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THE DUTY TO BARGAIN REGARDING DISCIPLINE: NO LESS UNIQUE UPON RE-EXAMINATION BY NLRB

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In the Winter 2010 *Lawnotes*, my article "The Unique Nature of the Obligation to Bargain Regarding the Discharge/Discipline of Employees" examined the Board's decision in *Alan Ritchey, Inc.,* 354 NLRB 628 (2009). Upon reissuance of that decision, the Board has reversed itself and found that whenever an employer exercises discretion in the decision to implement significant disciplinary action (such as suspension or discharge), it must first bargain with a newly certified union. Yet, an employer need not bargain about all disciplinary actions (such as reprimands and warnings) before implementation and it need not bargain to impasse or agreement before implementing any disciplinary decision, which still makes this bargaining obligation rather unique.

The uniqueness of this bargaining obligation has potential pitfalls for an employer since the extent of an employer's obligation to bargain pre-imposition of disciplinary action is not clearly defined. As the Board itself stated, the issue is one that has never been adequately addressed before. Consequently, only as case law develops will the lines become clearer.

Fallout from *New Process Steel*

That the Board chose *Alan Ritchey, Inc.,* 359 NLRB No. 40 (Dec. 14, 2012) to redefine bargaining obligations for discretionary disciplinary actions is itself unique. The original decision in 2009 was decided by a two-member Board, at that time consisting of Chairman Wilma Liebman and Member Peter Schaumber. One being a Democrat and the other a Republican, they were to a large degree at opposite ends of the spectrum in their views regarding the interpretation of the National Labor Relations Act. Under the circumstances, this two-member Board being able to reach a consensus on how this obligation to bargain should be defined was a considerable accomplishment and no doubt reflected compromise on the part of both.

However, the Supreme Court's rather unexpected decision in *New Process Steel, L.P. v. NLRB,* 130 S.Ct. 2635 (2010), finding that the numerous two-member Board decisions that had issued were invalid, put the original *Alan Ritchey* decision back into play. Not surprisingly, when the Board regained a least a three-member quorum, it reaffirmed with only minor changes, if any, basically all of the original, moderately-oriented, two-member decisions that the Supreme Court had vacated. Not so with *Alan Ritchey*, which appears to be the rare exception. The Board has embarked on a completely different course on an issue it resolved in its initial decision.

How the Bargaining Obligation Regarding Discipline Is Similar

As discussed in my prior article, the original *Alan Ritchey* decision distinguished the bargaining obligation regarding the issue of discipline from other terms and conditions of employment where an employer exercises some degree of discretion. For instance, without debate an employer is obligated to bargain with a union over merit increases which were "in no sense automatic, but were informed by a large measure of discretion." *NLRB v. Katz,* 369 U.S. 736, 743 (1962). Likewise, after certification of a union as the bargaining representative, an employer is no longer free to unilaterally reduce the hours of unit employees even if the employer had exercised its discretion to do so in the past. *Eugene Iovine, Inc.,* 328 NLRB 294, 294-295, 297 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001). And when it comes to laying off employees, even if the employer has a past practice of using discretion in its selection of employees for economic layoffs, it must first bargain with a newly certified/recognized union before unilaterally exercising that discretion. *Adair Standish Corp.*, 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854 (6th Cir. 1990).

Yet, in the original *Alan Ritchey* decision, the two-member Board found that although the employer exercised discretion in handing out discipline, it didn't exercise enough discretion to impose a bargaining obligation. In the Board's view, the employer's discretion operated within the parameters of a five-step progressive disciplinary procedure. Generally, suspensions were preceded by warnings; and discharges were preceded by suspensions. In the Board's view, notwithstanding evidence of some flexibility or leniency, the framework of the progressive disciplinary system circumscribed the employer's exercise of discretion when it disciplined employees. However, in rejecting the General Counsel's argument and the ALJ's finding that the employer had effectively unlimited discretion, the Board did not—and believed it need not—decide precisely how much discretion is required before a duty to bargain attaches.

The recent *Alan Ritchey* decision has answered the question of how much discretion is enough to impose a bargaining obligation. Bottom line; it doesn't take much. Using the same factual record, a three-member Board found that even within an established disciplinary procedure, if an employer's discipline is not fixed regarding the type of offenses that are subject to discipline and the level of discipline to be ascribed to particular offenses, the exercise of discretion in imposing discipline in an individual employee's case will be subject to a bargaining obligation with a newly certified union until such time as the parties negotiate a collective bargaining agreement setting forth an agreed upon disciplinary procedure.

To put it another way, an employer must define what type of employee misconduct is subject to discipline and the level of discipline to be imposed for each offense (be it a progressive disci-

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STATEMENT OF EDITORIAL POLICY

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

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

THE DUTY TO BARGAIN REGARDING DISCIPLINE: NO LESS UNIQUE UPON RE-EXAMINATION BY NLRB

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plinary system or not) to avoid a bargaining obligation with the union. The employer has no duty to bargain over those aspects of its disciplinary decision that are consistent with past practice or policy. Only the lack of the exercise of employer discretion will put discipline on the same footing as merit increases and layoffs that are automatic or predetermined by objective criteria and thereby exempt from a bargaining obligation.

In another departure from prior Board cases addressing the issue of discipline, which were overruled, a union will no longer be required to specifically request pre-implementation bargaining regarding disciplinary action before a bargaining obligation will attach, again aligning this issue with the handling of other discretionary employer actions such as merit increases and layoffs. Instead, an employer must provide reasonable notice of a discretionary disciplinary decision to the union before implementing it and allow the union an opportunity to bargain.

Like the obligation to bargain regarding other terms and conditions of employment, exigent circumstances can excuse an employer from the obligation to bargain prior to implementing significant disciplinary action. However, these circumstances are narrowly defined and involve situations where an employer has a reasonable, good faith belief that an employee's continued presence on the job presents a serious, immediate danger to the employer's business or personnel. An employer would be allowed to quickly remove an employee from the workplace, limit the employee's access to co-workers or equipment, or take other necessary actions where the employer reasonably and in good faith believes that an employee has engaged in unlawful conduct, poses a significant risk of imposing legal liability upon the employer for his conduct, or threatens safety, health, or security in or outside the workplace.

The Board appears to have eliminated another potential distinction between the bargaining obligation regarding discretionary discipline and others decisions affecting terms and conditions of employment, like layoffs. As discussed in the prior article, there had been some suggestion that even if an employer unlawfully

SNAFU

Unfortunately, there was a SNAFU with the Winter 2013 *Lawnotes.* The printer dropped lines at the end of several columns in articles by David Arm, Erin Hopper, and Christina McDonald. The corrected articles are available at the LEL Section page on michbar.org. *Lawnotes* apologizes and, as well, subjected the printer to shock treatment.

"Our Printer."

failed to bargain before implementing discretionary discipline, only a cease-and-desist order was appropriate, without reinstatement or backpay. Without specifically addressing the issue, the Board indicated in the revisited *Alan Ritchey* decision that because of the potentially significant financial liability involved it would not apply its holding retroactively. But after the date of the Board's decision, any employer which fails to bargain about significant discretionary disciplinary action before imposing it would no doubt be subject to a backpay award and presumably a reinstatement order as appropriate.

How the Bargaining Obligation Remains Unique

Despite finding no reason to any longer distinguish the obligation to bargain about the discretionary imposition of discipline from other types of discretionary employment decisions, there remain unique differences. The most notable is that the Board will distinguish between types of the discipline in imposing a bargaining obligation. Any significant discipline which results in the suspension, demotion, discharge or analogous sanction of an employee is subject to bargaining with a union before implementation. However, oral or written warnings which do not themselves automatically lead to an immediate suspension, demotion, discharge, etc., are not subject to bargaining before implementation, but they nonetheless remain subject to bargain after implementation.

More unique though is the nature of the bargaining obligation imposed before implementation of significant disciplinary actions. According to the Board, based on the unique nature of discipline and the practical needs of employers, the bargaining obligation is more limited than that applicable to other terms and conditions of employment. An employer need not bargain to impasse or agreement regarding its exercise of discretion within an established disciplinary system. Instead, prior to implementation of discipline the employer need only provide the union with advance notice to allow for "meaningful discussion" concerning the grounds for imposing discipline in a particular case, as well as the grounds for the form of discipline chosen, to the extent that this choice involved an exercise of discretion.

Within this framework, it is anticipated that the union, in representing unit employees, would be afforded the opportunity to present exculpatory or mitigating information to an employer, to point out disparate treatment, or to suggest alternative courses of action. The Board recognized that requiring bargaining prior to implementation may, in some cases, delay discipline or change an employer's decision that it may have reached unilaterally. However, the Board did not believe that an obligation to bargain about discipline would unduly burden an employer. Instead, in the Board's view, any burden on the employer was outweighed by the benefits of bargaining that would likely lead to a more accurate understanding of the facts, a more even-handed and uniform application of rules of conduct, often a better and fairer result, and a result an employee was more likely to accept.

While meaningful discussion is clearly a lesser obligation than bargaining to impasse or agreement, there is little case law to guide an employer as to how much discussion is necessary to be meaningful. Furthermore, the obligation to provide information to the union, upon request, regarding the discretionary aspects of it disciplinary decision remains during these discussions. However, it is clear that if impasse or agreement is not reached during this pre-implementation discussion, the obligation to bargain will continue after implementation, at which time impasse or agreement will be a prerequisite to satisfying the bargaining obligation.

Investigative Interviews

Rather interestingly, in finding that the Supreme Court's decision in *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251 (1975), did not preclude a pre-implementation duty to bargain regarding discretionary discipline, the Board in *Alan Ritchey* did address the relationship of that duty to an employee's right to union representation during an investigatory interview which may reasonably lead to discipline. Despite the employee's Section 7 right to representation upon request, there ordinarily is no correlative obligation by the employer to bargain with a union during the investigative interview itself. But that remains the case only so long as the meeting remains investigative. Once the employer, based upon information from the investigative interview, decides to impose discipline, it will have the obligation to bargain with the union at that point regarding any exercise of discretion. If that decision is made at the investigatory interview, there will be an obligation to bargain with the union during the meeting.

Will the Other Shoe Drop?

That the Board still is treating discretionary discipline as a hybrid term and condition of employment by imposing unique bargaining obligations should cause employers concern. Although the Board asserted legitimate justifications for this special treatment, ultimately there would seem to be no valid reason to treat discretionary discipline differently than any other mandatory subject of bargaining. Inevitably, it would seem that either the Board or the reviewing courts would have to accord unions the same bargaining rights regarding discretionary discipline as it does for every other term and condition of employment. That would also seem to apply to discretionary discipline like oral and written warnings if indeed, as the Board finds, those actions have a sufficient impact upon an employee's terms and conditions of employment to require at least post-implementation bargaining.

One might suspect that the Board is attempting to soften the blow regarding a subject that employers have always clung to dearly as being within their exclusive provenance. Discipline is one of the most common employment actions carried out by an employer. Requiring an employer, and for that matter a union, to bargain about such matters, even to a limited degree, can result in a significant investment of time and effort. The Board's measured approach in *Alan Ritchey* may seem a palatable way to acclimate employers to the concept of bargaining about the exercise of discretion in imposing discipline. However, the conclusion that discretionary discipline is a mandatory subject of bargaining seems to be an obvious one. The Board's timid approach to the subject in the past, and arguably even in the revisited *Alan Ritchey* decision, leaves employers in a precarious position if and when the other shoe drops.

— ENDNOTE —

Being a retired, former employee of the National Labor Relations Board, the views expressed herein are clearly my own and in no way should be construed as those of the Board itself or the Acting General Counsel. ■

REVISITING THE INTERACTIVE PROCESS UNDER THE ADA

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One of the elements of a *prima facie* case of disability discrimination under the Americans with Disabilities Act is that the individual is qualified to perform the job requirements with or without reasonable accommodation.[1] The focus is on whether the individual can perform the essential job functions—those functions which an individual must be able to perform which could not be removed without fundamentally altering the position. The EEOC's regulations provide that an employer may need to initiate an informal, interactive process with the individual to identify precise limitations of the disability and potential reasonable accommodations to overcome them.[2]

In *Jakubowski v. Christ Hospital, Inc.*,[3], the 6th Circuit reviewed the interactive process in the context of a doctor who had been terminated from a family practice residency program because of an inability to communicate with colleagues and patients. The doctor was diagnosed with Asperger's. In affirming the district court's grant of summary judgment, the court stated that there was no dispute that that in the context of patient treatment, the ability to communicate clearly with colleagues and patients was an essential function of the job at issue. The doctor had proposed that he would be capable of communicating with the staff if they knew of his condition and its symptoms and triggers. He did not address how this accommodation would improve his communications and interactions with patients. He stated that he would work individually on his skills without being specific as to how he would accomplish this feat.

In reviewing the interactive process, the court identified the following requirements:

- The employer initiates the process.
- Both the employer and individual must participate in good faith and not obstruct the process or refuse to participate.
- The individual has the burden of proposing an initial accommodation.
- The employer has the burden of showing how the initial accommodation would cause an undue hardship.
- The employer is not obligated to propose a counter accommodation to participate engage in good faith; proposing a counter accommodation may be additional evidence of good faith.

If an employer offers a reasonable counter accommodation, the individual cannot demand a different accommodation.[4]

The doctor had argued that the hospital had not acted in good faith because it did not offer a remediation program similar to one that had been offered to another resident with similar deficiencies. In rejecting the argument, the court stated that the doctor had not made the request during an accommodation meeting held with the hospital. This contention was only raised during the litigation and not before. The court stated that it agreed that there was no dispute that the hospital participated in the interactive process in good faith.[5]

While concurring in the judgment, Judge Cole disagreed with the majority's analysis of the impact of failing to raise the remediation accommodation in the meeting with the hospital. The majority's focus on the initial accommodation request rather than the more comprehensive accommodations set forth in expert testimony during litigation means that the individual must always "muster a trial-ready accommodation proposal prior, in this case, to termination."[6] Judge Cole also stated that the majority's holding would undermine the interactive process by "incentivizing" employers to withhold potential accommodations in the hope that the individual will be held to the initial and legally inadequate accommodation in any subsequent litigation.

What is the impact on the interactive process if the employer consults with third parties as part of its consideration of whether an individual is qualified or whether an accommodation is reasonable? In *Keith v. Oakland County*,[7] the 6th Circuit addressed the issue when it reversed summary judgment which had been granted to the county. The case arose in the context of the revocation of a job offer made to Nicholas Keith, a deaf individual who had applied for a life guard position. The offer was contingent on a pre-employment physical.

The doctor who examined the Keith told him and his mother who was present that he would fail him because Keith was deaf and if something happened, he was concerned that he would be sued. In his report, however, the doctor gave his approval with the notation that his deafness would have to constantly accommodated. The doctor also indicated in his report that he doubted that accommodation would always be adequate.[8]

The county put the hiring on hold and contacted the consultants who advised it on aquatic safety and risk management and who worked with the county regarding its water parks and life guard training. The county employee involved in the hiring had discussions with two individuals and put together a six page outline containing the accommodations that she believed could successfully integrate the individual and sent it to the consultants for review. The consultant expressed concerns over the accommodations and stated that without 100 % certainty that the proposed accommodations would always be effective, he did not think that the county could safely have Keith on the lifeguard stand by himself. The court noted that the consultant had no experience or education regarding the ability of deaf people to be lifeguards; did not do any research upon learning of the issue; did not meet or observe the individual; and did not speak with the individual.

The county decided to revoke the offer. It did not have further discussions with Keith. Keith applied for the lifeguard position

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the following year and was not hired based on the county's 2007 assessment and the determination that his deafness prevented the applicant from performing the essential functions of the lifeguard position. There is no indication in the record that there were any discussions or written communications between Keith and the county. Keith filed discrimination charges with the EEOC which were dismissed when he filed the lawsuit.

During the litigation, Keith provided testimony through affidavits from individuals whom the court of appeals referred to as experts. One had worked with deaf people in the area of lifeguarding for more than 30 years; was a certified life guard training instructor; and had certified over 1,000 deaf lifeguards. She stated that it was her opinion that the ability to hear is not necessary for the performance of the essential duties of the lifeguard position. Another individual was a deaf lifeguard who stated the ability to hear is unnecessary and that deaf lifeguards do not require accommodation to perform the essential functions of the job. The final expert was a physician who specialized in pediatric neurodevelopmental disabilities who had worked with hearing impaired individuals for over 30 years. In her opinion, Keith met the criteria for the position and his deafness would neither disqualify him nor require constant accommodation.[9]

The court of appeals identified the issues on appeal as whether the county had made an individualized inquiry; whether Keith was otherwise qualified for the position with or without reasonable accommodation; and whether the county engaged in the interactive process. With respect to the issue of individualized assessment, the court stated that the district court had not addressed the issue of whether the consultant had made an individualized assessment of Keith's ability to perform the job, given the lack of any interaction with him and given the lack of any background or training in dealing with deaf lifeguards. The court said it agreed with the district court that county made an individualized assessment which led to a plan to provide accommodations for Keith, but it questioned what had changed and whether the county had altered its assessment based on the doctor's report and the advice of the consultants. The court said it found that it was "incongruent" with the underlying objective of the ADA for an employer to make an individualized inquiry only to defer to opinions and advice from those who had not. It directed the district court consider the issue on remand.[10]

With respect to the issue of "otherwise qualified," the court was persuaded by the experts' testimony which is considered "the most compelling evidence" that Keith was qualified. The court stated that all had given their opinions that he was qualified and that they had the knowledge, experience, and education on which to base their opinions. The court noted that among the information provided was the fact that the world record for saving the most lives (over 900) is held by a deaf lifeguard. In light of this expert evidence, the court stated that reasonable minds could differ regarding whether Keith was otherwise qualified because he could perform the essential communication functions of a lifeguard.[11]

With respect to the issue of whether the county had engaged in the interactive process, the court noted that the district court did not reach the merits of the argument because it had concluded that Keith had failed as a matter of law to propose an accommodation that was objectively reasonable and therefore any failure by the county did not constitute an violation of the ADA. Since the court had found, at least for summary judgment purposes, that Keith had met his burden to show a reasonable accommodation was possible, it directed the district court to address the merits on remand. [12]

The *Keith* decision certainly has an impact where an employer utilizes and relies upon a third party in determining whether and to what extent an individual can be reasonably accommodated. The failure of the third party to do a truly individualized assessment will be attributable to the employer, especially where the analysis is based upon general assumptions. Employers will need to understand the basis of any recommendations and whether the particular disability was considered in reaching any recommendation.

While the concurrence in *Jakubowski* was concerned about an individual being required to "muster" a trial ready proposal to the employer during the informal, interactive process, the court's decision in *Keith* shows the risk in not providing the opportunity for input. What if the county had contacted Keith; advised him the basis for the revocation of the job offer; and interacted with him as he requested? What if Keith referred the county to individuals who had expertise in the ability of deaf persons to be lifeguards? The approach that the county had taken, especially creating the document setting out the accommodations that it believed could successfully integrate Keith, suggests that it would have seriously considered Keith's input and may well have resulted in a different outcome.

The court in *Keith* identified the shortcomings of the consultant's individualized assessment as including the failure to speak with the doctor; never meeting with Keith; and never allowing Keith the opportunity to demonstrate his abilities. The court also stated that by failing to contact Keith for further discussion after revoking the job offer, the county lost an opportunity to gain input from individuals with expertise concerning the abilities of deal individuals which would have dispelled unfounded fears and resulted in a more informed decision. These observations provide the outline of what is expected of an employer.[13] It is interesting to note that there is no indication that Keith presented any arguments or support with his application in 2008.

An employer who provides an opportunity for an individual to respond to a determination regarding a reasonable accommodation would be in a position to rely upon the 6th Circuit's decision in *Jakubowski*. An individual would be held to the options that were proposed during any discussion or meeting and not be able to utilize subsequent expert testimony in litigation to establish an option not previously presented. The employer would also be in a position to consider this input before a final decision. An employer who chooses not to have a follow up meeting may well find itself in the position of the county. What happens during the interactive process has a major impact on subsequent litigation. The "informal, interactive process" may not be so informal after all.

— END NOTES —

1 *Monette v. Electronic Data Services, Inc.,* 90 F. 3d 1173 (6th Cir. 1996).

2 29 C.F.R. § 1630.2 (o) (3) (2010).

3 627 F. 3d 195 (6th Cir. 2010).

4 627 F. 3d at 202-03.

5 627 F. 3d at 203.

6 627 F. 3d at 204.

7 _F.3d_, (6th. Cir. 2013).

8 Slip op. p. 3.

9 Slip op. p. 6.

10 Slip op. p. 10.

11 Slip op. pp. 13-14.

12 Slip op. p. 18.

13 Slip op. p. 17. ■

WISCONSIN FORGES AHEAD OF MICHIGAN IN PARALLEL LEGAL BATTLES OVER CONTENTIOUS STATE LABOR LAWS

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As the legal challenges to right-to-work commence in Michigan, the litigation of similarly controversial labor legislation in neighboring Wisconsin has been ongoing for nearly two years. Recently, the litigation in the Badger State has reached an apex. In September a Wisconsin State Circuit Court decision invalidated the State's new labor law as it applied to municipal employers. In January, the Seventh Circuit Court of Appeals overturned a District Court decision and upheld the State's labor law in the face of federal constitutional challenges. While these decisions have little bearing in Michigan, they offer an interesting look at how a parallel legal battle has developed in an adjoining jurisdiction.

BACKGROUND

In March of 2011 Governor Scott Walker signed into law the Budget Repair Bill otherwise known as Act 10.[1] In June of 2011, that law was partially supplemented by Wisconsin Act 32.[2] Act 10 differs significantly from right-to-work as passed in Michigan. The Act affects only public sector unions. Affected unions are required to hold annual recertification elections with super-majority requirements. Affected unions are restricted to bargaining over base wage increases capped by the consumer price index and are prohibited from bargaining over healthcare or pension contributions.

However, as applied to public sector unions Act 10 has certain similarities with the right-to-work law passed in Michigan. The law places multiple encumbrances on union finances. Act 10 contains a de facto right-to-work provision which prohibits negotiating fair share agreements for public employees. Additionally, the law prohibits payroll dues deductions for public employees.

Act 10 also creates separate classifications of workers to which the law does and does not apply. The restrictions of Act 10 apply to what has been termed the "general" employees of municipal and state employers. However, akin to Michigan's public sector right-to-work law, Act 10 excludes from its restrictions "public safety" employees, a classification consisting loosely of police and firefighters.

RECENT DECISIONS

While there have been many rulings on the validity of Act 10, both the financial encumbrances and classifications of employees created by the law have been subjects of recent or ongoing litigation. These two commonalities with Michigan's right-to-work law have been challenged on First Amendment, freedom of association, and Equal Protection grounds with varied success. That varied success is embodied in two recent decisions.

Madison Teachers, Inc. v. Walker. For the time being, Act 10's application to municipal employers is enjoined. In *Madison Teachers, Inc. v. Walker*[3] plaintiff unions challenged the law's application to municipal employers in Dane County Circuit Court. Plaintiffs challenged the Act on several grounds including free speech, association, and equal protection. In September of 2012 Judge Juan Colas agreed with plaintiffs and ruled the Act unconstitutional as applied to municipal employers.

Judge Colas found that many of the law's restrictions, including the prohibitions on municipal employers to enter into fair share agreements and deduct membership dues, violated constitutional rights of free speech and association. Speaking in part to the restrictions on fair share agreements and dues deductions Judge Colas held that the challenged sections of the law:

> …single out and encumber the rights of those employees who choose union membership and representation solely because of that association and therefore infringe upon the rights of free speech and association guaranteed by both the Wisconsin and United States Constitutions.[4]

In making his finding Judge Colas noted that the defense had offered no justification for what he deemed an excessive infringement of free speech.

Judge Colas also held that the separate classifications of workers within the law violated the Equal Protection Clause. Judge Colas found that a fundamental right was at issue. Adopting a corresponding standard of strict scrutiny, Judge Colas found unequal treatment specifically in the law's exemption of public safety and transit employees from the dues deduction restrictions.

> The statutes prohibit payroll deduction for dues of general employee labor organizations, allow deductions for dues of public safety and transit labor organizations, and do not regulate payroll deduction of dues for any other kind of organization. These classes are similarly situated and unequally treated.[5]

Judge Colas held that the defense offered no sufficient justification for the disparate infringement of a fundamental right.

Wisconsin Education Association Council v. Walker. In *Wisconsin Education Association Council v. Walker*[6] plaintiffs unions challenged the limitations on collective bargaining, the recertification requirements, and the dues deduction prohibition on Equal Protection grounds based on the law's distinction between general and public safety employees. The preceding District Court decision ruled for plaintiffs on the issues of dues deductions and recertification requirements, but upon review a partially divided Seventh Circuit Court of Appeals panel upheld Act 10 in its entirety.

The plaintiffs challenged the division between the general and public safety employees in the law's application as a violation of the Equal Protection Clause. The plaintiffs argued that the classifications were based on political favoritism. In reviewing the claim the Court adopted a rational basis review. The defense argued that the exclusion of public safety employees from the Act was necessary to protect the well being of the State. Specifically, the defense argued that public safety employees were vital to government function and would potentially illegally strike at the prospect of inclusion in Act 10. Plaintiffs argued that the fact that motor vehicle inspectors were classified as public safety employees while the University of Wisconsin Police, capitol police, and correctional officers were classified as general employees exposed the justification as disingenuous. The Court rejected Plaintiff's arguments and held that the State's proffered justification was sufficient to survive rational basis scrutiny.

Plaintiffs also challenged the dues deduction prohibitions on First Amendment grounds. Plaintiffs argued that the prohibition on payroll dues deductions violated the First Amendment because the prohibition was not viewpoint neutral. Plaintiffs contended that the restriction on dues deductions was targeted at general employees and their unions because of their political affiliations. The majority took notice that the five public sector unions who endorsed Governor Walker during his election in 2010 were all later classified as public safety employees and exempted from the restrictions of Act 10.[7] The plaintiffs also pointed to a statement by then State Senate Majority Leader Fitzgerald who made a public statement lauding that Act 10 would curtail union fundraising and impede a Democratic presidential victory in the State of Wisconsin in 2012. The majority acknowledged the statement, but concluded it did not undermine the viewpoint neutrality of the dues deduction prohibition:

> Admittedly, the Unions do offer some evidence of viewpoint discrimination in the words of then-Senate Majority Leader Scott Fitzgerald suggesting Act 10, by limiting unions' fundraising capacity, would make it more difficult for President Obama to carry Wisconsin in the 2012 presidential election. While Senator Fitzgerald's statement may not reflect the highest of intentions, his sentiments do not invalidate an otherwise constitutional, viewpoint neutral law.[8]

The Court concluded that the payroll deduction restriction did not erect a barrier to free speech and that speaker-based view point neutral discrimination was permissible where the state subsidized the speech.

Judge Hamilton issued a fiercely worded dissent on the issue of payroll deductions. Hamilton suggested that the majority's finding that the selective restriction on dues deductions was viewpoint neutral was superficial. Hamilton went on to note the striking correlation between the classification of general and public safety employees to unions which opposed and supported the Governor:

> The net effect is that all public employees represented by unions that endorsed Governor Walker continue to enjoy collective bargaining, and those unions continue to benefit from payroll deductions. On the other hand, nearly all members of the public employee unions that did not endorse Governor Walker are categorized as "general" employees. Their bargaining rights have been reduced to a hollow shell and payroll deductions are not available for their union dues.[9]

Hamilton rejected the State's argument that public safety employees were better situated to illegally strike if included in the Act by questioning how a strike of motor vehicle inspectors, which were classified as public safety employees, posed a greater threat than a strike of the University of Wisconsin or capitol police who classified as general employees. Hamilton found the motives for the two different classifications of employees were not viewpoint neutral and the payroll deduction was therefore unconstitutional.

CONCLUSION

The decision of the Seventh Circuit in *Wisconsin Education Association Council* did not impact Judge Colas' ruling in *Madison Teachers, Inc.*. Judge Colas' decision, however, has been appealed and is currently pending before the Wisconsin Court of Appeals. A separate suit has also been filed seeking to extend Judge Colas' decision to state employees. To the extent that either of these decisions and the ongoing two year legal battle in Wisconsin is any indicator to Michigan, it may only be that legal challenges over such heavily contested laws are rarely resolved expediently.

UPDATE: On March 12, 2013 the Court of Appeals denied a motion to stay the decision of Judge Colas in *Madison Teachers* pending the Court's own ruling. However, the decision inconclusively addressed the issue of whether Judge Colas' decision has a statewide effect on non-parties to the litigation. The Court stated that the decision does not have the same effect as a published appellate decision, but it refused to determine what its effect may be. Developments continue to be ongoing.

— END NOTES —

1 2011 Wisconsin Act 10.

2 2011 Wisconsin Act 32.

3 Case No. 11-CV-3774 (September 14, 2012).

4 Id. at 16.

5 Id. at 18.

6 2013 U.S. App. LEXIS 1309 (7th Cir. 2013).

7 Id. at 4.

8 Id. at 9.

9 Id. at 55. ■

TO THE EDITOR

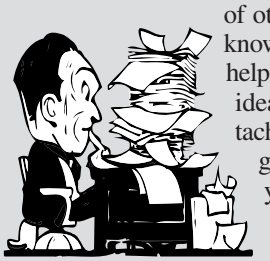
Stuart Israel's reference to the Rule in Shelley's Case (http://en.wikipedia.org/wiki/Rule_in_Shelley's_Case) ("The 2012 Bar Examination: Cruel And Unusual Punishment"), in the Winter 2013 issue of *Lawnotes,* calls to mind Montana Senator Burton K. Wheeler's (http://en.wikipedia.org/wiki/Burton_K._Wheeler) classroom answer when asked to state the Rule In Shelley's Case.

Wheeler is said to have responded, "Sir, the Rule In Shelley's Case is the same as the rule in any other man's case; the law brokers no favorites."

Very truly yours,
Avern Cohn

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.



MICHIGAN SUPREME COURT UPDATE

Richard A. Hooker
Varnum

***Debano-Griffin v Lake County & LC Board of Commissioners,* 493 Mich 167 (2013).**

This was a Michigan Whistleblowers Protection Act (WPA) case that began in 2005 and was reported upon previously in *Lawnotes* when the Supreme Court vacated an earlier Court of Appeals ruling and remanded the case for decision on issues raised but not considered by the Court of Appeals. On remand, the Court of Appeals once again reversed the trial court jury verdict for plaintiff. The court ruled Defendants should have been granted summary disposition because temporal proximity between the protected activity and the adverse employment action, standing alone, was insufficient to create a jury question on the WPA's causal connection requirement, citing *West v Gen Motors Corp,* 469 Mich 177 (2003).

On appeal, the Supreme Court reversed and ordered the verdict for plaintiff reinstated. The Court rejected the Court of Appeals finding there was no evidence of causal connection other than temporal proximity, noting such an abundance of additional evidence adduced by plaintiff it is difficult for any reader to fathom how the court of appeals could have overlooked or failed to consider it. In fact, there was so much evidence of causal connection and pretext, the case more than amply highlights the vital necessity of consulting competent employment counsel *before* implementing adverse employment actions.

However, the Supreme Court's Opinion is even more instructive on three other points, the last two of which dealt with issues raised by the public employer defendants in their original appeal:

- The Court expressly ruled the burden shifting analysis established by the U.S. Supreme Court in *McDonnell Douglas v Green,* 411 US 792 (1973) is to be applied to retaliation cases under the WPA. In other words, once a plaintiff has established a prima facie case by showing 1) protected activity, 2) adverse employment action and 3) causal connection, the burden then shifts to the defendant to "offer" or "articulate" a legitimate, non-retaliatory reason for its action. Thereafter, the plaintiff may yet prevail by demonstrating the defendant's reason is a mere pretext for unlawful retaliation. 493 Mich. at 172.

- The Court also dealt with defendants' contention on appeal that plaintiff could not bring a claim that challenged defendants' "business judgment" that her position elimination had been financially necessary. The Court rejected defendants' argument, finding plaintiff was not attacking the soundness or prudence of defendants' decision, merely arguing it was false or had no basis in fact. The latter argument, she could advance.

- Finally, the Court dealt with defendants' "separation of powers" argument, i.e., that the judicial branch of government could not sit in judgment over what was essentially a legislative action by defendant Board of Commissioners. After re-characterizing defendants' argument as really one of legislative immunity, the Court rejected it without difficulty, noting the WPA's express applicability to both private and public employer entities. MCL 15.361(b).

[Practitioner's Note: perhaps the most significant aspect of the Court's Opinion may prove to be its treatment of the "business judgment" principle. In distinguishing between the soundness of the employer's action on the one hand, and the action's basis in fact on the other, the Court may have for most practical purposes obliterated the business judgment defense, of which both public and private employers have availed themselves. So caution is surely advised before relying solely on the defense in implementing adverse employment actions.]

One to watch:
***Henry, et al v Laborers Local 1191*, No 143631 (2/16/13); lv to app granted from Ct Apps No 302373 (Unpub 7/3/12).**

The Supreme Court has agreed to hear Defendant's appeal from Circuit Court and Court of Appeals decisions holding Plaintiffs' claims of discharge in violation of Michigan's Whistleblower Protection Act against their Union employer are not preempted by either the National Labor Relations Act or the Labor-Management Reporting and Disclosure Act. Plaintiffs had claimed they were fired after they told the state and/or federal Departments of Labor about the alleged misappropriation of union funds when union members were issued checks "far below union wages" for work performed on a building owned by a trade union leadership council.

The Supreme Court has invited the parties and interested amici curiae to brief the following issues:

- whether the two federal statutes do preempt the WPA;
- whether the employees' report of suspected illegal activity, or participation in an investigation of such activity, is of only "peripheral concern" to the federal statutes; and
- whether the state's interest in enforcing the WPA is so deeply rooted that in the absence of compelling congressional direction, courts cannot infer that Congress has deprived the state of the power to act.

Of greatest interest might be the Court's discussion of the particular alleged illegal act by Defendants in the case, which arguably involves little more than violation of contract, Union policy or Union Constitution and By-Laws. It is not difficult to posit a potentially different result here than in a case involving, for example, a much clearer alleged statutory violation. ■

FMLA Update

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

Casual Comments About Parents' Serious Illnesses Insufficient To Trigger FMLA Notice. In *Nicholson v. Pulte Homes Corp.*, 690 F.3d 819 (7th Cir. 2012), the U.S. Court of Appeals for the Seventh Circuit held that an employee's casual comments to supervisors about her parents' ailing health was insufficient to put her employer on notice of her intent to take leave to care for them, and thus doomed her FMLA case. Nicholson was a sales associate who informed her supervisor in December 2008 of her father's leukemia, and indicated that she "might" need leave to care for him in early 2009 should her father need chemotherapy. In April 2009, Nicholson also told her supervisor that she was driving her mother to medical appointments due to her mother's chronic kidney disease. Nicholson was terminated in June 2009 after failing to meet her sales goals, but claimed that her employer really terminated her to avoid giving her time off to care for her parents. The Seventh Circuit disagreed and held that Nicholson never placed her employer on notice for her need for leave. The court found that her casual conversation about her aging parents and comments indicating a possible need for future leave were not sufficient to put her employer on notice that she needed FMLA leave. Nicholson had not definitively stated that she needed time off to care for her parents, and the employer, had significant evidence of Nicholson's performance deficiencies at the time of termination.

Reinstatement Rights Are Not Absolute Where Employer Would Have Taken Action Irrespective of FMLA Leave. In *Winterhalter v Dykhuis Farms, Inc.*, 2012 U.S. App. LEXIS 15305 (6th Cir. 2012), the U.S. Court of Appeals for the Sixth Circuit held that the employer (a farm) did not unlawfully retaliate against an employee when it terminated him on the day that he was scheduled to return from FMLA-protected leave. The employer established that it was going through a period of serious economic hardship and Winterhalter (a manager responsible for supervising operations at four different farms) was the highest-paid and lowest-performing employee at the farm. The farm had evidence that it laid-off thirteen full-time employees and reduced the size of its herds to improve its financial performance. The court reviewed the employer's legitimate business reasons, and found that Winterhalter did not show that the employer's reasons were pretext, and thus affirmed dismissal of Winterhalter's case.

FMLA Interference and Retaliation Claim Denied Where Employer Had Good Faith Belief That Employee Misused FMLA Time. In *Scruggs v. Carrier Corp.*, 688 F.3d 821 (7th Cir. 2012), the U.S. Court of Appeals for the Seventh Circuit held that the employer did not improperly retaliate or interfere with the employee's FMLA reinstatement rights when it terminated him for misusing approved FMLA leave. Scruggs had been granted intermittent leave to care for his mother who was in a nursing home, and he had requested and received a full day's leave to pick his mother up and take her to medical appointments. After surveillance (conducted as a result of a suspicion that Scruggs was misusing his FMLA leave) revealed that Scruggs did not leave his home on the day in question, the employer suspended him pending further investigation. Scruggs ultimately submitted documents from the nursing home and doctor showing he picked his mother up and took her to a doctor's appointment, but the employer believed the documents were suspicious and inconsistent and terminated him for misusing his leave. The court found that the employer had made a reasonably informed and considered decision before terminating Scruggs, and thus did not violate Scruggs' FMLA rights because it honestly believed Scruggs was not using his leave for its intended purpose and terminated him on that basis.

Reassignment to Position Subjectively Less Desirable to Employee Did Not Violate FMLA. In *O'Sullivan v. Siemens Industry, Inc.,* 2012 U.S. Dist. LEXIS 136163 (E.D. Mich. 2012), the U.S. District Court for the Eastern District of Michigan held that a sales representative failed to state a viable FMLA retaliation and interference claim based on her proposed reassignment to a different sales territory upon return from FMLA leave. The FMLA requires that an employee be reinstated to the same or an "equivalent position," upon return from leave, and Department of Labor regulations define equivalent position as one having equivalent "employment benefits, pay, and terms and conditions of employment." The regulations also provide that employee must have "the same or an equivalent opportunity for bonuses, profit-sharing, and other similarly discretionary and non-discretionary payments." O'Sullivan claimed her proposed reassignment to a new sales territory that had less sales potential violated her reinstatement rights, so she quit claiming she had been "constructively discharged" from her job. The trial court disagreed and dismissed her case finding that O'Sullivan never "triggered" the right to be restored to an equivalent position because she there was no evidence that the proposed change in her sales territory created an intolerable working condition because the change in territory did not impact her base salary, benefits, title, and working hours. Further, the coworker previously assigned to the territory did not find it objectively intolerable and was able to outperform O'Sullivan's sales margins at her more lucrative territory. The court also rejected O'Sullivan's retaliation claim holding that that the proposed reassignment was not an adverse action. The court found that although the territory to which she would have been reassigned not "prime," it was capable of allowing her to generate income that was roughly the same as what she earned before leave.

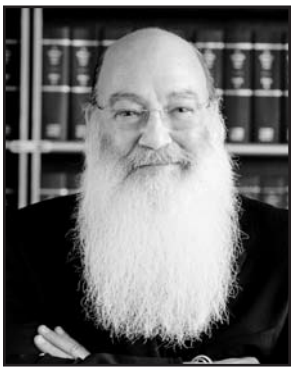
Discharge for "Personal Issues" In Addition to Decreased Work Output Sufficient to Send FMLA Case to Jury. The U.S. District Court for the District of Massachusetts found that an attorney terminated for inadequate work output had sufficiently stated an FMLA retaliation claim against his employer to allow the case to proceed to a jury where he claimed that his employer reduced his work assignments but then later discharged him for failing to meet his billable hour requirements. In *Ayanna v Dechert LLP,* 2012 U.S. Dist. LEXIS 149128 (D. Mass. 2012), the court found that there was sufficient evidence supporting a causal connection between Ayanna's FMLA leave (to care for his mentally ill wife) and his termination where he was told that he was terminated due to his "fair" performance rating and his "personal issues." The court held that a reasonable jury could find that the comment was directed at Ayanna's recent FMLA leave. The court also found that there was a factual dispute about whether Ayanna's billable hours were low because the firm intentionally withheld work from him in retaliation for taking FMLA leave. Also, unlike other attorneys who had been terminated in the past, Ayanna met his billable hours requirements the previous year and had not been given any warning about his low billable hours. ■

JOSEPH A. GOLDEN DISTINGUISHED SERVICE AWARD RECIPIENT

David A. Kotzian

It's my pleasure and honor to introduce someone who really needs no introduction to this group. With his quick laugh, sharp wit, and a beard large enough to shelter an entire forest of small woodland creatures, it seems like everyone knows Joe Golden. Joe is truly one of the pioneers in employment law in Michigan and nationally.

Joe went to night school at the University of Detroit and graduated in 1967. While in law school, he honed his negotiation skills as an adjuster for Travelers Insurance. But, he quickly moved on from haggling over the cost of replacement drapes to the practice of law.



Joseph A. Golden

Joe began his legal career in 1968 working for the Wayne County Neighborhood Legal Services poverty program. He spent most of his time there organizing welfare rights mothers in Southwest Detroit and Downriver. In 1970, he moved on to the law firm of Craig and Fieger and began union organizing as counsel for the Michigan Federation of Teachers. At that time, organizing public employees in Michigan was still a relatively new and uncharted area of the law. Joe negotiated one of the first contracts at Wayne County Community College with Len Givens. Joe used to tell me stories of those days, when collective bargaining agreements were reached after late nights in the bar, with Joe decked out wearing a t-shirt and toe rings.

After eight years of union work, Joe left what was then Golden and Couzens to begin his work in individual employment rights. That was in 1978 as the stage was being set for the era of the wrongful discharge case. The Elliott-Larsen Civil Rights Act had just been passed in 1976 to replace Michigan's Fair Employment Practices Act. In 1980 Chuck Gottlieb was successful in the Michigan Supreme Court case of *Toussaint v. Blue Cross,* and the just cause conspiracy was born.

Joe was at the forefront of this new and exciting area of law. He joined Don Gasiorek at Sommers Schwartz in the Fall of 1985 to begin that Firm's employment law group. I was graduating from Law School around that time and looking for a work as a plaintiff's employment attorney. Ted St. Antoine suggested that I contact Joe, and he brought my resume with him to Sommers Schwartz. Joe and Don hired me in December 1985. Dan Swanson and Sam Morgan joined the group shortly thereafter. In those days, all we needed was a progressive disciplinary policy, an employer's assurance of job security, an unfair termination, and we had a case. Of course, the *Toussaint* era eventually ended as the politics in the Michigan Supreme Court changed and as "at-will" language became incorporated into every boilerplate employment application and employee handbook. But, as it always does, the individual employment rights practice shifted with the adoption of the Americans with Disabilities Act, the Family and Medical Leave Act, the Whistleblowers Protection Act and other laws. Joe's practice shifted with it and never missed a beat. In 2007, Joe left Sommers Schwartz and joined the renowned Firm of Pitt, McGehee, Palmer, Rivers and Golden and has successfully continued his practice there.

Along with Don, Joe was my mentor. He taught me how to practice law, and gave me an endless number of great cocktail party stories. Joe taught me all the things I never learned in law school: how to negotiate, how to deal with clients, how to try cases, and that no matter how tense the situation, to always have a sense of humor. There was never a dull moment practicing with Joe.

I thought I was pretty good at legal writing, but Joe taught me his unique method for writing settlement demand letters. I recall finding a key opinion to support our legal theory in a case. Joe promptly sent a copy to defense counsel with the following enclosure: "In preparing to kick your ass, we have located the enclosed case supporting our position. Please contact me with your settlement offer."

I also thought I knew a thing or two about math. But, I quickly learned that no-one could calculate one-third of a settlement offer faster than Joe.

Joe also taught me statistics and probability theory. I've often repeated Joe's stock answer to clients anxiously wanting to know their chances of winning their case. He'd tell them: "Are you the employee? Are you in Michigan? Then you're never better than 50-50."

I also learned from Joe how to impress corporate executives. As a young associate, I was staying with Joe at the Four Seasons hotel in Philadelphia to prepare for a series of depositions at the very plush offices of Pepper Hamilton and Scheetz. At the first deposition of a key executive with a room full of people, as Joe was pulling out his notes and exhibits he pulled out a negligee that his wife Cindy had secretly packed in his briefcase. Joe, always, took it in stride, held up the negligee, laughed, and calmly filed it back in the case. Personally, I was just relieved that he didn't put it on.

But, seriously, Joe has a record that would make any trial lawyer envious:

- Five jury verdicts in excess of one million dollars.
- Numerous high profile clients and cases, including the legendary Bo Schembechler.
- Honored as one of the Best Lawyers in America in Employment Law for the past 20 years.
- Elected as a Fellow to the College of Labor and Employment Lawyers in 1996.

Joe's work in employment rights law was not limited to the courtroom. He's a nationally recognized speaker and leader in plaintiff's employment initiatives. Joe was one of the founding members of the National Employment Lawyers Association. He served on its Executive Board from its inception in 1985

until 1995, and was its second President from 1991-1993. NELA now boasts 3,000 members with 68 state and local affiliates, and is a national force in employment rights litigation, legislation and policy. Joe also helped found the Michigan affliliate of NELA.

Joe was the first plaintiff's attorney to serve on the governing council of the ABA section of Labor and Employment Law. But, Joe didn't join to receive some token accolade, and he later resigned in protest over their refusal to expand the number of plaintiff's attorneys on the Council.

Joe has spoken at numerous national conferences and seminars, and he testified before the US House of Representatives on the proposed Civil Rights Act of 1991. He's been an advocate for establishing a just cause ballot initiative so that the rights of all employees can be protected against arbitrary dismissal by employers.

Recently, Joe's been active in the Macomb County Bar as the founder and Chair of its Master's Section, and working on a mentoring program for law students. Joe also revived the employment section of the Macomb County Bar, served as its Chair, and helped establish a special employment rights case evaluation panel in that County.

With all his success and accomplishments, Joe never forgot the reason why he selected this area of the law: to help people with their employment problems; and to make their lives and circumstances at least a little better than they were when they walked in his office. Joe's desire to try to help everyone is well-known and the subject of a little good-natured kidding.

I remember the potential clients gathered in the lobby on Saturday mornings waiting for a chance to tell Joe their story. I also remember the stacks of pink telephone messages from potential clients. One of the first tasks Joe assigned me as an associate was to take that stack (which seemed to be endless) and to call each and every person and make sure we gave them a chance to be heard. It was rumored for a while, that Joe never turned back a case. And, when he did finally produce a turnback letter to prove us wrong, one of the associates in the office had it framed for Joe and he hung it in his office.

By the way, Joe has done all this while resisting the computer age. I believe that Sommers Schwartz had updated and replaced its computers at least twice before Joe even turned his on. I recently received an email response from Joe, which astounded me, until he confessed that his secretary answers his emails for him.

Joe is everything that this award is designed to recognize:

- He's made major contributions to our field of law.
- He has the highest ethical standards.
- He has advanced the development of labor and employment law.
- He has exhibited a commitment to excellence.
- And he has certainly earned the respect of his colleagues and constituents.

So, please join me in congratulating this year's recipient of the State Bar of Michigan Labor and Employment Law Section Council's Distinguished Service Award: Joseph A. Golden. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Back in the 80's when Coleman Young was the Mayor of Detroit and I was a young civil servant just out of law school, Stanley Gruszkowski was the City Treasurer. I used to spend a fair amount of time with Stanley at a joint called Little Harry's on Jefferson Ave. His drink was Cutty and soda. And as the ashtrays filled up and the empty glasses covered the table, Stanley would tell me stories and explain things to me.

They don't make 'em like Stanley anymore. In the first place, no one talks the way he did. If he said something I wasn't supposed to repeat, he told me to keep it under my tipper. But more important, we don't conduct our affairs according to Stanley's principles. I'm thinking in particular about the Babushka Test.

The way I remember it, I was planning to spend City money to send myself to a conference - no doubt someplace warm in the winter - and I mentioned it to Stanley. He asked if I'd ever been in the cashier's office on the first floor where the teller cages are. I said I had. He asked if I had watched the old Polish ladies pay their taxes. I had not. He said old Polish ladies don't trust banks, and they don't believe in checks. So when it's time to pay their taxes they tie the money in a babushka and take the bus to the City-County Building and stand in line. And when they get to the teller they untie the babushka and count out each dollar bill.

Stanley said if I could take the money out of that old lady's babushka, look her in the eye, and tell her what I was going to spend it on, then it's a legitimate expense. And if I couldn't, it ain't.

Many of the people I work with – on both sides – are not applying the Babushka test.

I walked into a room not long ago for an arbitration hearing where there were nine people in suits waiting for me. I listened to the lawyers' opening statements and learned that the issue in the case had to do with shift premium for one guy for two weeks. I asked if this grievant represented a class of similar grievants. No, he was alone. I asked if there was an important precedent being set here. No, the situation was not likely to be repeated. I asked how much money was at stake. The parties didn't know exactly. They'd have to check. We took a break while they did the math. When we reconvened the lawyers agreed the amount in controversy was $118.

I had driven across the state and stayed in a motel the night before, so the parties had spent more on my fees than the case was worth before I even walked in the room. And that's not counting the cost of the two lawyers and the other seven people at the table. What was going on?

What was going on is that the parties had gotten locked into positions. Both sides believed they were right. Since they both thought they were right, neither side saw any virtue in capitulating. The collective bargaining agreement outlined the steps they are supposed to take when they can't agree, culminating in arbitration, so the case proceeded to arbitration. And throughout the process it never occurred to anyone to ask whether the whole exercise made any sense.

I have cases like this all the time. And my colleagues all over the country have the same experience. There is someone whose job it is to interview witnesses and build a case file. There is someone whose job it is to select the arbitrator and book the conference room and schedule the hearing. But there doesn't seem to be anyone whose job it is to ask whether - win or lose - the case is worth the time and effort.

Alas, my friend Stanley is not available to tell us how to conduct our affairs. We're going to have to do it ourselves. But he did leave us the Babushka test. It would be a wiser and saner world if we would use it. ■

RECENT ACCOMMODATION CASES UNDER THE ADA

Jay C. Boger
Kienbaum Opperwall Hardy & Pelton, P.L.C.

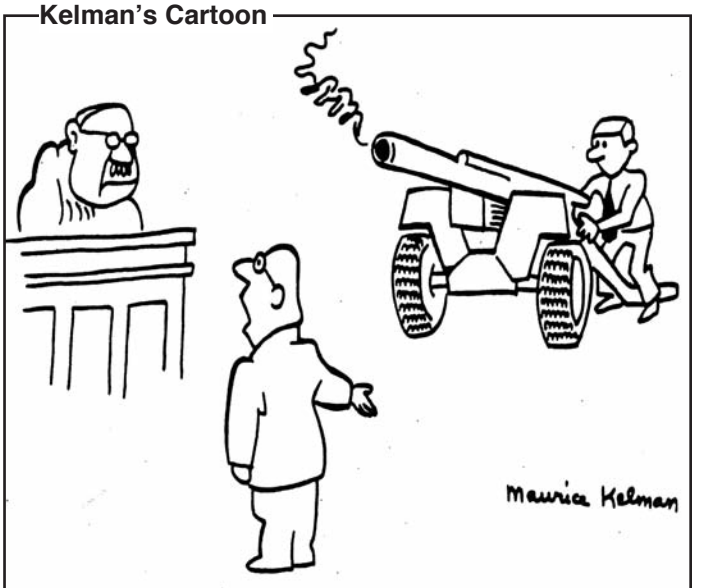
Federal courts continue to address interesting and challenging accommodation issues under the Americans with Disabilities Act (ADA). Given the expanded standard for finding a protected "disability" under the amended ADA, more cases are focusing on the issue of reasonable accommodation — i.e., assuming an employee is disabled, has the employer met its obligation to provide reasonable accommodation to assist him or her in performing essential job functions?

How Far Does The Duty To Transfer Extend? The U.S. Court of Appeals for the Tenth Circuit recently held in *Sanchez v. Vilsack*, 2012 U.S. App. LEXIS 19684 (10th Cir. 2012), that an accommodation request seeking a job transfer to allow for medical treatment might be reasonable even where the employee can perform the essential functions of her job without that accommodation. Clarice Sanchez was a secretarial employee with the U.S. Department of Agriculture's Forest Service in Texas. She suffered a brain injury when she fell down a flight of stairs. She was then diagnosed with an irreversible nerve condition that restricted her vision and ability to focus her eyes. The Forest Service granted her requests for an office with special lighting, as well as a temporary transfer to a New Mexico office closer to her family and a preferred treater. But it denied her request for a permanent transfer to New Mexico, which Sanchez asserted was necessary for her to obtain medical treatment. Whether the law required a transfer accommodation even though the employee could perform the essential functions of her current job was an issue of first impression for the Tenth Circuit. In reversing summary judgment for the Forest Service, the Tenth Circuit concluded that the law requires more than mere equal treatment of disabled employees — it imposes an affirmative duty to meet the needs of disabled workers and to broaden their employment opportunities.

Telecommuting And Irritable Bowel Syndrome. The U.S. District Court for the Eastern District of Michigan recently ruled, based on the facts of that case, that an employer need not permit an employee with irritable bowel syndrome to telecommute. In *EEOC v. Ford Motor Company,* 2012 U.S. Dist. LEXIS 128200 (E.D. Mich. 2012), Jane Harris' job involved purchasing and reselling steel to stamping companies that supplied parts to Ford's assembly plants. Harris requested that she be allowed to telecommute up to four days per week due to her medical challenges. Ford denied the request based on Harris' need to regularly interact with her team and also with contacts inside and outside of Ford that could not be adequately handled remotely. Harris turned down Ford's offers to move her desk closer to a restroom or to assist her in finding another job that might allow her to telecommute. Harris was ultimately discharged due to performance problems. She then sued, claiming that Ford had failed to accommodate her as required by the ADA. The court granted summary judgment to Ford, ruling that the evidence established that Harris could not perform the essential functions of her job from home. Her frequent and unpredictable absences negatively affected her performance and increased the workload of her colleagues. Ford therefore had legitimate factual and legal grounds for both denying her telecommuting request and discharging her for poor performance.

Telecommuting And A Fragrance-Free Workplace. *Core v. Champaign County Board of County Commissioners,* 2012 U.S. Dist. LEXIS 149120 (S.D. Ohio 2012), involved a somewhat similar claim. Pamela Core was a social services worker, who was required to have regular contact in and out of her office with child and adult clients, the public, and coworkers. Core claimed to suffer from severe chemical sensitivity to certain perfumes and other scented products. She requested the accommodations of either permission to work from home or a fragrance-free workplace. The U.S. District Court for the Southern District of Ohio ruled that neither was a reasonable accommodation because (1) Core could not perform from home the essential functions of her job related to interacting with other people; and (2) her request for a workplace restriction on all fragrances was impractical, unreasonable, and would burden the non-disabled population she was required to interact with. ■

Kelman's Cartoon



"A piece of evidence has just come to our attention that we feel has a bearing on this case."

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

MICHIGAN JOINS INCREASING LIST OF STATES THAT BAR EMPLOYERS FROM DEMANDING PRIVATE SOCIAL MEDIA INFORMATION FROM APPLICANTS AND EMPLOYEES

Marlo Johnson Roebuck
Jackson Lewis LLP

A new Michigan law signed by Governor Rick Snyder prohibits employers and prospective employers from requiring employees and applicants to grant access to, allow observation of, or disclose information used to access private Internet and e-mail accounts, including social media networks such as Facebook. This ban also applies to educational institutions and their students. Michigan's Internet Privacy Protection Act, *Public Act 478 of 2012*, is effective as of December 28, 2012. The new law also prohibits employers from discharging, disciplining, failing to hire, or otherwise penalizing those who refuse to disclose information that allows access to such accounts.

A covered employer under the law is "a person, including a unit of state or local government, engaged in a business, industry, profession, trade, or other enterprise in this state and includes an agent, representative, or designee of the employer." A person who violates the Act is guilty of a misdemeanor punishable by a fine of not more than $1,000.

The Act does not prohibit an employer from doing any of the following:

(a) Requesting or requiring an employee to disclose access information to the employer to gain access to or operate any of the following:

(i) An electronic communications device paid for in whole or in part by the employer.

(ii) An account or service provided by the employer, obtained by virtue of the employee's employment relationship with the employer, or used for the employer's business purposes.

(b) Disciplining or discharging an employee for transferring the employer's proprietary or confidential information or financial data to an employee's personal internet account without the employer's authorization.

(c) Conducting an investigation or requiring an employee to cooperate in an investigation in any of the following circumstances:

(i) If there is specific information about activity on the employee's personal internet account, for the purpose of ensuring compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct.

(ii) If the employer has specific information about an unauthorized transfer of the employer's proprietary information, confidential information, or financial data to an employee's personal internet account.

(d) Restricting or prohibiting an employee's access to certain websites while using an electronic communications device paid for in whole or in part by the employer or while using an employer's network or resources, in accordance with state and federal law.

(e) Monitoring, reviewing, or accessing electronic data stored on an electronic communications device paid for in whole or in part by the employer, or traveling through or stored on an employer's network, in accordance with state and federal law.

In addition, the Act does not prohibit or restrict an employer from complying with a duty to screen employees or applicants prior to hiring or to monitor or retain employee communications that is established under federal law or by a self regulatory organization, as defined in section 3(a)(26) of the securities and exchange act of 1934, 15 USC 78c(a)(26).

Finally, the Act does not prohibit or restrict an employer from viewing, accessing, or utilizing information about an employee or applicant that can be obtained without any required access or that is available in the public domain. ■

UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long

Four Employment Law Cases Currently on Court's 2012-2013 Docket

As of day one of its 2012-2013 docket, the U.S. Supreme Court has committed to reviewing only four employment law cases. The definition of "supervisor" under Title VII, the effect of a named plaintiff's settlement on an FLSA collective action, whether an employer's health plan is entitled to reimbursement from participants who receive personal injury settlements, and the appropriate venue of civil service claims, are the issues currently before the Court.

Limits on Title VII Definition of Supervisor

The issue in *Vance v. Ball State Univ.*, U.S. No. 11-566, is whether to be deemed a "supervisor" under Title VII, an employee must have the authority to hire, fire, demote or discipline. In *Vance,* the plaintiff worked in the Ball State University Banquet and Catering Department. She began her employment as a substitute server and was ultimately promoted to a full-time catering assistant. At various times throughout her employment, Vance worked with an employee named Davis. Vance alleged that Davis physically intimidated her and used racial epithets in her presence. Vance also made allegations that several of her supervisors used racially derogatory language and physically intimidated her.

Vance sued Ball State for hostile environment racial harassment under Title VII. Vance argued that Ball State should be vicariously liable for Davis' conduct because Davis was her supervisor. The Seventh Circuit disagreed, holding that "under Title VII, a supervisor is someone with power to directly affect the terms and conditions of the plaintiff's employment," and that this power is primarily exercised through "the power to hire, fire, demote, promote, transfer, or discipline an employee." *Vance v. Ball State Univ.,* 646 F.3d 461, 470 (7th Cir. 2011). The Seventh Circuit continued by recognizing that some circuits hold that "the authority to direct an employee's daily activities establishes supervisory status under Title VII," but made it clear that it does not join in the decisions of those circuits. *Id.* The issue before the Supreme Court, then, is whether an employee must have the power to hire, fire, demote, promote, transfer or discipline an employee in order to be deemed a supervisor under Title VII.

Effect of Rejection of Offer of Judgment on Conditional Certification

The putative representative in *Symczyk v. Genesis Healthcare Corp*., 656 F.3d 189 (3d Cir. 2011), was a registered nurse who worked for Genesis Healthcare for approximately eight months. She filed a collective action under § 216(b) of the Fair Labor Standards Act alleging that the defendant's policy of taking automatic meal break deductions for certain employees, regardless of whether the employee performed any compensable work during that time, violated the FLSA. Prior to the named plaintiff's motion for certification, the defendant made a Rule 68(a) offer of judgment that would have fully compensated the plaintiff for her alleged lost wages, atttorneys' fees, costs and expenses. The plaintiff never responded to the offer of judgment, and the defendant moved to dismiss her claim on the basis that the court lacked subject matter jurisdiction. The district court granted the motion, and the plaintiff appealed.

The Third Circuit analyzed the issue following the basic principle that "[a]n offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation. Thus, whether or not the plaintiff accepts the offer, no justiciable controversy remains when a defendant tenders an offer of judgment under Rule 68 encompassing all the relief a plaintiff could potentially recover at trial. *Id.* at 195, citations omitted. The Court reminded, however, that "conventional mootness principles do not fit neatly within the representative action paradigm" and that "special mootness rules apply in the class action context, where the named plaintiff purports to represent an interest that extends beyond his own." *Id.*, citations omitted. The Court of Appeals expressed concern that granting the defendant's motion to dismiss would effectively allow it to avoid FLSA claims by "picking off" class named plaintiffs prior to a determination about class certification. *Id.* at 199. The Third Circuit reversed the district court and remanded for a decision on certification and identification of opt-in plaintiffs. The defendant sought cert and the Supreme Court agreed to address the question whether a collective action brought under § 216(b) of the FLSA becomes moot when, prior to moving for conditional certification and prior to any other plaintiff opting in to the suit, the putative representative receives a Rule 68 offer.

Equitable Principles Affect Plan Reimbursement

The plaintiff in *U.S. Airways v. McCutchen*, 663 F.2d 671 (3rd Cir. 2011) suffered serious injuries in an automobile accident. A U.S. Airways-administered health benefit plan paid $66,000 towards plaintiff's medical expenses. The plaintiff also recovered $10,000 from the driver of the vehicle who caused the accident and an additional $100,000 in underinsured motorist coverage. After paying his lawyer a 40% contingency fee and other expenses, the plaintiff recovered less than $66,000. The U.S. Airways Plan sought reimbursement of the $66,000 paid to him under the Plan pursuant to that plan's subrogation provision. The plaintiff refused to pay, arguing that it was inequitable to require him to reimburse the U.S. Airways Plan an amount that exceeded his actual recovery. The Plan argued that its language permitted it to recover the full $66,000 it paid for the plaintiff's medical care, regardless of the plaintiff's legal costs. The district court agreed with the Plan and ordered the plaintiff to reimburse the entire $66,000. The plaintiff appealed.

The Third Circuit Court of Appeals reversed, noting that a fiduciary's rights under ERISA are "governed by § 502(a)(3)

and are limited to an injunction or other appropriate equitable relief." *Id.* at 674. The Court recognized that under existing law, the question of whether "§ 502(a)(3)'s requirement that equitable relief be 'appropriate' means that a fiduciary like US Airways is limited in its recovery . . . by the equitable defenses and principles that were "typically available in equity." *Id.* at 675-676. Thus, applying traditional equitable principles of unjust enrichment, the Court of Appeals reversed the decision of the district court. U.S. Airways sought and was granted cert.

Venue for Mixed Civil Service Bias Claim

In *Kloeckner v. Solis,* 639 F.3d 834 (8th Cir. 2011), the plaintiff worked as a Senior Investigator for the Department of Labor Employee Benefits Security Administration in St. Louis until 2005 when she left work and filed an EEO complaint alleging hostile work environment and discrimination on the basis of her age and gender. The DOL subsequently terminated the plaintiff's employment in July 2006 while her EEO complaint was pending. The plaintiff appealed her removal to the Merit Systems Protection Board (MSPB), but subsequently moved to dismiss the appeal without prejudice and amended her EEO complaint to include discriminatory removal. In the dismissal order, the MSPB mandated that if the plaintiff intended to refile the case, she must do so prior to January 18, 2007.

The EEOC subsequently returned the plaintiff's discriminatory removal case to the DOL for decision due to the plaintiff's abuse of the discovery process. The Secretary of Labor ultimately issued an agency action rejecting the discriminatory removal claim. The Secretary advised the plaintiff that because hers was a "mixed case," in that it raised both procedural and discrimination issues, she could appeal to the MSPB or file a civil action in federal district court. Within 30 days of the Secretary of Labor's decision, but ten months after the January 18, 2007 deadline set by the MSPB, the plaintiff appealed to the MSPB. The MSPB dismissed the appeal as untimely. The plaintiff then filed a lawsuit in the District Court for the District of Columbia. That Court transferred venue to the District Court for the Eastern District of Missouri. That Court dismissed the lawsuit on the ground that the Court of Appeals for the Federal Circuit had exclusive jurisdiction over the plaintiff's claims. The plaintiff appealed to the Eighth Circuit Court of Appeals arguing that the federal district court had jurisdiction because the MSPB did not determine whether her removal had been discriminatory, but dismissed only on procedural grounds.

The Court of Appeals rejected the plaintiff's reasoning and following its unpublished decision in *Brumley v. Levinson*, 1993 U.S. App. LEXIS 9419 (8th Cir. April 27, 1993), held that the Federal Circuit has exclusive jurisdiction over review of MSPB final decisions, unless the Board has reached the merits of the discrimination issue. In this case, because the MSPB did not reach the merits of the plaintiff's discrimination claim, the Court of Appeals held that the federal district court did not have jurisdiction over the plaintiff's appeal. The plaintiff sought Supreme Court review on whether a federal district court has jurisdiction to review an MSPB decision in a mixed case, where the MSPB never reached the merits on the issue of discrimination. ■

WHAT SHOULD EMPLOYERS EXPECT NEXT FROM THE INVIGORATED EEOC?

Elizabeth Hardy
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With the re-election of President Barack Obama, employers should be prepared for more aggressive initiatives by the Equal Employment Opportunity Commission (EEOC) as it pursues greater workplace protections for employees.

During the first Obama administration, the EEOC undertook many high-profile enforcement initiatives, issued controversial guidelines on such topics as an employer's use of arrest and conviction records in making hiring decisions, and addressed how victims of domestic abuse should be protected under Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA).

Lawsuits with ADA claims more than doubled during this period, while the EEOC's success rate in resolving such actions declined dramatically. In cases the EEOC had initiated against employers — typically known as merit suits or direct interventions – its resolution rate dropped from 364 cases in 2007 to 276 in 2011. Any employer who has attempted in recent years to negotiate a reasonable resolution of litigation the EEOC had filed will certainly understand why this trend line has been so depressed.

The EEOC's current Draft Strategic Enforcement Plan identifies as the EEOC's first priority the elimination of systemic barriers in recruiting and hiring – with protecting immigrant and migrant workers as a secondary focus. Systemic actions are brought by the EEOC on behalf of groups of employees. They can and often do develop in short order into hugely expensive and protracted class litigation that can go on for years.

Some other clues about what employers should expect from the invigorated EEOC can be discerned from the policy issues that preoccupied the agency during the past four years. For example, the EEOC will surely continue its focus on transgender discrimination and will further advance its position that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on…sex' and such discrimination violates Title VII." Employers should also be prepared for increased scrutiny on hiring decisions (including high-volume internet-based recruitment and hiring), and, in particular, issues relating to hiring decisions for applicants with criminal records. The use of credit checks for applicants and asserted ADA violations in connection with attendance policies are other likely target areas.

The short message for employers large and small (though not so small as to fall below Title VII's and the ADA's 15-employee jurisdictional threshold) is that the second generation Obama EEOC, with enhanced budget dollars and a larger head of political steam, may be looking over your shoulder at your organization's employment decisions with more interest and in more ways than you might have thought. ■

MERC NEWS

Ruthanne Okun, Sidney McBride, and Verna Miller

ACT 312 ARBITRATOR/FACT FINDER AND CONSTITUENT CONFERENCE IN APRIL

On April 18 and the morning of April 19, 2013, MERC presented training sessions for its Act 312 Arbitrator/Fact Finder panel members, as well as labor and employer constituents. The sessions were conducted at the Inn at St John's in Plymouth and co-sponsored by the State of Michigan Department of Licensing & Regulatory Affairs (LARA) and supporters at MSU College of Law. With the plethora of new legislation since the last MERC conference in 2011, topics featured during the training sessions included:

- Proposed Amendments of MERC's Administrative and Act 312 Rules & Impact on MERC proceedings
- Recent MERC Cases Affecting Act 312 and Fact Finding
- Bargaining/Mediation/Fact Finding/Act 312 After Acts 54, 152, Act 312 Amendments and Legislation Concerning Mergers and Consolidations
- Bargaining/Mediation/Fact Finding After Amendments in the Public School Arena
- Municipal and Pension Updates
- Impact of the Affordable Care Act on Bargaining Health Insurance, Fact Finding, and Act 312
- Recent Michigan Legislation and its Effect on Bargaining Insurance

Also, a brief session on "MERC basics" was presented to constituents, as well as a presentation summarizing recent MERC decisions interpreting some of the recent legislative changes. Many of the conference materials from each day will be on the agency's website no later than the end of May.

During both days of the conference, the agency formally introduced its newest Administrative Law Specialist, Travis Calderwood (see biographical information set forth below) who is principally responsible for handling MERC matters involving the Freedom to Work changes under PA 348 and 349 of 2012.

Be sure to stay tuned to the MERC website at www.michigan.gov for further highlights from the training.

MERC WELCOMES ADMINISTRATIVE LAW SPECIALIST TRAVIS CALDERWOOD

In mid-February, MERC and the Bureau of Employment Relations welcomed Travis Calderwood, as he started work in the agency as an Administrative Law Specialist, handling matters related to the recently-implemented "Freedom to Work" laws. Prior to joining the Bureau, Travis was employed at the law firm of Collins & Blaha, P.C. in Farmington Hills, where he represented numerous public school districts in all areas of employment and labor law, as well as in state and federal compliance and regulatory issues. In that position, he handled matters involving a variety of laws, including PERA, FLSA, ERISA, FMLA, EEOC, ADA, FERPA, the Teachers' Tenure Act and the Revised School Code. His experience also includes work at the Brook McCray Smith law firm in Ann Arbor, where he handled complex commercial litigation, real estate transactions, trust and estate issues, and business-related issues.

Travis attended Hillsdale College where he earned numerous scholarships and awards and graduated with a B.A. in Political Economy. He received his law degree from Ave Maria School of Law in Ann Arbor, where he was awarded a full tuition scholarship. He is a member of the State Bar of Michigan. Travis works in the Bureau's Detroit office, located in Cadillac Place and may be reached at CalderwoodT@michigan.gov.

MERC SURVEYS CONSTITUENTS RE: VIDEO/WEBCASTING OF COMMISSION MEETINGS

MERC is currently considering whether to provide live webcasting of the monthly commission meetings. We value the opinion of our constituents. Therefore, before moving forward with this endeavor, we need your feedback. We want to know whether our stakeholders will view the webcasting of meetings as a means of maintaining an awareness of commission activities. Keep an eye out for further details and plan to participate in an online survey which will soon be available on the MERC website. ■

OBJECTIONABLE DEPOSITION OBJECTIONS: "ASKED AND ANSWERED."

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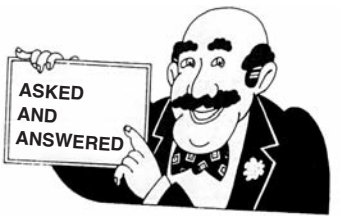
It is not unusual for deposition defenders to register "asked and answered" objections. Not unusual, but usually objectionable.

In my book, which no self-respecting library should be without, I write about the "asked and answered" deposition objection. I observe that it is "a shorthand way of saying that the inordinate repetition of inquiry has reached the point of annoyance or oppression, or, in other words, 'enough is enough.'" Stuart M. Israel, *Taking and Defending Depositions* (ALI-ABA 2004) Sec. 14.09, ¶¶23-24.

The words "annoyance" and "oppression," accompanied by the words "embarrassment" and "undue burden or expense," appear in Fed.R.Civ.P. 26(c), which provides for "protective orders." See also Rule 30(c)(1) (the cross-examination of a deponent generally proceeds as "at trial under the Federal Rules of Evidence") and Rule 30(c)(2) (objections "must be stated concisely in a nonargumentative and nonsuggestive manner"; instructions not to answer are proper "only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)"). Rule 30(d)(3)(A) permits a motion "to terminate or limit" a deposition "on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party."

I opine that the "asked and answered" objection is "overused and, in my view, rarely appropriate." I concede that "doesn't mean" the objection "is never useful or that it doesn't resonate with judges." Indeed, the objection may be fondly applied by judges who entertain it at trial and themselves used it at depositions back in the day, before they became black-robed government employees.



Under FRE 403, judges may exclude evidence to avoid "undue delay, wasting time, or needlessly presenting cumulative evidence." And under FRE 611(a), judges "should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment."

Still, it is very rare that repetitive truth-testing and continuity-promoting deposition questions sink to the level that would justify a motion for Rule 30(d)(3)(A) protection. More often, repeated "asked and answered" objections are the illness, not the cure, because they unreasonably annoy, obstruct, and "oppress" the deposition-taking party. For example:

Q. [Examining Counsel] Why did the chicken cross the road?
[Defending Counsel] Objection. Asked and answered.
A. [Deponent] I already answered.
Q. Please answer the question.
[Defending Counsel] Same objection.
A. I'm not going to answer.
Q. You are required to answer.
A. I already gave you my answer.
Q. What is your answer?
A. My answer is the same.
Q. What is that answer?
[Defending Counsel] Same objection. Asked and answered. Let's move on. This is a waste of time.
Q. Can I just get your answer? Then we can move on.
A. What was the question again?
Q. Why did the chicken cross the road?
[Defending Counsel] Asked and answered.
Q. Please answer.
[Defending Counsel] Same objection. You can answer again. Give him the same answer, if you know.
A. I don't know.

This example displays poetic license, but not much.

Ultimately, I disapprove of the "asked and answered" objection because "leeway is allowed on cross-examination and some repetition is necessary and inevitable, so excessive and obstructive 'asked and answered' objections improperly interfere with a deposition." When repetitive questioning truly becomes "oppressive," and "things get extreme," I advise defenders, it "may be appropriate to stop the deposition and go to the judge."

Others agree. The "asked and answered" deposition objection "is *fundamentally improper* because it interferes with the spontaneous testimony of the deponent." David Malone and Peter T. Hoffman, *The Effective Deposition: Techniques and Strategies That Work* (NITA, 4th ed. 2012) Sec. 14.9.3 (emphasis added).

Malone and Hoffman concur that repetition is proper, not objectionable. It "is often a tactic for the taking lawyer in a deposition to ask in a different way an already-asked question to test the credibility of both the witness and the information that has been provided."

Malone and Hoffman advise: "Judges will only rarely sustain an asked-and-answered objection made in a deposition, and then only when repetition constitutes harassment." They go on to address the mischief that lurks in the hearts of many "asked and answered" objectors (emphasis added):

> But defending lawyers rarely make the objection with the expectation that it will be sustained. Instead, the usual purposes of the objection are to throw the questioning attorney off track and to alert the witness that the question has been answered before and the answer this time should be the same as the previous time. *Both of these are impermissible ground for making an objection.*

Fundamentally improper and impermissible. Why didn't I say that? Next time. And if experience is a good predictor, there will be next times. There will be no shortage of opportunities to say exactly that in future depositions defended by benighted lawyers who seek to obstruct and coach and who do not read *Lawnotes*.

— END NOTE —

In the interest of full disclosure, Professor Peter T. Hoffman, co-author of *The Effective Deposition,* was my law school roommate some decades back. In the "Acknowledgements" section of the Fourth Edition of their book, Malone and Hoffman list me among those who warrant "special thanks" and who "over the years have shared with us and have freely allowed us to incorporate many of their thoughts and strategies." And in my book I thank Hoffman "who read my manuscript and made useful suggestions" and who "made some useless ones, too." I explain that "this is America" and Hoffman has a "right to his misguided opinions." Having known Hoffman for decades, I know that he has an abundance of "misguided opinions" about many things. About "asked and answered" deposition objections, however, he is dead right. Kidding aside, *The Effective Deposition* is an impressive, thorough, and eminently practical work. ■

SIXTH CIRCUIT UPDATE

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Employee's Failure to Follow Established Time Reporting Procedures Precludes Claim for Uncompensated Work Time

In *White v Baptist Memorial Health Care Corp*, Docket No 11-5717 (Nov. 6, 2012), the Sixth Circuit rejected claims brought by a former nurse, Margaret White, seeking unpaid wages for missed and unpaid meal breaks. The defendant, Baptist Memorial, maintained a policy requiring employees who worked shifts of six or more hours to receive an unpaid meal break that was automatically deducted from the employees' paychecks. Under the policy, employees were to report on an "exception log" each missed or interrupted meal break so that the defendant could properly compensate them for the additional time worked. Each employee signed a statement acknowledging that she understood the policy and that to be compensated for missed or interrupted meal breaks, she had to record the time in her "exception log."

Each time White followed Baptist's procedures for tracking missed or interrupted meal breaks, she was compensated. She alleged, however, that there were other times when she missed her meal breaks but was not compensated. Although White had complained from time to time to her supervisors that she did not receive a lunch break, she never told her supervisors or Baptist's human resources department that she was not compensated for those missed meal breaks. White eventually stopped using the "exception log" altogether, but did not maintain any other records showing that she actually missed meal breaks. She sued in the U.S. District Court for the Western District of Tennessee alleging violations of the Fair Labor Standards Act for not compensating her for working during meal breaks.

The U.S. District Court for the Western District of Tennessee granted the defendant's motion for summary judgment. The Sixth Circuit affirmed, following reasoning in similar cases by the Fifth, Eighth, and Ninth Circuits. Noting that automatic meal deduction systems are lawful under the FLSA, the Sixth Circuit held that "if an employer establishes a reasonable process for an employee to report uncompensated work time the employer is not liable for non-payment if the employee fails to follow the established process." It rejected White's argument that Baptist should have known about the unpaid time because of her complaints to her supervisors. According to the Sixth Circuit, "When an employee fails to follow reasonable time reporting procedures she prevents the employer from knowing its obligation to compensate the employee and thwarts the employer's ability to comply with the FLSA."

EEOC May Pursue "Patter-or-Practice" Claims Under § 706 of Title VII

At issue in *Serrano, EEOC v Cintas Corp*, Docket No 11-2057 (Nov. 6, 2012) was the scope of the EEOC's authority to pursue a pattern-or-practice claim on behalf of a class of individuals and other administrative matters. The plaintiffs filed a Title VII, gender discrimination lawsuit on behalf of women allegedly discriminated against by Cintas, a uniform supply company, during the hiring process for its Service Sales Representative position. One unsuccessful female applicant filed a charge of discrimination with the EEOC in April 2000 challenging Cintas's hiring practices. In July 2002, the EEOC later issued a reasonable-cause determination. The EEOC sent a conciliation notice to the defendant on the same day. Cintas did not respond to it. Three years later, the EEOC notified Cintas that it was terminating the conciliation process as "unsuccessful."

In May 2004, before the EEOC terminated the conciliation process, the claimant filed a Title VII class-action lawsuit in U.S. District Court for the Eastern District of Michigan. After the conciliation process ended, the EEOC, citing its authority under § 706 of Title VII, intervened in the lawsuit alleging a pattern-or-practice claim. Section 706 expressly gives the EEOC authority to bring a civil action on behalf of a person after conciliation efforts fail.

The district court granted Cintas's motion on the pleadings as to the EEOC's pattern-or-practice claim, and it granted summary judgment in Cintas's favor on the thirteen individual-claimant claims. The district court also granted Cintas attorneys' fees as the prevailing party. The EEOC appealed, challenging the district court's rulings that, among other things: (1) the EEOC could not pursue a pattern-or-practice claim under § 706 of Title VII, (2) the EEOC failed to satisfy its administrative prerequisites to suit; and (3) Cintas was entitled to attorneys' fees.

The Sixth Circuit reversed. First, citing to the U.S. Supreme Court's decision in *Int'l Brotherhood of Teamsters v. U.S.*, it rejected Cintas's argument that only § 707 of Title VII, not § 706, expressly gives the EEOC authority to pursue a lawsuit if a defendant is engaged in a "pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter." Cintas argued that giving the EEOC authority to pursue a pattern-or-practice claim under § 706 would render § 707 superfluous. According to the Sixth Circuit, however, *Teamsters* suggests that the inclusion of the "pattern or practice" language in § 707 "simply means that the scope of the EEOC's authority to bring suit is more limited when it acts pursuant to § 707." The Court explained that § 707 permits the EEOC to pursue only a particular type of claim – a pattern-or-practice claim, with limited remedies – if it acts without first receiving a charge filed by an individual. This, according to the Court, is an "important distinction" between the two sections that does not, as Cintas argued, render § 707 "superfluous."

Second, the Court addressed whether the EEOC exhausted all prerequisites before filing its § 706 claim. It rejected the district court's reasoning that the EEOC never investigated or sought to conciliate on a class-wide basis. Pointing to the EEOC's reasonable-cause notice, the Sixth Circuit explained that Cintas had notice that the EEOC indeed investigated and reached out to Cintas to conciliate. And, according to the Court, "the EEOC is under no duty to attempt further conciliation after an employer rejects its offer."

Finally, the Sixth Circuit reviewed the district court's decision to award to Cintas attorneys' fees as the prevailing party because it deemed the EEOC's failure to comply with its Title VII administrative prerequisites to be "unreasonable conduct." Because it reversed the district court's conclusion that the EEOC failed to exhaust administrative prerequisites and because Cintas was no longer the prevailing party, the Sixth Circuit concluded that the

fee award demanded reversal, and in any event, was an abuse of discretion because the EEOC did not engage in any "unreasonable" or "frivolous" litigation conduct.

The Michigan Constitution's Affirmative Action Ban In College Admissions Violates the Federal Constitution

On July 1, 2011, a three-judge Sixth Circuit panel declared unconstitutional Michigan's 2006 voter-approved state constitutional amendment prohibiting sex- and race-based preferences in university admissions, government hiring and contracting. The amendment, commonly known as "Proposal 2", prohibits universities and governments in Michigan from using affirmative action programs that give "preferential treatment" to groups or individuals based on their race, gender, color, ethnicity, or national origin for public employment, education, or contracting purposes.

The three-judge panel held 2 to 1 that Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because it burdens racial minorities by altering Michigan's political process along racial lines. In other words, the Court concluded that because less onerous avenues to effect political change remain open to those advocating consideration of non-racial factors in admissions decisions, Michigan cannot force those advocating for consideration of racial factors to go down a more arduous road – i.e., amending the constitution – without violating the Fourteenth Amendment.

Michigan's Attorney General sought *en banc* review, which was granted. On November 15, 2012, the Sixth Circuit, sitting *en banc*, ruled in *Coalition to Defend Affirmative Action v Regents of the Univ of Mich*, Docket Nos 08-1387, 1389, 1534, and 09-1111 (Nov. 15, 2012) that Proposal 2 is unconstitutional. The Sixth Circuit majority, in a closely divided decision, specifically declined to "weigh in on the constitutional status or relative merits of race-conscious admission policies" addressed in *Gratz v Bollinger* and *Grutter v Bollinger*. Instead, according to the Court, "the sole issue before [it] is whether Proposal 2 runs afoul of the constitutional guarantee of equal protection by removing the power of university officials to even *consider* using race as a factor in admissions decisions – something they are specifically allowed to do under *Grutter*."

Echoing the prevailing reasoning in the July 2011 panel decision, the *en banc* Court explained that, by now requiring supporters of race-conscious admissions policies to amend the state constitution, Proposal 2, despite being enacted by popular vote, works a real and substantial denial of the equal protection of the laws. Citing two United States Supreme Court decisions, *Hunter v Erickson* and *Washington v Seattle School District No 1*, the Sixth Circuit explained that if Proposal 2: (1) has a "racial focus, targeting a policy or program that inures primarily to the benefit of the minority," and (2) "reallocates political power or reorders the decisionmaking process in a way that places special burdens on a minority group's ability to achieve its goals through that process," the enactment must be struck down "absent a compelling state interest."

The Court concluded that Proposal 2 met both elements of the test, and that the government defendants did not articulate a compelling state interest to justify the special burdens it places on minority groups. Notably, the Sixth Circuit struck down as unconstitutional only those provisions of Proposal 2 affecting the admissions policies of Michigan's public colleges and universities.

One significant debate between the majority and dissent of the *en banc* Court focused on whether university admissions policies affected by Proposal 2 were actually a part of a "political process." According to the dissent, admissions decisions lie outside the political process because the governing boards of the universities delegate the responsibility for establishing admissions standards to politically unaccountable admissions committees and faculty members. The majority rejected that position because the three University defendants' boards, created by the Michigan constitution and popularly-elected, have ultimate governing authority to set admissions policies. Finally, the Court also rejected the dissent's reasoning that the *Hunter* and *Seattle* cases are inapposite because they dealt with government enactments that burden racial minorities' ability to obtain "protection from discrimination" through the political process, whereas Proposal 2 burdens racial minorities' ability to obtain "preferential treatment" through race-based admissions policies. According to the Sixth Circuit, the *Hunter/Seattle* doctrine "works to prevent the placement of special procedural obstacles on minority objectives, whatever those objectives may be." The Equal Protection Clause, the Court noted, does not impose "an outcome-based limitation on a process-based right."

"Black Lung" Benefits Analysis Requires Review of *All* Relevant Evidence

In *Dixie Fuel Co., LLC, et al v Director, Office of Workers' Comp Programs*, Docket No 11-4298 (Nov. 28, 2012), a former coal miner for Dixie Fuel had tried to obtain benefits under the federal Black Lung Benefits Act for two decades. He worked as a coal miner for thirteen years between 1972 and 1988. He also smoked a half a pack of cigarettes every day for at least ten years. From 1990 to 2010, he tried to convince the federal government that he was entitled to benefits under the Act because his exposure to coal dust, not his smoking, caused a disabling pulmonary impairment called pneumoconiosis (or "black lung").

On the coal miner's third attempt at benefits, a United States Department of Labor Administrative Law Judge granted benefits under the Act, concluding that the miner suffered from pneumoconiosis caused by his job in the coal mines. The federal Benefits Review Board affirmed. Dixie Fuel appealed, and the Sixth Circuit concluded that the ALJ erred "by failing to adhere to a key regulatory directive in weighing the medical evidence concerning [the coal miner's] disease."

At issue before the Sixth Circuit was whether "substantial evidence" supported the ALJ's conclusion. First, the Court noted that under the Act a claimant may establish work-related pneumoconiosis through x-rays, autopsies, biopsies, and medical opinions. Although the record contained x-rays that the ALJ believed alone established entitlement to benefits, it also contained two biopsies that "came back negative," several CT scans that "may have been inconclusive," and several physicians who testified against an award of benefits. "The ALJ erred by singling out the x-ray evidence to the exclusion of the other [contrary] evidence" because the Act "commands judges to consider "*all* relevant evidence'." As a result, the Sixth Circuit reversed and remanded, with a directive that "the ALJ…quickly, fairly and finally resolve this long-running claim" because "if [the coal miner] deserves benefits under the Act, he should not have to wait this long to obtain them." ■

MERC UPDATE

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A summary of two 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.

Bedford Public Schools -and- Bedford Education Association, MEA/NEA, Case No. C11 L-211 (December 14, 2012) (on appeal to the Court of Appeals).

Charging Party alleged that Respondent Board violated its duty to bargain by failing to provide salary increases as set forth in the expired collective bargaining agreement. The Board responded that it was not required to pay these increases given the passage of 2011 PA 54, which amended Section 15(b) of the Public Employment Relations Act (PERA), MCL 423.215(b). This amendment contains language stating that after the expiration of a collective bargaining agreement and until a successor agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts no greater than those in effect on the expiration date of the collective bargaining agreement (CBA). The amended Section further provides that the prohibition includes increases that would result from wage step increases. Administrative Law Judge (ALJ) Doyle O'Connor found first that Section 15(b) of PERA (Act) clearly prohibits automatic wage step increases and cost of living increases. These increases are based on years of service and every bargaining unit member generally receives them on a calendar basis, rather than upon completion of advanced education as the teachers involved here had.

ALJ O'Connor next examined whether Section 15(b) also bans lane changes, which are premised on the change in an individual employee's level of education, rather than an across-the-board increase based on continued service to the District. He noted these lane changes are essentially an incentive and reward for individual employees to secure advanced degrees, typically on their own time and largely, if not entirely, at their own expense, with those advanced degrees objectively increasing the value of the teacher in the classroom and in the market place. ALJ O'Connor concluded Section 15(b) does not prohibit payment of individualized educational lane-change-based increases following the expiration of a CBA. He directed the Board to make lane change salary adjustments to those individual teachers and also make them whole with statutory interest.

Following the filing of exceptions, the Commission reversed the ALJ's Recommended Decision and dismissed the unfair labor practice charge. MERC reviewed the amendment's statutory construction and noted that it must first review the statute, which provides the most reliable evidence of the Act's intent. Where there is no statutory definition of the words used, those words and phrases must be given their plain and ordinary meaning. When the language is clear and unambiguous, there is no need to rely on legislative history or other means of statutory interpretation to determine legislative intent. In reviewing the phrase "levels and amounts," the Commission interpreted it to mean the amounts payable for wages are those amounts set forth in the collective bargaining agreement, including all those specified in a salary grid. However, the Legislature went on to provide: "[t]he prohibition in this subsection includes increases that would result from wage step increases." MERC held the addition of that language makes it clear wage step increases not due as of the date of the contract expiration are not to be paid prior to the effective date of a successor CBA. The Commission rejected Charging Party's arguments that it has long recognized a distinction between step increases and lane/rail changes, relying on *Sandusky Community Schools*, 22 MPER 90 (2009) (no exceptions), and *Ida Public Schools*, 1996 MERC Lab Op 211, 9 MPER 27062 (1996). It found the "distinction" as one without a significant difference for its purposes here. The Commission noted that wage increases based on increased experience differ from wage increases based on educational attainment, but both kinds of increases result from the achievement of a contractually-specified goal. The Commission has made no distinction between the legal effects of these types of provisions as mandatory subjects of bargaining. The employer is bound by the contract's requirements and must pay the higher wage when the precondition for the wage increase has been met.

Lastly, the Commission noted that the Legislature is presumed to be aware of statutory interpretations by the court and by administrative agencies charged with statutory enforcement. Since MERC has treated lane changes or rail increases as a type of step increase, it cannot assume that the Legislature would require it to do otherwise. MERC therefore concluded that PA 54 prohibits the payment of step increases whether based on years of service or educational advancement. The "lane changes" at issue are included with the prohibition against the payment of these "wage step increases." This decision has been appealed by Charging Party to the Michigan Court of Appeals.

Michigan State University (Police Department) -and- Capitol City Lodge No. 141, Fraternal Order of Police, Case No. C10 I-230 (November 7, 2012).

Charging Party, Capitol City Lodge No. 141, claimed Respondent employer, Michigan State University (Police Department), violated Section 10(1)(a) of PERA by conducting an internal investigation of, and later disciplining Detective Anne Stahl, after she attempted to assert her rights under the CBA. ALJ David M. Peltz found that Respondent did violate Section 10(1)(a) of PERA when her supervisors disseminated an email that a reasonable employee in Stahl's situation would interpret as an express or implied threat. No exceptions were filed and the Commission adopted the ALJ's Preliminary Decision and Order as the decision of the Commission.

In 2007, Ms. Stahl was selected to become qualified as a polygraph examiner. After attending a 14-week training program paid for by her employer, she began conducting polygraph examinations. On completion of 200 such examinations, Stahl became eligible to take the Michigan examination to become licensed as a polygraph examiner. In 2009, Ms. Stahl expressed concerns over whether she had sufficient time to study for this exam while working. In January, 2010, Stahl emailed her supervisor, Monette, expressing her concerns. Monette responded by telling her to conduct polygraph examinations only two days a week to allow three work days to focus on cases and the upcoming exam. Monette further indicated studying at home or overtime was not an option. Stahl decided ultimately to study at home before taking the exam in March of 2010.

A month later Stahl submitted a request for compensatory time for the 36 hours she spent studying for the exam. Monette discussed this matter with his supervisor Roudebush, who de-

cided to deny the request because Stahl did not receive prior approval before working the overtime. Monette then formally denied Stahl's request at which time she contacted her union representative about the situation. After a meeting with the assistant police chief, the employer again denied her request for compensatory time because the issue was not raised in a timely fashion. The union grieved this denial, requesting Stahl be paid overtime or granted compensatory time for the hours worked. This grievance was denied as the employer claimed it was untimely and subsequently claimed that Stahl violated work rules by studying at home without approval and began an internal investigation. A verbal warning for insubordination was ultimately issued to Stahl.

In May of 2010, the union filed a second grievance challenging the verbal warning. The grievance proceeded to arbitration where the arbitrator found the compensatory overtime grievance was not timely filed. However, the arbitrator found for the union on the disciplinary grievance. The submission of an overtime request did not rise to the level of insubordination or disobeying an order; Stahl was merely seeking reconsideration of the previous denial. The verbal warning was to be removed from Stahl's personnel file.

The same day the union filed the grievance regarding denial of Stahl's request for compensatory time, the employer sent a memorandum to the department asking if anyone was interested in working as an additional polygraph examiner. Following receipt of this memorandum, Stahl met with the assistant police chief who had directed the memo be sent to staff.

The ALJ dismissed the union's claim that the verbal reprimand issued to Stahl was motivated by anti-union animus, because the union conceded the issue was moot, as the verbal reprimand was already addressed. The ALJ then considered whether the memo soliciting employee interest in an additional polygraph examiner was done in retaliation to Stahl's attempt to exercise her contractual rights to seeking overtime compensation. The ALJ noted public employees are protected by Section 9 of the Act when acting in good faith they file a grievance issued on a contractual provision. Implicit or explicit threats to terminate employees, reduce their wages, or adversely change their working conditions if or because they have filed grievances or engaged in other types of activity protected by the Act violates Section 10(1)(a). The test of whether that provision is violated does not turn on the employer's motive for the proscribed conduct or the employee's subjective reactions to it, but rather whether the employer's actions tend to interfere with the free exercise of employee rights. The content of the employer's statement and the surrounding circumstances must be examined. The ALJ noted it was not until after the union filed a grievance that the employer declared it was initiating an investigation into Stahl's alleged insubordination. The commencement of this investigation was announced shortly after the memo was disseminated and after Stahl submitted her request for compensatory time. The ALJ concluded a reasonable employee would interpret the message as a direct response to Stahl's attempt to seek enforcement of her contractual claim to overtime compensation and an implied threat to retaliate against her if she continued to engage in protected conduct. The employer was ordered to cease and desist from interfering with restraining or coercing employees in the exercise of their right to engage in lawful concerted activities. A notice of wrongdoing was also required to be posted. No exceptions were filed in this matter and the Commission adopted the decision of the ALJ as its own. ■

ARBITRAL REINSTATEMENT WITHOUT BACK PAY: PRINCIPLED DECISION MAKING OR MERE SPLITTING OF THE BABY? (PART 2)

David Arm

This article looks at the "reinstatement with no back pay" remedy in labor arbitration, arguing that there often is no rationale for such awards. Part 2 begins with the final sentence of Part 1, corrected, and then compares the NLRB's approach to reinstatement remedies.

Under these facts it is difficult to conclude that the award of reinstatement with, de facto, a nine month suspension was anything other than a brazen case of splitting the baby with a thinly veiled rationale.

In *Edscha-Jackson and UAW, Local 670,* 120 LA 1377 (2005) the grievant signed a last chance agreement (LCA). The LCA stated that further violation of employer rules may result in discharge. It was undisputed that the grievant was later guilty of a rule violation by mislabeling product. However, another employee was guilty of same and was not disciplined. Therefore, the arbitrator relied on disparity of treatment to mitigate the discipline from discharge to reinstatement without back pay.

One can take issue with the arbitrator's conclusions that the LCA did not supplant the CBA "just cause" standard and that the disparity of treatment defense is availing to a grievant despite an LCA. Perhaps a more artfully drafted LCA would have resulted in a different award from the arbitrator. Nevertheless, the arbitrator provided some rationale for his award of reinstatement with no back pay. Still, should not the disparity defense have led to an award of reinstatement with full back pay as the fellow employee who was treated disparately was issued no discipline whatsoever by the employer?

In *ConocoPhillips and IUOE Local 351, 120 LA 1537* (2005) the grievant failed an alcohol test four years after failing previously. However, the CBA limited post-rehabilitation testing to three years. The arbitrator reinstated the grievant with no back pay. In doing so, he clearly decided to trump the labor contract with his own sense of justice. He wrote:

> At first glance the union's reaction to this grievance has appeal. Since the employer agreed to a three year testing window for all employees, it would appear W__'s grievance should be sustained. However, proper disposition of this dispute cannot be decided by mechanically applying the contract language because this case is not that simple—there's more involved here than just reading the contract language in a vacuum. At the same time, neither can the clear three year limit of the contract be ignored in deciding this grievance. As is often the case in grievances such as this, a reasonable resolution is to be found only by weighing all relevant factors, with the contract itself being a paramount, but not controlling, consideration.

The arbitrator got it exactly wrong. The contract is and should be controlling, when unambiguous, and not the arbitrator's

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ARBITRAL REINSTATEMENT WITHOUT BACK PAY

(Continued from Page 21)

sense of what is just. If the employer was concerned about employees testing positive at any time in the future following rehabilitation it was incumbent upon it to attempt to rewrite its labor contract.

In a case[10] involving an employee who was discharged for engaging in a strike, the arbitrator concluded that the grievant was not involved in a strike. Had the grievant been involved in a strike the arbitrator conceded that the CBA, by its terms, would have divested the arbitrator of the ability to second guess the discipline imposed. To this extent the arbitrator applied reason. He then went on to state that in light of his conclusion, ordinary principles of just cause apply and progressive discipline is in order. Thus, his award was to issue, in explicit terms, a nine month suspension to the grievant for his "impulsiveness" and "poor judgment" given "all the circumstances" which are left unexplained. He states that a warning is not sufficient. Was there no level of discipline between a warning and a nine month suspension which would have been appropriately "progressive?" Did not the arbitrator do in a back door fashion exactly that which he stated he was not empowered to do i.e. to second guess the discipline imposed?

In yet another case where the arbitrator stretches to award reinstatement without back pay, *Cutrale Citrus Juices USA, INC. and IBT, Local 79,* 118 LA 1691 (2003), the arbitrator concedes that there was cause for discharge. Indeed the arbitrator even wrote: "[T]ermination of the grievant is upheld." However, the employer did not conduct a proper investigatory interview prior to discharge. Thus, the arbitrator awarded reinstatement with no back pay. Logically, a contrary award would have made more sense i.e. there was cause therefore the discharge stands. However, as the employee was denied full due process he is awarded a monetary sum to redress the wrong.[11]

Adding to the litany of arbitral awards awarding reinstatement without back pay sans a compelling rationale is *Tekni-Plex and USWA Local 673-l*, 118 LA 1524 (2003). In that case the arbitrator found that the employer did not prove that the grievant sold marijuana at work. The arbitrator further found that the employer's proof that the grievant smoked marijuana at work was limited to the grievant's admission. The arbitrator awarded reinstatement with no back pay (a de facto 10 month suspension). The arbitrator further stated that previously the rule against smoking marijuana had not been enforced in that it lead at most to a one week suspension but not discharge. Rationally, the arbitrator should have awarded reinstatement with full back pay if she did not believe the grievant's admission.

Yet, the decision states that the grievant admitted to smoking at work (50-75 times) at the hearing! The only rational award would then have been to reduce the discharge to a one week suspension so that the grievant did not suffer a penalty disparate from that other employees had been assessed. Had the employer, ab initio, suspended the grievant for 10 months the same arbitrator would surely have found "disparate treatment" and reduced the 10 month suspension.

In perhaps the most irrational decision of all, the arbitrator in *United Parcel Service and IBT Local 959,* 118 LA 1127 (2003) awarded reinstatement because the employer failed to comply with the time requirements regarding notification of discharge in the labor contract. But, because the grievant was found to be plainly guilty of assaulting a supervisor, no back pay was awarded. The arbitrator relied upon the following language in the contract:

> Within ten (10) days of the occurrence of the alleged cause for discharge or suspension, the Employer shall give written notice by certified mail to the employee and to the Local Union of its decision to discharge or suspend the employee, and such notice shall set forth the reason or reasons for the discharge or suspension. If the Employer fails to give such written notice within the specified ten (10) day period, the right to discharge or suspend for that particular reason shall be waived.

As can be seen, the time limit applied to notification by the employer of either discharge or suspension. But, the arbitrator ignored the obvious absurdity of his decision in issuing an award which, impliedly, suggested that it was acceptable to saddle the employee with a seven month suspension but not discharge where, in either event, the gravamen of the employer's error was in not complying with the contractual time limits on notification. Here, too, had the employer issued, ab initio, a seven month suspension the arbitrator would almost certainly have set the discipline aside due to the employer's failure to notify the grievant timely.

Perhaps no less strange is the award in *Georgia-Pacific Corporation and PACE Local 6-0323* , 118 LA 1079 (2003). The employee was discharged for absenteeism. The arbitrator found that two days counted against the grievant were FMLA qualifying. Yet, he also found that grievant did not properly inform the employer, pursuant to FMLA regulations, of his need for FMLA leave on the two days in question. Thus, the arbitrator awarded reinstatement with no back pay stating:

> As the Company had no way of knowing that the August 27 and August 28 absences were FMLA-related because the grievant did not fulfill the expectation to provide the information, the Company should not suffer a financial penalty for not properly considering those absences as FMLA leave. Any back pay would constitute such a penalty. Accordingly, the award in this case will be a reinstatement without back pay.

Essentially, the arbitrator makes the impossible logical proposition of both "A" and "not A." In other words, he says the days in question should have counted as FMLA leave but also says that legally the days do not count under the FMLA as the employee did not comport with the regulatory requirements regarding notice to the employer. In a case where the DOL or a court would certainly have found no FMLA violation by the employer, the arbitrator simply "split the baby."

In *Mansfield Plumbing Products, Inc. and IBT, Local 40*, 117 LA 400 (2002) the arbitrator found that the employer violated its drug policy when it tested the grievant. Thus, he ordered reinstatement. His justification for not awarding back pay is worded thusly:

> Notwithstanding the foregoing, it must be recognized that the Grievant has an admitted drug problem that he failed to address until his discharge. The Company has the right to insure that its workplace is free from such influences. To give the Grievant full compensation during his recovery period would be unfair to the Company, its work environment, and the remainder of its employees. Thus, although the Company acted wrong [sic], it was more an overreaction than an act of capriciousness. Since the Company's overreaction is balanced by the need to place some blame on the Grievant for his actions, then back pay is not justified.

The rationale is almost pathetic. It smacks boldly of "splitting the baby" almost without rationale. It might have made more sense for the arbitrator to deny back pay on the rationale that the grievant was unavailable for work during the recovery period (see discussion of NLRB decisions below).

In *Quaker Oats Company and RWDSU, Local 125,* 116 LA 211 (2001) the grievant harassed supervisors by sending unwanted mailings to their homes. The arbitrator found almost without rationale that there was just cause for discipline but not discharge. In light of the grievant's clean 12 year record, the arbitrator awarded reinstatement with no back pay. This is a simple case where had the arbitrator reduced the discipline to, say, a 30 day suspension the rationale would have been understandable. Why this case should result in a de facto 16 month suspension is completely unclear.

In *Georgia-Pacific Corporation and GCIU, Local 235-M*, 115 LA 799 (2001) the grievant threatened a fellow employee with a gun. The arbitrator found no just cause because two key witnesses did not provide in person testimony. In what can only be described as a bizarre conclusion, the arbitrator awarded reinstatement with no back pay amounting to an 8 month suspension. Apparently, the arbitrator believed that hearsay evidence is sufficient to make out just cause for an 8 month suspension but not for discharge. One can only ask, facetiously, how long a suspension is justified by mere hearsay testimony?

Finally, and perhaps mercifully, is *Spectacor and SEIU, Local 188,* 116 LA 1278 (2001). The arbitrator wrote:

> On the evidence presented I find as a fact that Grievant did not properly perform the managerial duties that are required of any employee assigned to the lead position. The job duties the Employer requires of the lead were not performed with competence by the Grievant. Management repeatedly imposed disciplinary penalties but they failed to achieve the desired results…After a careful evaluation of all credible testimony, the Collective Bargaining Agreement and all exhibits I find as a fact that there was insufficient proof of deliberate improper conduct to constitute just cause for termination….Under the unique circumstances of this case, no back pay will be required.

The arbitrator took a garden variety progressive discipline case for poor job performance and turned it on its head. He found that there was no "deliberate improper conduct" by the grievant. However, this is not necessary nor is it often the case when an employee simply cannot do the job. Surely, the employee could have used his seniority to bid into another less demanding position. Or, his union could have effectuated a negotiated settlement prior to arbitration allowing the employee to save his job by working in another classification. Instead of calling it what it is the arbitrator finds that in the "unique circumstances" of the case no back pay is indicated. But, there is nothing unique about the case. In the American workplace employees are daily found to be doing less than an acceptable job without "improper conduct" on their part. Either there was just cause for discipline or there was not. The arbitrator finds none but instead of awarding back pay he determines, without citing any contractual support, that it was proper for the employer to remove the employee from his job classification.

C. Decisions with reasonable rationale

Fortunately, there are a modicum of reported decisions awarding reinstatement with no back pay but supplying at least an arguably persuasive rationale for the award. These decisions are catalogued below by the type of rationale they employ.

1. Reinstatement to sensitive position

In *AT&T Midwest and IBEW, Local Union 21, 126 LA 294* (2009) the grievant was charged with violating a rule requiring disclosure of criminal convictions. However, the arbitrator found that the rule was promulgated after the grievant's conviction and that the rule was not made retroactive. Thus, he ordered reinstatement. Separately, he considered the issue of remedy and wrote "[T]he standard remedy in a discharge case is reinstatement to the grievant's former position with full seniority and full back pay." In light of the seriousness of the conviction (for embezzlement) and the sensitive nature of the grievant's position (access to consumer credit information which could result in a claim against the employer for negligent retention), the arbitrator denied full back pay. Moreover, he allowed the employer to place restrictions on the job to which the employee would be reinstated. One can argue with the arbitrator's logic but, in this case, at least he provided a rationale for the remedy he imposed.

2. Lengthy suspension <u>is</u> the appropriate penalty

An employer discharged its employee for sleeping on the job. The arbitrator carefully distinguished the criteria for "intentional" sleeping on the job (often referred to as "nesting") versus "unintentional" sleeping on the job. He concluded that in the instant case the sleeping was unintentional. He found that only intentional sleeping may result in discharge and that a long term suspension is appropriate for unintentional sleeping. One may disagree with the arbitrator's rationale but there is no disagreement that a careful analysis and rationale was made by the arbitrator in reaching his result.[12]

A pilot employee was discharged for calling a fellow employee a "fag—-" in violation of a rule against hate speech. The arbitrator found that although the speech was not "hate speech" it was still subject to the penalty of discharge. However, the arbitrator concluded that "the appropriate penalty is a lengthy suspension."[13] Although one might take issue with the arbitrator's conclusion that the speech did not come within the proscription of the rule which in turn may lead to discharge but does not in this case, the arbitrator is to be credited with flatly stating that a lengthy suspension (here, 13 months) is the appropriate level of discipline. Minimally, this gives the employer future direction. It suggests that, indeed, there may be times when a <u>lengthy</u> suspension is in order and will be upheld in arbitration. Conversely, many arbitral decisions simply award reinstatement with no back pay and never flatly state that a lengthy suspension is, ab initio, a proper level of discipline.

— END NOTES —

10 *WTRF-TV and NABET-CWA, Local 212*, 119 LA 92 (2003)

11 Even this might be more than is required. Cf. *Foamade Industries and UNITE*, 119 LA 961 (2004) where the arbitrator wrote:

> The Union has raised an important issue about the lack of an investigative interview. However, as a general rule it is not absolutely required. It is not required generally as a part of industrial due process. Even if it was required, there is the question of whether a procedural error should void the disciplinary decision. The employer's failure to ascertain the facts before imposing discipline leaves it open to surprise at the arbitration, particularly if the Union presents a surprise affirmative defense. On the other hand, the arbitration process, which is adversarial, is the one best suited to fully develop the facts and all relevant considerations.

12 *BASF and International Chemical Workers Local 73C*, 128 LA 1233 (2011)

13 *American Airlines, Inc. and Allied Pilots Association*, 125 LA 1025 (2008)

PART 3 WILL APPEAR IN THE NEXT ISSUE OF *LAWNOTES*

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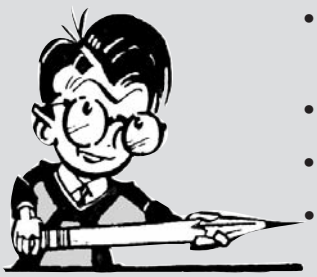

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