Dave Khorey," or "You know my partner," or when all else fails, "you know my friend." And of course they don't, but in Tom's world they should, and so many of us in this room know each other through Tom.

Indeed, what would the Labor and Employment Law Section be without Tom Barnes? He has served as chair of the Section, on so many committees over the years, as a regular contributor to its continuing education programs and publications, and as a tireless advocate for the cause of being an all around good fellow.

Tom now, as many of you know, leaves the field of active advocacy, but in the finest tradition of the Section, you don't retire, you just become a "neutral." How is it that after all these years as an advocate in the often heated disputes Section members find themselves in, you can even aspire to credibly represent to those same lawyers you fought with tooth and nail, or shoulder to shoulder, that you are a "neutral?"

It says something special, something distinguished, about a person who is able to do that. But I think it also says something special about this Section, that it has been led by and continues to produce such people, people like Tom who served this Section so well. Who helped build it, and continue to contribute to it, and embody its finest ideals: advocates but also counselors, officers of a legal system of which we can be proud, and not cynical.

Tom Barnes is not a cynical man. He believes in the system he advocated in, and now will arbitrate in, because fundamentally he believes in and has faith in those people he likes so much—the people of this Section he served so well, advocates and neutrals. We are grateful for that service and honor it tonight. Please join me in thanking and congratulating this year's Distinguished Service Award recipient, Tom Barnes. ■

**These remarks were delivered at the January 21, 2011 LEL Section dinner.*

Labor and Employment Law Section
State Bar of Michigan
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INSIDE *LAWNOTES*

- Larry Jensen writes about the "cat's paw" liability theory, and John Holmquist addresses the NLRB and the future of premises access.
- Professors Stacy Hickox and Mark Roehling report on their research addressing hiring ex-offenders.
- The Kienbaum Opperwall law firm edifies: Eric Pelton on the WARN Act, Ted Opperwall on the NLRB, Noel Massie on arbitrating class claims, Jay Boger on the ADA, and Shannon Loverich on the FMLA.
- Barry Goldman writes about government workers and about ADR, neuropsychology, and neurochemistry, and Stuart Israel writes about expert witnesses and about the litigation business.
- Dave Khorey profiles LEL Section Distinguished Service Award recipient Tom Barnes.
- 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 Jay C. Boger, Regan K. Dahle, Stephen M. Glasser, Barry Goldman, Stacy A. Hickox, C. John Holmquist, Jr., Erin M. Hopper, Richard A. Hooker, Stuart M. Israel, Larry R. Jensen, Maurice Kelman, David E. Khorey, Shannon V. Loverich, Noel D. Massie, Sidney McBride, Theodore R. Opperwall, Eric J. Pelton, and Mark Roehling.