LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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USE OF COLLECTIVE BARGAINING HISTORY IN ARBITRATION

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It is somewhat ironic that while all collective bargaining agreements ("CBAs") have their genesis in bargaining history, the origins and evolution of a collective bargaining provision is not often offered evidence in an arbitration hearing. As an advocate for nearly 40 years, I seldom offered such testimony. That may emanate from the fact that 70% of my cases were discharge or discipline matters under just cause provisions and bargaining history is usually of little significance. This may be due to a variety of other factors, viz: the authors are not available to testify; the origins are forgotten by succeeding negotiators on both sides of the table; bargaining notes, much less minutes, were not kept or are indiscernible — the sum of which is that the collective history is lost. With that lost history, any chance of demonstrating the real intent of the parties or disabusing an arbitrator of what appears to be plain meaning of a CBA provision evaporates as well.

This is not a law review article. These are observations from four decades of negotiating labor agreements for both management and labor. That was in the setting of where the "sausage was being made" and thus these are reflections not from the flight deck but the bilge deck. In that connection, fine points of evidence such as relevancy, admissibility, hearsay, attorney-client and work product privileges, and parol evidence, all relevant in the admission of bargaining history, are not the focus.[1] Rather, the practical aspects of how CBAs are negotiated and how arbitrators may consider such recorded labor history is the focal point.

For an overview, we start with the premise that the art of bargaining a labor contract is usually far different than the negotiation of a commercial contract. Most often, significant commercial contracts are hammered out by lawyers; CBAs are sometimes negotiated by lawyers (some very sophisticated, some not), union business agents (skilled and not), and consultants and HR people (of all skill levels). Likewise the records these negotiators keep run the gamut from a complete record (what proposals were made, by whom, when, what dialogue occurred, and what resolution was reached on an issue) to the pitiful. The latter case is exemplified by sketchy notes at best, little noting of who said what, conclusory statements of what was agreed to or what was intended, vague memories without documents to refresh and, of course, negotiations with no notes at all. Perhaps this is summed up best by observing that no one on the negotiating team was charged with being the historian or docent when that history becomes important to their arbitration case.[2]

Quality bargaining history testimony is the product of a good negotiator (or bargaining committee) *and* the careful recording in an orderly fashion of the bargaining intercourse. An experienced arbitrator will nearly always be able to discern a less skilled negotiator and/or inadequate memorialization and preservation of the pertinent history. To put it another way, a less skilled party spokesperson who testifies is greatly aided by the accomplished archivist recording his dialogue; conversely a very skilled negotiator is a marginal witness without a first rate set of notes. It's critical to note that neither the witness or the documents standing alone are worth much; in combination they can be compelling or conclusive evidence.

The usefulness of bargaining history can arise in several contexts. It is generally recognized that "arbitrators seek to interpret collective agreements to reflect the intent of the parties.[3] Justice Holmes (before his elevation) put it succinctly: "It is not an adequate discharge of duty for courts to say: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" *Johnson v. United States*, 103 Fed. 30, 32 (1st Cir. 1908). No less should be said of the arbitration forum. What a party is "driving at" is extensively outlined in *Elkouri*, pp. 9-21 through 9-56.

The purpose here is to provide some ground level guidance as to the use of bargaining history, where appropriate, in arriving at a reasoned decision and award. In doing this, the focus is on what types of bargaining history evidence best assists an arbitrator in fashioning the award. In another forum, the NLRB, bargaining history is critical to establish whether a CBA even exists. See *MGM Grand Detroit, LLC*, 7 RD 003295 (7/30/2001) (finding no contract bar to a decertification election even though economic and non-economic provisions of a proffered CBA had been ratified and there was a formal, but unsigned CBA, subject only to typographical corrections). *See also Appalachian Shale*, 121 NLRB 1160, 42 LRRM 1506 (1958) (informal documents [TA's] must be signed or initialed by all parties to constitute a bar and even where signed is not a bar where the CBA required ratification by its express terms!).

Assuming that the history is intact and available, what are the components or underlayment of a contract provision at issue? Some of the constituent pieces of evidence of a contract provision's mooring are described below, not in order of importance or priority:

1. Minutes of a collective bargaining session would obviously be a gold mine of what the parties agreed to and are probably the best evidence as to the agreements reached. They are seldom kept, however, in most negotiations except the most sophisticated. They can be thought to undercut the continuity and spontaneity of negotiations unless they are quietly and unnoticeably recorded by someone designated only for that task.

2. Notes of bargaining. Of course these can range from almost a verbatim account of bargaining discussions to mere scraps of "yes," "no," "maybe," "hold," etc. Standing alone, however, such notes are virtually worthless - - they come to life when the author can interpret them with all of the symbols, abbreviations, and distinct signs indicating agreement on an issue, discussion of an issue, and circumstances anticipated by the proposed agreement on the issue or provision.[4] The value of such notes are enhanced when they: (a) contain

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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***

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the names of all the negotiating team members; (b) contain precise dates of negotiations and specific times events took place (e.g., time of proposal (written or oral) exchange, start and stop times, time an agreement was reached); (c) disclose who was talking and responding; (d) capture the parties' positions and rationale; (e) note how specific tentative agreements ("TAs") were reached (e.g., initialed by parties, "ok" in the margin of proposed language, or agreed orally and actual language to be memorialized and initialed by the parties at the next session, or each party indicating agreement in their own bargaining notes subject to preparation of a revised agreement or "highlights" to be presented at a union ratification meeting.)

Without going into detail as to each of these, probably the most authoritative source of an agreement reached is the initialing of the proposal by each party's spokesperson (with date and time) or the precise language presented for the parties' signature or initials at that or the next bargaining session (often now done concurrently with bargaining with the use of the laptop).

3. Laptop computer generated accounts taken during the bargaining sessions, while somewhat distractive to the negotiators, are nevertheless another form of decent evidence made better with the testimony of its author. I would tend to think that the hand written account carries slightly more authenticity than computer notes subject to all of the vicissitudes of that technology.[5]

4. Another good source for bargaining history are documents which reflect what was ratified (which usually only formally takes place on the union side [with a possible exception for multi-employer CBAs]). The so-called Highlights of the Agreement or Summary of Tentative Agreements reached is usually a written document handed out in advance of ratification, sometimes as much as a week in advance, so that the bargaining unit can understand what they are going to be voting on and raise any questions they may have. Such a document runs the gamut from a general recitation in layman's terms of what was accomplished in negotiations to a word for word recital on the precise terms or language and economics that form the deal, and sometimes a combination of both.[6] Again, if the ratified document is the product of a bilateral effort, it's a compelling piece of evidence. If it's unilateral (where one party prepares its own "highlights" or "summary") it is of marginal value unless corroborated by other evidence.

5. Another venue for bargaining history is the union ratification meeting. This is but one example of where a last minute agreement on a bargained item arose as an outgrowth of a question raised at a union ratification meeting. Not atypically, a union member raises a question regarding one of the TAs or "highlighted" bargaining agreement provisions. The union representative gives his or her best answer knowing that particular issue wasn't specifically

discussed at the bargaining table, but they believe it's covered by a provision that was more generic in nature. The union representative subsequently calls his counterpart for the employer to affirm his understanding either during the ratification sometimes or afterwards. That is solid evidence of the deal if the employer representative agrees or doesn't testify. If he disagrees and the highlighted generic language appears in the final contract because the parties couldn't adjust their differences, then the arbitrator may be left with "there was no meeting of the minds" when the precise issue presents itself in an arbitration case. Most times, fortunately, such differences are resolved by the parties in their final contract language so an issue isn't left hanging.

6. Certainly understandings and agreements reached by the parties' chief representatives (usually spokespersons) away from the bargaining table are entitled to be admitted, but such evidence may be less compelling, unless in writing, than agreements and understandings reached at the table with the full bargaining committee present and the notation of these matters in the notes or minutes (or corroborated by other bargaining team members' testimony). In addition, written notes illustrating the mutual assent (even on one's personal calendar) can be persuasive.

7. Certain other forms of evidence of events away from the bargaining table may be of value for purposes of background, context, and understanding of what was at issue. Telephone calls, e-mails, faxes, texts, and the like are the grist for such communications. One example might suffice. It is not unusual that just before (or even during) a union ratification meeting the union business agent or international representative encounters a question that has come up or is about to come up in the ratification, the answer to which he is not confident of. Thus, the inevitable phone call from the union representative to the employer's spokesperson to iron out that issue. Such a verbal discussion is oftentimes not memorialized but may find its way into the final agreement, or at least be understood (intent) that the situation discussed is covered by the generic language ratified.

8. Another consideration in terms of useful bargaining history, at least with regard to economic items, is whether the employer (or union less often) can present evidence that it costed out the items sought in bargaining and either did or did not include the cost in the economic package offered. Let's take a couple of illustrations.

   a. First, a simple example concerning a contract provision that "there will be a uniform and cleaning allowance of $500." Surely the bargaining history will provide the context of what was intended. Several questions arise where a police clerk is requesting the allowance and it winds up in arbitration. Is it an annual allowance? Does it apply to all employees or only those wearing a uniform? What is meant by "uniform" — does it include casually neat clothing that is required to be worn, so-called business attire? Is an employee not required to wear any prescribed uniform or clothing entitled to $500 for cleaning only? Is $500 an entitlement or was it anticipated that it only related to dry cleaning, commercial washing, washing at home where expense receipts are provided? How did the employer cost out the benefit? Certainly the bargaining history will furnish, perhaps not all, but many of the answers to the above questions and thereby provide a path to a reasoned award.

   b. Take a more complicated example as follows: "Retirees will be provided with health insurance that is the same as active employees." While cases involving retiree insurance are usually litigated in the courts because unions do not represent retirees, there are arbitration cases.[7] Suppose, as is often the case, it is 30 years after the language was negotiated and the employer, through bargaining (including perhaps unilateral implementation of a final offer after a true impasse) has substantially (or modestly) altered the retiree insurance provision. Such a situation is the penultimate case where bargaining history will play a central role in reaching a reasoned arbitral decision and award.

      The collective bargaining history for such a provision is a veritable gold mine, a treasure trove of information (and hopefully evidence) on what the parties said and contemplated. One might find some of the original drafters of the original language, their notes, proposals made, what employees (and their spouses or widows) were told by HR and other employer representatives when they were about to retire, had retired, or passed away.[8] Costing of such retiree insurance proposals is also important evidence as are the letters to retirees (and/or spouses), written information published by the employer on benefits (in later years in SPDs!), interim employer changes in retiree health insurance (with or without union challenge), and of course all of the bargaining subsequent to the original benefit creation (as health insurance premiums were rising from a mere pittance – supplementing the 1965 creation of Medicare – to a benefit of great cost and in the national spotlight). Just from 1965 to 2000 one would likely encounter 12 three-year contracts, 12 sets of bargaining notes, numerous bargaining team members as potential witnesses, perhaps 12 to as many as 35 separate CBA insurance agreements and accompanying insurance policies. All of this would wind up in an arbitrator's lap where the collective bargaining agreement is less than precise in providing for "retiree health insurance" and saying little more. Is it for the retiree's life, is it only for the life of the CBA, do premium costs matter, what about a surviving spouse – does a 35 year course of conduct have any bearing? Some courts (Sixth Circuit) have said merely the use of the word "retiree" connotes a status benefit that is vested and cannot be eliminated or modified without mutual agreement.[9] There are other courts of an opposite or different view.[10]

      It is not likely however that an arbitrator is going to arrive at his or her own award based solely on court precedent, but rather rely heavily on the collective bargaining agreement in front of him and the origins and history surrounding the provision for health care insurance for retirees. At least the arbitrator in such cases will have plenty to consider since such benefits are extremely

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costly and respective counsel turn every stone to support their respective positions.

Advances in technology as well as negotiations outside the traditional bargaining setting raise new challenges in an arbitrator's evaluation of bargaining history. Voice mail, texting, and e-mail may be implicated in reaching an agreement on a particular CBA provision. Sometimes these mediums are used concurrently in the midst of negotiations at the table and sometimes at the tail end to wrap up the details, clarify some issues, or simply to confirm what the understanding or deal was. While it must be recognized that these are rather "cheap" forms of communication (often filled with all kinds of shortcuts and lack of attention to detail), that is not an impediment to admitting such evidence perhaps with the usual caveat "admitted for what it's worth."

As with bargaining notes, an e-mail or transcribed voice mail is of marginal value without its author (or e-mail recipient). Particularly where there is a string of e-mails it is likely to be virtually impossible to discern the agreement or intent without the accompanying oral testimony of the parties.

While written proposals, counter proposals, package proposals, highlights, and bargaining notes or minutes furnish much of the cannon fodder that eventually ends up in a CBA, oftentimes verbal agreements and clarifications on language can be just as important. It is often said that language in a CBA can't anticipate all situations intended to be covered by language sometimes or often generic in nature. Thus the negotiation dialogue on what the parties were addressing and resolving is good evidence. Even if the notes don't capture the dialogue properly, the oral exchanges can, when the negotiators testify about the negotiation events.[11]

Recall that 80-90% of most negotiation dialogue is not testimony relevant to the agreement reached or even necessarily the intent. Oftentimes it is merely banter, what ifs, maybes, what makes sense, what doesn't. This communication is nowhere near an offer and an acceptance and is of limited use except as background, but that's about all. Recall too that matters get complicated since most agreements that are reached are tentative on specific items until agreement is reached on the total contract. Thus, tentative agreements are only of value where they are not subsequently altered or are ratified as part of the package. Finally, "a party's subjective view of the meaning of an agreement isn't really bargaining 'history' unless it has been communicated to the other side, preferably at the main table, but at least at a sidebar where responsible representatives of both parties can hear it." Email comment from Ted St. Antoine, February 24, 2013.

Bargaining history well preserved with the witnesses who made such history are invaluable parts of any arbitration case where such history illuminates the understandings reached and the intent in reaching those agreements. A party that has preserved this archeology has the upper hand in arbitration, particularly where the other party has not thought to keep careful track of what has transpired in the negotiations. No one can do an adequate job of testifying without notes or minutes, proposals, and the dialogue in the negotiations having been carefully preserved, particularly where a contract provision at issue may have originated several contracts ago.[12] Perhaps with all of the technology and storage facilities now available on earth and in the clouds, technology furnishes a much greater opportunity to preserve the bargaining history.

It seems that in nearly every important U.S. Supreme Court decision, there is a long intonation of the history of the precise issue before the Court brought about because the Constitution or statute at issue isn't self-evident, or plain on its face. In many arbitration cases, the relevant collective bargaining history would seem to be no less important. A party who can articulate that history and have it confirmed by a careful recording of the bargaining ongoings has a major advantage in proving its case.

—END NOTES—

1 Obviously, attorney-client privilege is in play if counsel is involved in keeping the notes or it is done at his direction. This article is about a party's own preserved documents and testimony, not the opposing party's. In any event it is doubtful (but not well settled arbitral or NLRB precedent) a party is entitled to the other party's bargaining notes and any other negotiation documents. Attempts to subpoena such possible evidence have not been well received. *Champ Corp*. 291 NLRB No. 119, 131 LRRM 1555 (1988) (ALJ properly revoked employer subpoena seeking union notes, memoranda, transcripts, and other writings from contract negotiations citing "an unwarranted injury to the collective bargaining process.") *Berbiglia, Inc*., 233 NLRB No. 193, 97 LRRM 1369 (1977) (Employer not entitled to subpoena to examine union records including communications between the union and its members as "subversive of collective bargaining.") *But see American Baptist Homes of the West*, 359 NLRB No. 46 (2012) (holding that an employer is obligated to provide witness statements to a union representing a disciplined employee [on the basis a union's need for the statements outweighs the employer's confidentiality interests]). The Board's *Anheuser-Bush*, 237 NLRB No. 982, decision was thus overruled. Until this decision, I doubt most arbitrators would grant any requests for the bargaining notes of the opposing party much less make an adverse inference if a party did not produce them since they prefer to avoid discovery matters, leaving it to the NLRB to address. However, this new NLRB position could well cause some arbitrators to take on the issue in arbitration since the NLRB already defers certain ULP's to an arbitrator along with the claimed CBA violations.

2 As one might expect, there is no uniform or commonly accepted way that parties keep their bargaining history. A sample of four prominent unions illustrates the point. By way of example only, four major unions (UAW, IAM, Steelworkers, MEA) were surveyed regarding their note keeping. The methods used were:

1. Mutually designated note taker, sometimes typed and corrected;
2. Local President takes notes;
3. School Board takes notes and shares with union for corrections;
4. Court reporter and transcript for national negotiations;
5. Local Secretary takes notes on a computer;
6. Jointly paid for note taker.

One union at the national level has a CBA provision prohibiting the use of legislative history! (Steelworker's) — no doubt true believers in the plain meaning school of arbitral thinking. See "Plain Meaning" Rule, *Elkouri, How Arbitration Works*, 9-8 — 9-12 (7th Ed, May Ed. 2012) [hereinafter *Elkouri*]. Generally speaking, the more prominent the negotiations, the more elaborate the recordkeeping. One union, in its national negotiations, reported it kept "careful notes, copies of proposals and tentative agreements, information requests, information shared at the table, responses to information requests, proposal tracking sheets, fliers and newsletters given to members, etc." Finally, recall that many Teamster contracts use a Joint Board to resolve grievances, Boards that are often not enamored with the niceties of bargaining history.

3 *Elkouri*, *supra*, (5th Ed, Volz & Goggin Eds. 1997)

4 As negotiating spokesperson for a party, my notes would be dreadful except perhaps if I copied some exact language upon which agreement was reached. In all cases I designated another bargaining team member to take notes since I couldn't analyze, talk, and listen to the other side all the while trying to capture what was transpiring.

5 Brief mention needs to be made of bargaining history testimony that is not helpful and of very marginal value. The following are some examples of testimony regarding bargaining history with little value:

"I or the committee understood that was the deal or agreement." Not helpful unless conveyed to the other side.

"We clearly understood when we left the bargaining table that the effective date of the contract was ." Only helpful if the "we" refers to both parties and there are underlying statements/documents to support the statement.

"The grievance was dropped as part of the final contract settlement." Evidence would be necessary in that case to show how that agreement was memorialized – either by the grievance being signed off on, withdrawn, or there was some quid pro quo clearly tied to the grievance withdrawal that can be established.

6 Typically in the contracts I negotiated I was the only lawyer involved at the bargaining table and thus the task of preparing the "Highlights" devolved to me. While the union almost always ceded that scrivener work, they also always reviewed my draft word for word for accuracy so they had a clear idea of how to describe the settlement to a room full of voters who are very interested in how their work lives would change - - - and more than willing to pepper a union representative with questions. I always tried to be as dead accurate as possible in memorializing the Highlights since any errors, mischaracterizations, or agreements left out would only raise suspicions or doubts about other faults in the document which is not something to irritate a union representative or committee with when they are endeavoring to get a positive ratification vote.

7 The parties could stipulate to arbitrate (perhaps where employees retire during the term of a CBA). This may be less daunting than facing a 5 year federal court and appeal battle and one gets an arbitrator who knows more about these matters than a judge. In another scenario, the CBA itself could provide that vested benefits are within the purview of the arbitrator. *Boeing Co. v UAW*, 600 F.2d 722 (7th Cir. 2010) (affirming arbitration award in union's favor which held the employer was required to pay lifetime medical benefits to early retirees under the CBA).

8 For an extensive discussion of such extrinsic evidence (much like an arbitrator would consider and opine), see *Cole v Arvin Meritor, Inc*., 516 F.Supp. 2d 850 (2005) (including 14 examples of written lifetime admissions, *Id*. at 858-59; four examples of "for life" prescription cards, *Id*. at 859; 13 examples of other written assurances, *Id*., at 860-61; and 14 examples of oral "lifetime" statements, *Id*. at 861-62.

9 *UAW v. Yard-man*, 716 F.2d 1976 (6th Cir. 1983).

10 *Int'l Chem. Workers Union Council v. PPG Indus. Inc.*, 236 Fed. App'x. 789 (3rd Cir. May 17, 2007) (in affirming SJ for the employer, held that language stating retiree medical benefits "will continue" was not sufficient to show an intent to vest); *Nichols v. Alcatel USA, Inc.*, 352 F.3d 364 (5th Cir. 2008) (denial of preliminary injunction against employer since CBA lacked affirmative language suggesting an intent to vest benefits and presence of a durational clause limiting the retiree medical benefits to the term of the agreement).

11 See the excellent discussion of the use of bargaining history with regard to proposals made, withdrawn, failing to rebut testimony of the other party with regard to bargaining history, "shorthand" notes backed up a witness's sworn testimony, handouts prepared at ratification meetings, and similar pieces of bargaining history and its use in Elkouri, p. 9-26 — 9-32.

12 To illustrate the point, in a recent case a union made a bargaining proposal to include certain ("hourly") employees, who had 4 years earlier voted to be unionized, in a larger existing bargaining unit. The union merely proposed to delete their exclusion contained in the recognition clause for the larger unit. The bargaining history, unrefuted, was that the employer wanted to know why the union sought to include these separate unit employees. The union replied that they wanted these previously excluded employees to have seniority rights to bid on jobs (so they would have preference over hires from the street). The employer ultimately agreed and the following language was incorporated in the CBA: "The only benefit hourly employees [the newly added group of employees] shall be eligible to receive and accumulate is seniority based on the number of hours worked." This language, at the employer's insistence, was placed both in a benefits section of the CBA and in the Recognition Clause definition section of "hourly employees". One of these hourly employees was subsequently discharged and the union sought to arbitrate on the basis she was entitled to the just cause protection of the CBA. Without the aforementioned bargaining history there would be little doubt that the hourly employee, having been accorded seniority was so entitled. The bargaining history, however, was that the above clause was inserted only to enable hourly employees to use their seniority to bid on posted jobs. The employer's chief bargainer (HR Director) who offered the testimony also produced her notes (date, time and participants) which corroborated her oral testimony. Without such oral testimony and notes there would have been no basis to deny the grievant was entitled to a further hearing on whether there was just cause for the termination. While there was testimony that a half dozen other terminations of hourly employees had taken place under the above provision in the CBA without a grievance being filed I found that evidence inconclusive and relied solely on the bargaining history to deny the grievance as not cognizable under the CBA. The union representative at the bargaining table when the matter was negotiated testified at the arbitration hearing but did not refute the HR Director's testimony.. ■

STATE BAR COMMITTEE COMMENTS ON THE PROPOSED FEDERAL RULES AMENDMENTS

Michelle C. Harrell
Chair, State Bar of Michigan Standing Committee on the United States Courts

The State Bar of Michigan Standing Committee on the United States Courts, on February 11, 2014, presented comments to the Committee on Rules of Practice and procedure of the United States Courts, addressing the proposed amendments to Federal Rules of Civil Procedure 4, 16, 26, 30, 31, 33, 34, 36, and 37.[1]

Rules 4 and 16

The Committee concurs with the proposed revisions to Rules 4 and, 16, both of which are designed primarily to eliminate delay at the outset of the litigation. Requiring that service of the summons and complaint take place within 60 days in most cases makes excellent sense, as it is rarely necessary for service to take longer than that. Advancing the deadline for issuance of the initial scheduling order is also worthwhile in order to promote progress earlier in the litigation. The Committee also agrees with the recommendation that the initial pretrial conference be conducted in person, and hopes that more judges will see the wisdom in personally conducting those conferences, rather than leaving them to their staff.

Rules 26

Rule 26 (b) (1) proposes to distinguish or identify a party's ability to obtain discovery based on the "proportional needs of the case, the amount in controversy, the importance of the issues, the parties' resources, and the burden or expense on the party's ability to produce the requested discovery." The Committee concurs with the establishment of this standard. The Committee disagrees, however, with the proposed remedy for discovery requests found not to be "proportional." In the Committee's view, if the burdened party can establish that a request would be unduly burdensome to that party financially, the Court should not simply forbid the discovery at issue. Rather, an approach similar to that used by Rule 26(c) for protective orders would be more appropriate, thus giving the Court the discretion to forbid the requested discovery or to prescribe certain conditions under which the discovery may proceed. One such condition could be that the requesting party may have certain discovery only upon agreeing to pay some or all of the cost of producing it. The parties should be responsible for raising this issue with the court at the earliest practicable opportunity to resolve the question of which party may be financially responsible for discovery claimed by a party to be burdensome.

Rules 30 and 31

The Committee opposes the proposed changes to Rules 30 and 31. The Rules' proposed presumptive limit of five depositions and 6 hours per deposition unduly, and unnecessarily, restricts the number of depositions and their duration. It is the opinion of the Committee that there is no current need to reduce the number of depositions and/or their duration. The Committee believes that the appropriate, and fully adequate, means of combatting potential discovery abuse in this area is through the entry of protective orders, or through the procedure available under the revised Rule 26.

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STATE BAR COMMITTEE COMMENTS ON THE PROPOSED FEDERAL RULES AMENDMENT

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Rules 33

The Committee opposes the proposed amendment to Rule 33, which would reduce the presumptive limit on interrogatories from 25 to 15. The Committee believes that the 1993 amendment establishing a presumptive limit of 25 interrogatories, including discrete subparts, was salutary, but sees no reason to further tinker with the limits. If discovery abuse in this area continues - which the Committee is not convinced is the case - the more appropriate means of combatting that abuse is the entry of a protective order or, in the right case, a limiting order during the initial pretrial conference.

Rules 34

The Committee concurs with the proposed amendments to Rule 34. The revisions recognize that few inspections of documents now take place, but that instead copies of documents, either paper or electronic, are provided. Clarifying that production of copies should take place on the same schedule as inspections is appropriate. Also appropriate is the requirement that objections be stated with specificity, as opposed to the boilerplate serial objections that often are put forth, and that the responding party delineate which, if any, responsive documents are being withheld based on any objections.

Rules 36

The Committee opposes the proposed changes to Rule 36. While the current Rule 33 presumptive limit on interrogatories works well to prevent discovery abuses, requests to admit are quite different. As the Rules Committee observed in its comments, a request to admit can be a device used to frame the issues even more directly than contention interrogatories. The consensus of the Committee is that requests to admit propounded pursuant to Rule 36 are not prone to abuse. Moreover, for requests to admit to be effective in attempting to resolve and limit facts, the application of law to fact, or opinions about either, in most instances, multiple discrete requests are required in order to avoid objections and achieve the goal of obtaining substantive responses. Consequently, imposing a presumptive limit of 25 requests to admit undermines the effectiveness of this discovery tool.

The proposed amendments to Rule 36 also carve out an exception regarding requests to admit as to the genuineness of documents. In the Committee's view, this invites abuse in the form of "hybrid" requests that go beyond simply requesting an admission as to the genuineness of documents to also include requests relating to the substantive content of the documents as well.

All told, the Committee is of the opinion that the proposed amendments to Rule 36 are not necessary and not carefully crafted to achieve their stated goal.

Rules 37

The Committee concurs with the proposed revisions to Rule 37, including those to 37(e). The proposed revision to Rule 37(a)(3)(B)(iv) does well to acknowledge the practical realities of document production nowadays, and make this rule consistent with the revised version of Rule 34. The proposed revised Rule 37(e) successfully addresses the truths that (i) the mass and nature of ESI has expanded significantly in the last decade (since the original Rule 37(e) was adopted to protect against sanctions when innocent conduct resulted in the destruction of evidence); (ii) the expense and burden of adopting a litigation hold have also risen sharply; and (iii) there presently exists a sharp divide among the circuits in their respective handling of preservation/sanction issues.

In response to the request of the Committee on Rules of Practice and Procedure for comments on certain specific issues, our Committee is of the opinion that: (i) this rule should not be limited to ESI, because the current consistency in standards is warranted; (ii) the portion of the rule permitting sanctions absent willfulness/bad faith, when the loss "irreparably deprived a party of any meaningful opportunity" to present a case, should be eliminated, because that portion properly acknowledges the importance of prejudice in the sanctions analysis; (iii) the current Rule 37(e) should also be retained, because the new rule does well to address the matters covered by the current rule; and (iv) "substantial prejudice" or "willfulness or bad faith" should be further defined, because guidance regarding their definitions can be found in existing case law, and it is important that the trial court have discretion in making those determinations based on the unique facts of each case.

Our Committee appreciates the opportunity to comment on these proposed amendments, and is hopeful that its comments will assist the Committee on Rules of Practice and Procedure in finalizing its recommendations.

—END NOTE—

1 The members of the State Bar of Michigan Standing Committee on the United States Courts are:
Michelle C. Harrell (Chair)
Jordan S. Bolton
Harold Z. Gurewitz
John P. Nicolucci
Joel J. Kirkpatrick
Thaddeus E. Morgan
Paul F. Novak
Michael W. Puerner
Jan M. Geht
Kelley M. Haladyna
Mark W. McInerney
Lynn H. Schecteer
Tracey Cordes
David Weaver
Hon. David M. Lawson
Hon. Thomas L. Ludington
Hon. Ellen S. Carmody
The comments were prepared by the committee, but members may have individual viewpoints with regard to particular amendments that differ from the committee's comments. ■

WRITER'S BLOCK?

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THE NLRB AND NON-ACQUIESCENCE: YOU'RE NOT THE BOSS OF ME

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Employers have become accustomed to the presence of the National Labor Relations Board ("Board") in the nonunion workplace with its application of the National Labor Relations Act ("NLRA") to employer policies and procedures. One of the Board's earliest decisions in its assumed role involved the determination of whether an employer who utilized an arbitration procedure which required employees to waive pursuit of collective or class actions in arbitration and in litigation violated the Act. In *D.R. Horton*[1],the Board found that it did. The decision has led to a number of decisions by administrative law judges have found similar procedures also violated the Act.

Employers were heartened by the recent Fifth Circuit decision which granted review of the Board's *D. R. Horton* decision and, in a 2-1 opinion, found that the Board had not given proper weight top the Federal Arbitration Act (FAA)[2]. The majority stated that the NLRA should not be understood to contain a Congressional command overriding the application of the FAA.

Can employers now rest a little easier that their arbitration procedures which contained similar collective/class waivers will not be subject to a challenge under the NLRA? In all likelihood, the answer is no. The Board has historically followed a policy of non-acquiescence with respect to court of appeals decisions with which it disagrees. The Board views its legislative charge as enforcing and interpreting the NLRA on a national level. It will treat the court of appeals decision as the "law of the case" but will not consider it as impacting on its underlying determination that the arbitration procedure violated the NLRA. Administrative law judges are instructed to follow the law as stated by the Board and not the courts of appeals.[3]

As would be expected, the courts of appeals do not share the Board's view of the limited effect to be given to their decisions. The Third Circuit stated that a disagreement by the Board with its decision is simply an academic exercise that possesses no authoritative effect. The court went on to note that for the Board to predicate an order on its disagreement with the court's interpretation of a statute is for the Board to act outside of the law.[4] The Second Circuit has stated that if it disagrees with the decision in a particular case, the Board should seek review in the Supreme Court. The Board cannot choose to ignore the court's decision as if it had no force or effect. The Board's action is intolerable if the rule of law is to prevail.[5]

How does the Board respond to such criticism? On one occasion, the Board was ordered by the Fourth Circuit after oral argument in a case to provide a full explanation of its position with respect to its obligation to abide by decisions of the court in subsequent matters presenting the same or similar issues. The Board submitted a letter brief in response.[6]

The Board acknowledged that for more than 50 years, it had taken the position that it is not obliged to follow decisions of a particular court of appeals in subsequent proceedings not involving the same parties. It administers a federal act on a national basis. As a result, a uniform and orderly administration of the statute requires that the administrative law judges apply only established Board and Supreme Court precedents. The Board does not know which circuit court of appeals will review its decision. From the Board's perspective, implicit in the venue rules is a congressional judgment that the Board should not be guided by the views of any single circuit court when it makes its decisions.[7]

In its letter to the court, the Board acknowledged that its position will sometimes result in litigating within a circuit an issue which had previously been decided adversely. The Board offered its rationale that if it has a reasonable basis for believing that the court erred, it is "no affront" to argue that the court should distinguish, modify, or overrule prior precedent.[8] In addressing the impact on the party who would benefit from a decision from the court of appeals, the Board stated that it may seem unfair to require the party to exhaust administrative remedies before benefiting from the court's precedent. The measure of fairness should not be solely from the point of view of the party benefiting from the circuit law because it would overlook the interests of the parties who in good faith believe that the circuit's law should be overturned or modified.[9]

The Board concluded its letter brief to the court by stating that under the system established by Congress, the Board's practice to exercise its best judgment as to whether to apply adverse precedent to future cases is in no way disrespectful to the courts of appeals. Rather, the Board's exercise of its best judgment is a practical necessity under a statutory scheme "that seeks to foster reasonable administrative decisions and limited judicial review."[10]

There have been two recent examples of the Board's use of the non-acquiescence policy. The Board had disagreed with the decision of the D.C. Circuit in *Laurel Baye Healthcare* that its two member panels were invalid. The Board released a statement which stated that its decision not to adhere to the D. C. Circuit's decision was consistent with its traditional policy.[11] The Board chooses to adhere to its view of the law where it respectfully disagrees with the adverse decision which enables the Board to present its position to other circuits and, where appropriate, the Supreme Court. Chairman Pearce issued a statement after the D.C. Circuit's decision in *Noel Canning* which found President Obama's recess appointments to the Board to be invalid. Chairman Pearce stated that the Board disagreed with the decision, but in any event, the order applied to one specific case and that similar issues have been raised in more than a dozen cases pending in other courts of appeals.[12]

In *Leslie's Poolmart, Inc.*, an administrative law judge reviewed an arbitration procedure which did not specifically require waiver of collective/class actions and found it to violate the Act. The judge considered the impact of the Fifth Circuit's

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THE NLRB AND NON-ACQUIESCENCE: YOU'RE NOT THE BOSS OF ME

(Continued from page 7)

decision in response to an argument that the decision effectively overruled the Board's position. The judge stated that the Supreme Court has not addressed or resolved the issue involved in the case, and as a result, *D. R. Horton* is the controlling law[13]. Since that case represents current Board precedent, the judge is obligated to apply it even in the face of other Federal court decisions to the contrary.

The courts of appeals which have reviewed the Board's position in the context of arbitration being raised as a defense in a wage/hour cases have rejected its reasoning. In *Sutherland v. Ernst & Young*,[14] the Second Circuit rejected the Board's position which was raised as an alternative argument in the case and agreed with the Eighth Circuit's decision in *Owen v. Bristol Care, Inc*.[15], that the Board's decision carried "little persuasive authority."[16] The Ninth Circuit addressed *D.H. Horton in Richards v. Ernst & Young*.[17] The court stated the plaintiff had failed to properly raise the issue below but noted that two courts of appeals and the overwhelming majority of district courts that have considered the issue have decided not to defer to the Board's decision.[18] The court denied a petition for rehearing which relied in part on the argument that the court had erred in refusing to apply the Board's decision.

In light of the Board's policy of non-acquiescence, employers should expect the Board to continue to apply it *D. H. Horton* decision. The fact that the Fifth Circuit's decision was split will provide ample rationale for the Board to explain to the courts of appeals why it is following its position and ignoring contrary appellate decisions. Employers whose arbitration procedures contain provisions prohibiting class/collective actions must be prepared for a trip to the court of appeals if challenged by the NLRB, until the Supreme Court considers the matter or until there is a Republican majority on the Board.

—END NOTES—

1 357 NLRB No. 184 (2012).

2 *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

3 James Brudney, "Isolated and Politicized: The NLRB's Uncertain Future", 26 Comp. Lab. L. & Pol'y J 221, 238 (2004-5).

4 *Allegheny General Hospital v. NLRB*, 608 F. 2d 965, 970 (3rd Cir. 1979).

5 *Ithaca College v. NLRB*, 623 F. 2d 224 (2d Cir. 1980).

6 2/6/97 Letter from NLRB Acting Solicitor to Clerk, 4th Circuit Court of Appeals in *Industrial Turnaround Corp. v. NLRB*, Nos. 96-1783, 96-1926 ("Letter").

7 Letter, pp. 3, 8.

8 Letter, pp. 11-12.

9 Letter, p. 14.

10 Letter, p. 18.

11 R-2693 (5/18/09); Statement concerning D.C. Circuit's decision in *Laurel Baye Healthcare* (666 F. 3d 1365 (D.C. Cir. 2012)).

12 1/25/13, Statement of Chairman Pearce on recess appointment ruling.

13 Case 21-CA-102332 (2014) (ALJ Thompson).

14 726 F. 3d 290 (9th Cir. 2013).

15 702 F.3d 1050 (8th Cir. 2013).

16 702 F.3d at 1053.

17 734 F.3d 871 (9th Cir. 2013).

18 702 F.3d at 874, n.3. ■

CROSS-EXAMINING THE RECOLLECTION-IMPAIRED DEPONENT

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Some deposition witnesses believe that "I don't recall" answers are a good way to avoid testifying to inconvenient facts. Sometimes this works for them, sad to say. But not always. *Powell-Pickett v. AK Steel*, 2013 WL 6231743 (6th Cir. 2013), *affirming* 904 F.Supp.2d 767 (S.D. Ohio 2012), is a case in point.

1.

AK Steel terminated Powell-Pickett for "falsification" of her medical history in her original employment application. AK Steel discovered "inconsistencies" between her 2006 application and her 2009 account of her pre-employment medical history during a return-to-work examination following a month-long disability leave.

Powell-Pickett sued, filing a "fifteen count" complaint alleging that "she was treated less favorably, subjected to harassment and retaliation, and ultimately terminated based on her race, gender, disability, and/or protected activity," asserting violations of federal and state statutes and breach of an EEOC settlement agreement.

At Powell-Pickett's first deposition, defense counsel questioned her about why, *after* termination, she filed a Chapter 13 wage-earner bankruptcy and "declared an ongoing salary from AK Steel." Defense counsel "pressed her to explain." "Soon [she] was claiming not to recognize documents that minutes earlier she had acknowledged signing under penalty of perjury." The Sixth Circuit recounted:

> Things drew to a close when, after less than half an hour, she said she could not recall declaring bankruptcy, asked for a break, fainted, and was removed by the paramedics.

Plaintiff "missed the second deposition." The "district court ordered her to appear for the third." By then, her counsel had withdrawn, so she appeared *pro se*. The third deposition "began much like the first." The Sixth Circuit recounted that "AK Steel's counsel asked about" her "bankruptcy papers" and she "claimed to remember nothing."

Plaintiff "eventually gave some direct answers," but, the Sixth Circuit recounted, she "rejected every invitation to explain how she had been mistreated." The Sixth Circuit provided examples:

> Q. All right. Well,…tell me how [the "supervisory manager"] harassed you because of your race?
>
> A. I don't recall at this time.
>
> Q. Okay. Tell me how he retaliated against you because of your race?
>
> A. I don't recall at this time.

Q. Okay. Tell me why you think anybody in supervision at AK Steel discriminated against you because of your race?

A. I don't recall at this time.

Q. Tell me why you think anybody in management at AK Steel discriminated against you because of your gender?

A. I don't recall.

Q. Okay. Tell me why you think anybody in AK Steel management retaliated against you because of any protected activity you engaged in?

A. Don't recall.

Plaintiff testified that she had "plenty of reasons" to "feel" that the company fired her because of her "filings with the EEOC."

Q. Well, now is the time to tell them.

A. Don't recall them at this time.

AK Steel moved for summary judgment. Plaintiff filed a declaration attesting to events that she had not recalled at deposition. AK Steel moved to strike the declaration as inconsistent with her deposition testimony. Plaintiff's new counsel argued, the Sixth Circuit recounted, that "the hard questioning by AK Steel's counsel would cause any person uneducated in the law to become forgetful or silent."

The district court struck the declaration and entered summary judgment for AK Steel. The Sixth Circuit affirmed, demonstrating that the wages of recollection impairment at deposition—which is *the* time to support claims—may be dismissal. Both the Sixth Circuit and the district court offered some words to the wise. The Sixth Circuit:

> A party may neither duck her deposition, nor hold her cards in anticipation of later advantage.

The district court:

> A party cannot create a disputed issue of material fact by filing a declaration that contradicts the party's earlier deposition testimony.

2.

All deposition recollection deficiencies are not so stark, and many will not prompt definitive judicial action. Nevertheless, memory lapses are not uncommon—to employ the delicacy of a double negative. And so, memory lapses must be met with rigorous cross-examination.

One way to respond to a forgetful deponent is to persistently probe each unlikely memory lapse. This may not be a complete antidote, but may (1) produce useful information and (2) at the least, discourage the deponent's profligate use of "I don't recall" answers.

Here are possible follow-up questions, to be tailored to the occasion, to respond to "I don't recall" answers that are (1) unlikely, (2) too convenient, (3) smug, snarky, and self-satisfied, or (4) otherwise seem to be something less than the truth, the whole truth, and nothing but the truth.

> Can you recall any information that will provide an answer in whole or part?
>
> Did you once know the information? When?
>
> Did you ever discuss the information with anyone? Who? When? What was the discussion?
>
> Did you ever write anything about the information? Did anyone? What? When? Where is the writing?
>
> Did you do anything to preserve the information? What? When? Why? Why not?
>
> Who else might know the information?
>
> Are there any documents that might contain the information?
>
> Is there anything that might help refresh your memory? Anyone?
>
> If you needed the information, what would you do to try to find it? Who would you ask? Where would you look?
>
> What is your best guess as to the information?
>
> Do you have any problem with memory? Do you have any condition that interferes with your memory?
>
> Do you agree the information is important? Why? Why not?
>
> Do you agree the information is important because _____?
>
> Explain why you cannot recall the information.
>
> Explain how it is that you recall _____, but you are unable to recall the information.
>
> Will you promptly notify me if you recall the information in whole or part?

Asking questions like these may help recollection-impaired deponents see themselves as others see them, *e.g.*, as lacking credibility. Such newly-acquired self-perception may quickly improve a deponent's memory.

Some deponents, however, are immune from embarrassment, and will persist in not recalling the very things about which you want their testimony. They are like Steven Wright: "Right now I'm having amnesia and *déjà vu* at the same time. I think I've forgotten this before."

With your rigorous cross-examination highlighting suspect memory lapses, however, some recollection-impaired deponents will end up like the plaintiff in AK Steel. They will learn that too many "I don't recall" answers do not provide safe harbors. Rather, they sink ships.

—END NOTE—

Suspect deposition recollection deficiencies, of course, are not confined to plaintiffs. For an example of the cross-examination of a corporate bigwig who knew little and remembered less, see Stuart M. Israel, " 'Rope-A-Dope' Deposition Testimony" Vol. 23, No. 2 *Labor and Employment Lawnotes* 10 (Summer 2013). ■

IN *BURRAGE* , THE SUPREME COURT SEEKS TO CLARIFY THE "BUT FOR" LIABILITY STANDARD

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A criminal law opinion may seem a strange place to provide clarification of the "but for" liability standard in the employment arena, but *Burrage* does just that. In a decision issued January 27, 2014, within the backdrop of a criminal law setting, the U.S. Supreme Court again weighed in on the "but for" liability standard applicable to Age Discrimination in Employment Act (ADEA) cases and retaliation claims brought pursuant to Title VII of the Civil Rights Act of 1964.

Burrage appealed his conviction under the penalty enhancement provision of the Federal Controlled Substances Act, whereby a 20 year mandatory minimum sentence is imposed on a defendant who distributes a Schedule I drug when "death or serious bodily injury results from the use of such drug." The medical testimony at trial did not establish that the drug, heroin, alone caused the death of the victim, but rather was a contributing factor to the victim's death. The district court gave the instruction that the government need only prove that the drug distributed by the defendant was a contributing cause of the victim's death. The Eighth Circuit affirmed the conviction, holding that the district court's jury instruction was consistent with the law and that Burrage's requested instruction requiring proximate cause was not. The Supreme Court, in an unanimous decision, reversed, holding that "where use of the drug distributed by defendant is not an independently sufficient cause of death, a defendant cannot be liable for the penalty enhancement under the statute unless such use is a but-for cause of the death or injury.

Justice Scalia in his opinion for the Court noted that "the Controlled Substance Act does not define the phrase 'results from,' " therefore, statutory construction requires it be given its "ordinary meaning." In determining what "results from" means, the Court looked to several sources: the *New Shorter English Dictionary* (which provides that "a thing results when it arises as an effect, issue or outcome from some action, process or design), the Model Penal Code, the Court's recent opinion in a Title VII retaliation claim, and a baseball analogy. Yes, baseball. They all reflect the common theme that there must be a causal connection between an action and a result, that liability should attach only to those actions that caused the offense at issue.

Causation in the law is an essential function of jurisprudence. "Lawyers are constantly called upon to determine whether some injury or damage was caused by, or was the consequence of a defendant's negligent or wrongful act." "When a crime requires not merely conduct but also a specified result of conduct, a defendant …generally may not be convicted unless his conduct is both 1] the actual cause, and 2] the legal (proximate cause) of the result." In Burrage, the Court found that it was not necessary to address the issue of legal cause/proximate cause as the record established that the drug distributed by the defendant was not the actual cause of death in the sense that the statute requires.

In *Burrage*, the court noted that other statutes with phrasing such as "results from," "because of," and "based on" have been read to require a "but for" causation standard, unless there is textual or contextual indication to the contrary. The court noted that its recent interpretation of the anti-retaliation clause in Title VII provides insight into this discussion. Last term, the Court rendered a decision in *University of Texas Southwestern Medical Center v Nassar* that addressed a Title VII retaliation claim. In *Nassar*, the court held that the ordinary meaning of the words "because of" imposes "but for" causation standard. This same line of reasoning was expressed in recent cases interpreting the Age Discrimination in Employment Act (ADEA).

Justice Scalia wrote, quoting *Nassar*, "it is one of the traditional background principles against which Congress legislates[s], that a phrase such as 'results from' imposes a requirement of but-for causation." The Supreme Court has clearly indicated that the "but for" standard of causation will be utilized (unless directed to do otherwise) when phrases such as "results from," "because of" and "because" that appear in the ADEA and the anti-retaliation provision of Title VII. Not all of the justices were firmly on board with this reasoning. Specifically Justices Sotomayor and Ginsburg concurred in the opinion expressing the view that the "because of" language in the context of antidiscrimination laws did not mean "solely because of."

The *Burrage* decision further clarifies the appropriate causation standard applicable to ADEA and Title VII retaliation claims. The Supreme Court makes plain that it is incorrect to infer that Congress meant anything other than what the text says on the subject. ■

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MICHIGAN ARBITRATION AND MEDIATION 2012-2014 CASE LAW UPDATE

Lee Hornberger
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I. INTRODUCTION

This article supplements "Michigan Arbitration, Case Evaluation, and Mediation 2011-2012 Case Law Update," *Labor and Employment Lawnotes* (Fall 2012), by reviewing significant Michigan cases concerning arbitration and mediation issued since late 2012. For the sake of brevity, this article uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

II. ARBITRATION

A. Michigan Supreme Court Decisions

1. Arbitrator, not MERC, to decide past practice issue.

Macomb Co v AFSCME Council 25, 494 Mich 65 (2013) (Young, Markman, Kelly, and Zahara [majority]; McCormack and Cavanagh [dissent]; Viviano [took no part]). The employer did not commit an unfair labor practice when it refused to bargain with the union over the employer's decision to change the actuarial table used to calculate retirement benefits for employees. The unfair labor practice complaints concerned a subject covered by the CBA. The grievance process in the CBA was the appropriate avenue to challenge the employer's actions. The arbitrator, not MERC, is best equipped to decide whether a past practice has matured into a new term or condition of employment.

2. Arbitrator can hear claims arising after referral to arbitration.

Wireless Toyz Franchise, LLC v Clear Choice Commc'n, Inc, ___ Mich ___, 825 NW2d 580 (2013) (Young, Cavanagh, Markman, Kelly, Zahra, and McCormack). The Supreme Court, in lieu of granting leave to appeal, reversed the Court of Appeals judgment, for the reasons stated in the Court of Appeals dissenting opinion, and reinstated the Circuit Court order, denying defendants' motion to vacate the arbitration award and confirming the award.

Judge Servitto's dissent in *Wireless Toyz Franchise, LLC*, 303619 (May 31, 2012) (Cavanagh and Fort Hood [majority] and Servitto [dissent]), indicated the stipulated order intended the arbitration would include claims beyond those that were pending because it allowed further discovery, gave the arbitrator the powers of a Circuit Court judge, and stated that the award would represent a "full and final resolution" of the matter. The order did not exclude new claims from arbitration. The parties' intent appears to have been that the arbitrator would determine all claims in the case. Claims that were not pending at the time the order was entered were not outside the scope of the arbitrator's powers.

3. Shareholder arbitration agreement covers discrimination claims.

Hall v Stark Reagan, PC, 493 Mich 903 (2012) (Young, Markman, MB Kelly and Zahra [majority]; Hathaway, Cavanagh and M Kelly [dissent]) The Supreme Court reversed that part of the Court of Appeals judgment, *Hall*, 294 Mich App 88 (2012) (Gleicher and Stephens [majority] and Kelly [dissent]), which had held that the matter was not subject to arbitration. The Supreme Court reinstated the Circuit Court order granting summary disposition in favor of defendants and ordering arbitration. The dispute in this case concerned the motives of defendant shareholders in invoking the separation provisions of the Shareholders' Agreement. According to the majority, this, including allegations of violations of the Civil Rights Act, MCL 37.2101 *et seq*, is a "dispute regarding interpretation or enforcement of . . . the parties' rights or obligations" under the Shareholders' Agreement, and was subject to binding arbitration pursuant to the Agreement.

The dissents basically stated that the Shareholders Agreement provided only for arbitration of violations of the Agreement, and not for allegations of discrimination under the Civil Rights Act.

4. CBA just cause provision gives arbitrator authority.

In ***36th Dist Ct v Mich Am Fed of State Co and Muni Employees***, ___ Mich ___ (2012), the Supreme Court, in lieu of granting leave to appeal, reversed that portion of the Court of Appeals judgment that reversed the arbitrator's award of reinstatement and back pay for the grievants. According to the Supreme Court, MCR 3.106 does not preclude such relief where the CBA has a just cause standard for termination. In ***36th Dist Ct***, 295 Mich App 502 (2012) (Murray, Talbott, and Servitt), the Court of Appeals had ruled that because the CBA did not abrogate the Chief Judge's statutory or constitutional authority to appoint court officers, the arbitrator exceeded his jurisdiction by requiring the Chief Judge to re-appoint the grievants to their former positions.

B. Michigan Court of Appeals Published Decisions

1. Pre-award lawsuit concerning arbitrator selection.

Oakland-Macomb Interceptor Drain Drainage Dist v Ric-Man Constr, Inc, ___ Mich App ___ (2014) (Saad and Sawyer [majority]; Jansen [dissent]), is an example of the viewpoint that "[n]o part of the arbitration process is more important than that of selecting the person who is to render the decision[,]" Elkouri & Elkouri, How Arbitration Works (7th ed), p 4-37, and "[c]hoosing an arbitrator may be the most important step the parties take in the arbitration process." Abrams, Inside Arbitration (2013), p 37. In *Oakland-Macomb Interceptor Drain Drainage Dist*, the American Arbitration Association (AAA) did not appoint a member of the arbitration panel who had the specialized qualifications required in the agreement to arbitrate. The agreement modified the AAA rules by mandating qualifications for the panel and outlining the manner in which AAA must appoint the panel. Plaintiff brought suit against defendant and AAA to enforce these requirements. The Circuit Court ruled in favor of defendant and AAA. The Court of Appeals in a two to one decision reversed.

The issue was whether plaintiff could bring a pre-award lawsuit concerning the arbitrator selection process. According to the majority decision, courts usually will not entertain suits to hear pre-award objections to arbitrator selection. But, when a suit is brought to enforce essential provisions of the agreement concerning the criteria for choosing arbitrators, courts will enforce such mandates.

According to the majority, the agreement to arbitrate made the specialized qualifications of the panel central to the entire agreement; and that, when such a provision to arbitrate is central to the agreement, the Federal Arbitration Act (FAA), 9 USC 1, *et seq*, provides that it should be enforced by the courts prior to the arbitration hearing. "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an

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MICHIGAN ARBITRATION AND MEDIATION 2013-2014

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umpire, such method shall be followed … .” 9 USC 5.

According to the majority, a party may petition a court before an award has been issued if (1) the arbitration agreement specifies detailed qualifications the arbitrator(s) must possess and (2) the arbitration administrator fails to appoint an arbitrator that meets these qualifications. Also a court may issue an order, pursuant to § 4 of the FAA, requiring that the arbitration proceedings conform to the terms of the arbitration agreement. In addition, the majority awarded plaintiff its Circuit Court and Court of Appeals costs and attorney fees.

Judge Jansen’s dissent indicated that a party cannot obtain judicial review of the qualifications of arbitrators prior to an award. According to the dissent, there was no claim that the selection of the panel member involved fraud or any other fundamental infirmity that would invalidate the arbitration agreement, or any claim that the appointee had an inappropriate relationship with a party. Although the appointee might not have had the requirements for appointment set forth in the agreement, plaintiff was required to wait until after issuance of the award in order to raise the issue in a proceeding to vacate. 9 USC 10.

C. Michigan Court of Appeals Unpublished Decisions

1. Arbitrator to resolve factual issues.

In ***Command Officers Ass’n of Sterling Heights v Sterling Heights***, 310977 (December 17, 2013) (Boonstra, Donofrio, and Beckering), the Court of Appeals vacated the Circuit Court order vacating a labor arbitration award concerning reduction of work hours. The Court of Appeals indicated that while the Circuit Court may disagree with the arbitrator’s interpretation of the CBA, and of the interplay between CBA sections, the CBA vests in the arbitrator the authority to render that interpretation. The Circuit Court’s disagreement with the arbitrator’s interpretation was not grounds for vacating the award.

2. Cannot compel arbitration by non-signatory.

Ric-Man Constr Inc v Neyer, Tiseo & Hindo Ltd, 309217 (March 26, 2013) (Stephens, Hoekstra, and Ronayne Krause). The Court of Appeals held that the Circuit Court erred by concluding that defendant had the right to compel arbitration between it and plaintiff, based on plaintiff’s arbitration agreement with a third entity. The Court of Appeals indicated that, although arbitration is favored by public policy as a means for resolving disputes, arbitration is voluntary, and a party cannot be required to submit to arbitration a dispute which it has not agreed to submit.

3. Arbitration award can be *res judicata* in subsequent lawsuit.

Sloan v Madison Heights, 307580 (March 21, 2013) (Jansen, Fizgerald and KF Kelly). The Court of Appeals affirmed the Circuit Court’s ruling that a prior arbitration award was *res judicata* on the issue of whether the City had the unilateral right to change retiree insurance carriers. The grievances were based on CBA language that was substantially similar to the language contained in plaintiffs’ CBAs. A substantial identity of interests existed between those retirees represented by the former union and those retirees represented by the present union. Plaintiffs’ interests were presented and protected in the arbitration.

4. Arbitrator cannot render “default” award without a hearing.

Hernandez v Gaucho, LLC, 307544 (February 19, 2013) (Jansen, Whitbeck, and Borrello). The parties arbitrated plaintiff’s employment termination claim. The arbitrator ruled in favor of the employee. The award was based on the default of employer, who had failed to provide discovery during the arbitration proceeding. The arbitrator did not conduct an arbitration hearing, hear any testimony, or take any proofs. The employee moved to confirm the award and defendants moved to vacate the award. The Circuit Court was concerned by the fact that the arbitrator never took any evidence and there were ex parte communications between the arbitrator and the attorneys. The Circuit Court granted employer’s motion to vacate and denied employee’s motion to confirm. The Court of Appeals affirmed. According to the Court of Appeals, an arbitrator can hear testimony, take evidence, and issue an award in the absence of one of the parties if that party, although on notice, has defaulted or failed to appear. An arbitrator may not issue an award solely on the basis of the default of one of the parties, but must take sufficient evidence from the non-defaulting party to justify the award. § 15 of the Uniform Arbitration Act (UAA) provides, even when the arbitrator is entitled to proceed in the absence of a defaulting party, the arbitrator is required to “hear and decide the controversy on the evidence … .” MCL 691.1695(3). The UAA, MCL 691.1681 *et seq*, 2012 PA 371, took effect July 1, 2013.

Rule 31, AAA Commercial Arbitration Rules (October 1, 2013); Rule 29, AAA Employment Arbitration Rules (November 1, 2009); and Rule 26, AAA Labor Arbitration Rules (July 1, 2013), provide that:

> Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made [based] solely on the default of a party. The arbitrator shall require the other party to submit such evidence as may be required for the making of an award.

Rule 12603, FINRA Code of Arbitration for Customer Disputes (April 16, 2007), and Rule 13603, FINRA Code of Arbitration for Industry Disputes (April 16, 2007), provide that:

> If a party fails to appear at a hearing after having been notified of the time, date and place of the hearing, the panel may determine that the hearing may go forward, and may render an award as though all parties had been present.

5. Successor to arbitration agreement must prove that it is successor.

Brown v Morgan Stanley Smith Barney, 307849 (February 19, 2013) (Cavanagh, Sawyer, and Saad). In this customer against brokerage firm case the issue was whether an agreement to arbitrate that customer had signed with a non-party prior brokerage firm inured to the benefit of the defendant brokerage firm. The Court of Appeals found no evidence which definitively explained the relationship, if any, between defendants and either Smith Barney Inc. or Smith Barney Shearson Inc. Thus, according to the Court of Appeals, the defendant brokerage firm was not entitled to an order compelling arbitration. This case shows that if a party argues that an arbitration agreement with another entity inures to the party’s benefit, it should have a clear paper trail showing the relationship between the party and the other entity.

6. Effect of union not taking case to CBA arbitration.

Kucmierz v Dep’t of Corrections, 309247 (February 12, 2013) (Jansen, Whitbeck and Borrello). Employee brought a lawsuit against employer arguing the termination of employee was

improper. The parties stipulated to dismiss the court case so that the entities could go to CBA arbitration between the union and the employer. The union eventually decided not to take the matter to arbitration and there was no arbitration. The employee then moved to set aside the dismissal of the court case. The Circuit Court set aside the dismissal. The Court of Appeals reversed. The employee alleged the parties had the mistaken belief that the union was going to arbitrate the case. The stipulation and order provided that the parties agreed to dismiss the proceeding with prejudice because it was the subject of an agreement to arbitrate. The stipulation did not provide that the matter would actually be arbitrated or that the dismissal was contingent on arbitration occurring. Nothing in the stipulation precluded the union and the employer from reaching a settlement agreement to avoid the arbitration process. The employee failed to show that a mutual mistake occurred and he was not entitled to relief from the dismissal order.

7. Party did not waive objection to arbitration by participating in arbitration.

Fuego Grill, LCC v Domestic Uniform Rental, 303763 (January 22, 2013) (Murray and Shapiro [majority]; and Markey [dissent]), lv den, ___ Mich ___ (2013). The issue in this case was whether the Circuit Court erred in concluding that there was not an agreement to arbitrate between the parties. Plaintiff did not waive the issue of arbitrability through participation in the arbitration, as it argued during arbitration that no contract existed and, before the award was issued, it filed a complaint in Circuit Court seeking to preclude arbitration because no contract to arbitrate existed. The absence of a valid agreement to arbitrate is a defense to an action to confirm an award. It is for the court, not the arbitrator, to determine whether an agreement to arbitrate exists.

Judge Markey's dissent concluded that on the basis of Michigan's policy favoring arbitration and because plaintiff's claims were within the scope of the arbitration clause that plaintiff signed, that plaintiff may not relitigate its fact-based defenses in Circuit Court.

8. Three-year limitation precludes claim and arbitration.

Krueger v Auto Club Ins Ass'n, 306472 (January 8, 2013) (Ronayne Krause, Servitto, and Shapiro). The arbitration agreement between the insurer and the insured required that an arbitration demand must be filed within three years from the date of the accident or the insurer will not pay damages. Insured did not file an arbitration demand within three years of the accident. Insured argued that the three years did not start until the insurer communicated that it was denying the claim. According to the Court of Appeals, the policy requires that any arbitration demand be filed within three years of the accident, and such language does not bar an insured from filing an arbitration demand in order to comply with the three year time limitation even if a disagreement has not yet arisen. Therefore the arbitration demand was untimely.

9. Court of Appeals reverses confirmation of award.

Elsebaei v Ahmed, 303623 and 304605 (December 27, 2012) (Meter, Fitzgerald and Wilder). The Court of Appeals reversed a Circuit Court order confirming an arbitration award. The Circuit Court had earlier granted plaintiffs' partial summary disposition by finding that defendants owed plaintiffs a duty with regard to plaintiffs' negligence claim. The negligence case then proceeded to arbitration on the remaining issues. The arbitrator ruled in favor of the plaintiffs on these remaining issues. Defendants reserved their right to appeal the earlier "duty" ruling. The decision being reversed by the Court of Appeals was the "duty" ruling of the Circuit Court. There is no discussion concerning arbitration law or the deference to be given an arbitration award.

10. Court of Appeals affirms confirmation of DRAA award.

Cullens v Cullens, 306519 (December 18, 2012) (Hoekstra, Borrello, and Boonstra). The parties had an unsuccessful mediation. The parties then submitted the case to arbitration pursuant to the Domestic Relations Arbitration Act (DRAA), MCL 600.5070, *et seq*, before the same attorney who had been the mediator. The arbitrator rendered an award. Defendant moved to vacate the award. The Circuit Court denied the motion to vacate. The Court of Appeals affirmed the Circuit Court. The Court of Appeals indicated that its review of an arbitration award is extremely limited and that "[a] court's review of an arbitration award 'is one of the narrowest standards of judicial review in all of American jurisprudence.'" *Way Bakery v Truck Drivers Local No 164*, 363 F3d 590, 593 (6th Cir, 2004), quoting *Tennessee Valley Auth v Tennessee Valley Trades & Labor Council*, 184 F3d 510, 514 (6th Cir, 1999).

11. CBA arbitration award did not violate public policy.

Wayne-Westland Community Schools v Wayne-Westland Ed Ass'n, 304486 and 305296 (December 6, 2012) (Jansen, Fort Hood and Shapiro). The Court of Appeals affirmed a Circuit Court order confirming a labor arbitration award. The District contended that the award violated public policy established by Michigan law which required the District to hire certified teachers, prohibited the District from hiring noncertified teachers when a certified teacher is available, and placed responsibility for having teaching credentials on the teacher. According to the Court of Appeals, assuming this public policy was well defined and dominant, there were exceptions to this public policy. The Michigan Department of Education had exception rules, including allowing districts to apply for authorization. A district could hire a noncertified teacher when one of those exceptions applied. The award requiring the District pay the employee for the 2009-2010 school year and to determine his eligibility for employment did not violate public policy in light of the exceptions to the hiring of certified teachers and the arbitrator's factual findings.

The District further argued that the arbitrator exceeded her authority by relying on a CBA provision which the Association did not allege the District violated. The Association cited the provision in its post-hearing brief. According to the Court of Appeals, even if the Association had not alleged the provision was violated, the arbitrator was not prohibited from relying on the provision, even if the parties failed to cite the provision, since the provision was not expressly withheld from arbitration, and CBAs are to be read as a whole.

Furthermore, according to the Court of Appeals, the award drew its essence from the CBA.

12. State did not waive Eleventh Amendment immunity from ADA claim by participating in CBA arbitration.

Montgomery v Dep't of Corrections, 305574 (October 18, 2012) (O'Connell, Donofrio and Beckering). In this case, the defendant state appealed the Circuit Court's order denying its motion for summary disposition on the basis of sovereign immunity. Because the state did not waive its sovereign immunity defense to employee's claim under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq*, by participating in the arbitration of employee's grievance pursuant to the CBA, the Court of Appeals reversed and remanded for further proceedings. The grievance had alleged that defendant violated the CBA by refusing to

(Continued on page 14)

MICHIGAN ARBITRATION AND MEDIATION 2013-2014

(Continued from page 13)

accommodate the employee's disability. The arbitrator granted the grievance, finding that the employer had violated the CBA.

In addition to the arbitration proceeding, the employee had brought a Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*, and ADA lawsuit against his state employer. Because the employee had not timely requested an accommodation in writing, his state PWDCRA claim failed. The employee argued to the Circuit Court that the arbitrator's finding that the employer had violated the CBA was *res judicata* on the ADA allegations in his court case. The state argued to the Circuit Court that any ADA portion of the award was precluded by Eleventh Amendment, US Const, sovereign immunity. The Circuit Court's denial of summary disposition with respect to plaintiff's Title I ADA claim was the sole issue in this appeal.

The Court of Appeals held that the Circuit Court erred by denying summary disposition for the state because the state did not unequivocally express an intent to waive its sovereign immunity with respect to the Title I ADA claim by participating in the arbitration of plaintiff's grievance pursuant to the CBA. The limited purpose of the arbitration was to decide plaintiff's grievance, which alleged CBA violations. The employee's Title I ADA claim had nothing to do with the CBA, and the state's participation in CBA arbitration of the grievance was not an unequivocal expression of intent to waive sovereign immunity concerning the ADA claim.

13. Court of Appeals affirms Circuit Court orders favoring arbitration.

In the following cases the Court of Appeals affirmed orders ordering arbitration or declining to vacate awards. *Taylor v Great Lakes Casualty Ins Co*, 308213 (September 19, 2013) (Stephens, Wilder and Owens) (automobile insurance); *Mager v Giarmarco, Mullins & Horton, PC*, 309235 (June 25, 2013) (Jansen, Cavanagh and Markey) (deferred compensation); *Holland v French*, 309367 (June 18, 2013) (Gleicher and Murphy [majority], O'Connell [dissent]) (employment); *Yacisen v Woolery*, 308310 (May 30, 2013) (Krause, Gleicher and Boonstra) (auto restoration); *Platt v Berris*, 297292 and 298872 (April 23, 2013) (Owens, Whitbeck and Fort Hood) (firm dispute); *Derwoed v Wyandotte*, 308051 (April 16, 2013) (Jansen, Sawyer and Servitto) (CBA); *California Charley's Corp v Allen Park*, 295575, 295579 (April 9, 2013) (Talbot, Jansen and Meter) (alleged interference with business); *Herman J Anderson, PLLC v Christ Liberty Ministry*, 307931 (March 14, 2013) (Talbot, Donofrio and Servitto) (attorney fees); *Haddad v KC Property Service, LLC*, 306548 (February 21, 2013) (Riordan, Hoekstra and O'Connell) ("may" v "shall"); *Detroit v Detroit Police Officers Ass'n*, 306474 (February 12, 2013) (Jansen, Whitbeck and Borello) (right to interest); *Suchyta v Suchyta*, 306551 (December 11, 2012) (Wilder, Meter and Gleicher) (DRAA); *James D Campo, Inc v Trevis*, 305112 (December 4, 2012) (Wilder, Gleicher and Boonstra) (statute of limitations); *Wendy Sabo & Associates, Inc v American Associates, Inc*, 305575 (December 4, 2012) (Owens, Talbot and Wilder) (real estate commission); *Rouleau v Orchard, Hiltz and McCliment, Inc*, 308151 (October 25, 2012) (Murphy, Sawyer and Hoekstra) (indemnity); *Vandekerckhoue v Scarfore*, 301310 (October 11, 2012) (Gleicher, Owens and Boonstra) (attorney fee dispute); *Bies-Rice v Rice*, 295631, 295634, 300271 (September 4, 2012) (Meter, Fitzgerald, and Wilder), lv den, ___ Mich ___ (2013) (DRAA).

III. MEDIATION

A. Michigan Supreme Court Decisions

1. Supreme Court denies leave to appeal in "pressure to settle" case.

In ***Vittiglio v Vittiglio***, ___ Mich ___; 825 NW2d 584 (2013), the Supreme Court denied leave to appeal from *Vittiglio v Vittiglio*, 297 Mich App 391 (2012) (KF Kelly, Sawyer, and Ronayne Krause). In *Vittiglio* the Court of Appeals had affirmed the Circuit Court's holding that the audio recorded settlement agreement at the mediation session was binding and that "a certain amount of pressure to settle is fundamentally inherent in the mediation process." The Court of Appeals also affirmed the Circuit Court's holding that plaintiff was liable for sanctions because plaintiff's motions were filed for frivolous reasons and the Circuit Court did not abuse its discretion in awarding costs and attorney fees.

B. Michigan Court of Appeals Published Decisions

There do not appear to have been any Michigan Court of Appeals published decisions concerning mediation during the review period.

C. Michigan Court of Appeals Unpublished Decision

1. Mediation in parental rights case.

In re Vanalstine, Minors, 312858 (April 11, 2013) (Fitzgerald, O'Connell and O'Brien). The Circuit Court ordered the parties to participate in mediation, which resulted in a mediation agreement concerning parental rights to minor children. Eventually the mother did not comply with the agreement and the Court terminated her parental rights. The Court of Appeals indicated that contrary to the mother's assertion, the Circuit Court did not terminate her parental rights solely for her failure to comply with the agreement. The Circuit Court's decision was based on the mother's conduct, which included but was not limited to her failure to comply, and which led to the Circuit Court's assessment of the statutory termination factors. The Court of Appeals found it unnecessary to resolve whether a defense of impossibility could render such an agreement void or voidable.

IV. CONCLUSION

Michigan appellate decisions since late 2012 concerned the following ADR issues.

1. What issues are for the arbitrator to decide? *Macomb Co, Wireless Toyz Franchise, LLC, Hall, 36th Dist Ct*, and *Command Officers Ass'n of Sterling Heights*.
2. Can there be a pre-award court challenge to the arbitrator selection process? *Oakland-Macomb Interceptor Drain Drainage Dist.*
3. Can a non-signatory entity be compelled to arbitrate? *Ric-Man Constr Inc*.
4. Can an arbitration award be *res judicata*? *Sloan*.
5. Does a default award require a hearing? *Hernandez*.
6. Does an alleged affiliate have to prove that it is affiliated with the predecessor signatory to an arbitration agreement? *Brown*.
7. What can be the result of the union not taking a case to arbitration? *Kucmierz*.
8. Whether participating in the arbitration is a waiver? *Fuego Grill, LLC* and *Montgomery*.
9. What happens when a limitation period is missed? *Krueger*.
10. Can an award be vacated? *Elsebaei*, *Cullens*, and *Wayne-Westland Community Schools*.
11. Are mediated settlement agreements enforced? *Vittiglio* and *In re Vanalstine, Minors*. ■

UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long

Personal Protective Equipment — "Clothes" under FLSA

On January 27, 2014, the U.S. Supreme Court issued its decision in *Sandifer v. U.S. Steel Corp.*, 571 U.S. ___ (2014). *Sandifer* was a collective action brought on behalf of 800 hourly workers at the U.S. Steel plant in Gary, Indiana. The plaintiffs' employment was governed by the terms of a collective bargaining agreement. As allowed by 29 U.S.C. Sec. 203(o), the collective bargaining agreement included a provision that excluded from compensable time, time spent "changing clothes." The plaintiffs argued that certain personal protection equipment they were required to wear (flame-retardant pants and jacket, work gloves, metatarsal boots, a hard hat, safety glasses, ear plugs, and a "snood") did not qualify as "clothes" and that, even if they did, putting that equipment on every day did not qualify as "changing" clothes. Consequently, the employees argued that they should be compensated for the time spent donning and doffing that protective equipment each workday.

The Supreme Court reviewed and affirmed the decision of the Seventh Circuit Court of Appeals which held that certain personal protection items qualified as "clothes" and that time spent donning and doffing those items amounted to "changing" clothes. The Supreme Court applied the dictionary definition of "clothes"—covering for the human body or person—and rejected the plaintiffs' argument that this definition only includes items worn for decency or comfort and not for protection. It stressed that the statutory context of the word "clothes" is items that are integral and indispensable to the work of the employee and that this includes items for protection.

The Court next tackled the definition of the word "changing." The plaintiffs argued that changing meant "substitution." The Court rejected this plaintiffs' argument, holding that changing has two meanings, both to substitute and to alter. The Court held that when an employee changes into and removes protective gear, that employee is altering his or her dress.

The Court concluded that all but three items of protective gear were clothes under the FLSA. The Court held that ear plugs, a respirator and safety glasses were not clothes because they were not coverings for the human body. However the Supreme Court was not inclined to reverse the decision of the court of appeals affirming the district court's opinion that time spent donning and doffing these items was minimal and did not justify an award in the plaintiffs' favor.

Statute of Limitations for ERISA Claim

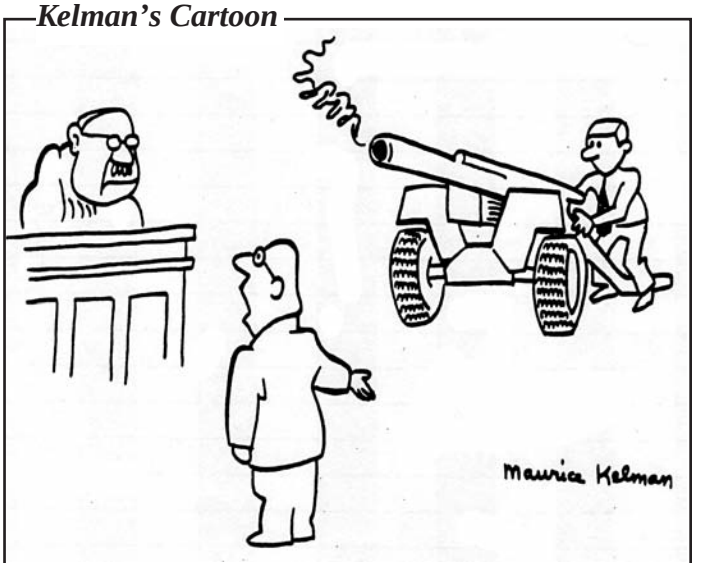
On December 16, 2013, the Supreme Court issued its opinion in *Heimeshoff v. Hartford Life & Accident Insurance Co.*, 571 U.S. __ (2013). Heimeshoff worked for Wal-Mart. She had a long-term disability benefit through Hartford Life & Accident Insurance Co. ("Hartford"). The terms of the benefit plan required that any employee seeking to bring legal action against Hartford must do so within three years after the time written proof of loss is required under the plan.

Heimeshoff submitted a claim for benefits after she was diagnosed with Lupus. Hartford ultimately denied Heimeshoff's claim. Heimeshoff filed suit within three years after the final denial of her claim, but more than three years after proof of loss was due under the plan. The trial court dismissed the suit as barred by the statute of limitations in the plan; the Second Circuit Court of Appeals affirmed, and Heimeshoff successfully sought certiorari.

Heimeshoff argued that her obligation to exhaust her administrative remedies prior to filing suit, coupled with a contractual limitations period that started running prior to the exhaustion of remedies, did not allow her a reasonable time to file suit. Because the contractual limitations period was unreasonable, she argued that it was not enforceable.

The Supreme Court rejected Heimeshoff's argument. It noted the general rule that parties can agree to a contractual limitations period, provided that the period is reasonable and not otherwise prohibited by law. The Court stated that parties can also agree when a statute of limitations period starts running. The Court stressed that enforcing contractual limitations periods in a benefit plan is especially important because plan administrators are mandated to abide by the written terms of a plan, and ERISA provides that an individual can bring suit to enforce rights "under the terms of plan." 29 U.S.C. Sec. 1132(a)(1)(B). Concluding both that the contractual statute of limitations period was reasonable and that it was not otherwise prohibited by law, the Supreme Court affirmed the decision of the Second Circuit Court of Appeals. ■

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 SUPREME COURT UPDATE

Richard A. Hooker
Varnum

"Sometimes the law truly is an ass."

Costella v Taylor Police & Fire Retirement System and City of Taylor, No 147810 (Slip Op 2/5/14), rev'g, COA No 310276 (Mich App Slip Op 8/27/13)(unpub)

The Plaintiff in this case was a Taylor firefighter for 19 years. In 2002, he accepted the position of Fire Chief, negotiating a contract with the City's Chief of Staff and Human Resources Director under which any termination without cause would entitle him to his choice of 26 weeks' pay at his then current base salary or the right to return to the firefighter bargaining unit. At the time, it was confirmed with both the Chief of Staff and the City Attorney that the 26 weeks' pay would be included in his "final average compensation" for purposes of calculating his retirement benefit. This understanding, however, did not appear in the contract itself.

In 2005, the City's mayor removed Plaintiff from the Fire Chief position without cause. The City initially refused to pay the 26 weeks' pay, but an arbitrator subsequently ruled the payment was required. The Retirement System Board then undertook to calculate Plaintiff's pension benefit. Based on the opinion of legal counsel, the Board concluded the 26 weeks' pay was properly includable in the calculation. When the City's Finance Director objected, however, the parties returned to the arbitrator for clarification. He then ruled the Contract "…is clear and unambiguous… .[and] that the intent of the parties was that the 26 weeks' severance pay to former Chief Costella was not to be included in the [FAC] for determining his pension." *Mich App, Slip Op at 2.*

When the Board then recalculated his pension benefit in accordance with the arbitrator's clarification, Plaintiff filed a complaint for superintending control in Wayne County Circuit Court. The Circuit Court granted Defendants summary disposition, noting the parties' failure to legislate the question expressly in their contract and ruling the Board's decision was not contrary to law, arbitrary, capricious, or a clear abuse of discretion. Plaintiff appealed, and the Court of Appeals majority reversed, essentially ruling the contract's silence on the issue created an ambiguity that allowed application of parol evidence to its interpretation, i.e., the affidavits of both the Plaintiff and Chief of Staff that inclusion of the 26 weeks' pay in calculating the FAC was part of the parties' bargain. The majority ordered the enforcement of what it felt was the clear intent of the parties. Judge Borrello dissented, asserting the majority had added a contract provision where previously none had existed, and the Circuit Court had applied the correct standard in granting Defendants summary disposition. Defendants sought leave to appeal.

In a one-page Opinion, in lieu of granting leave to appeal, the Supreme Court reversed the Court of Appeals majority, adopting the reasoning of the Dissenting Opinion. Bottom line: a seemingly unjust result was reached for the legally correct reason based on the courts' standard of review in such cases. While the lessons of this case for practitioners may be obvious, there was one other curious aspect: nowhere in either appellate court's opinion or their reference to the Circuit Court's ruling is there any reference to the potentially key issue of deference to the arbitrator's Clarification Award.

Chalk One Up For Just Cause

City of Holland v French, No. 147492 (Slip Op 2/7/14), den'g lv, Mich App No. 309367 (unpub 6/18/13).

In this very interesting case, Jennifer French worked as the City's Clerk for six years. She and her husband owned a home in Douglas, some 10-15 miles south of Holland. She purchased a house in Holland, enrolled her children in Holland schools, registered to vote in Holland, and applied for a personal residence property tax exemption (which required Ms. French's affidavit asserting the Holland house was her principal residence). The City denied the exemption, finding the Holland house was not her primary residence, and terminated her employment for "conduct detrimental to the image of the employer."

Since Ms. French's employment was subject to an Employee Handbook that contained both an arbitration and just cause provision, she sought and obtained arbitration over her discharge. The arbitrator ruled the City did not have just cause to discharge Ms. French, because it had failed to demonstrate the alleged dishonesty had been intentional or was in any way connected to her performance as the City Clerk. She was ordered reinstated with back pay. The City appealed, and the Ottawa County Circuit Court vacated the Award, ordering the matter back to a second arbitration. The second arbitrator ruled for the City.

Ms. French, however, had in the meantime appealed the Circuit Court's ruling to the Court of Appeals, which reversed and reinstated the original arbitration award. The City then sought leave to appeal, which the Supreme Court Majority denied, over Justice Markman's fairly thoughtful Dissenting Opinion.

The Significance: The Judiciary as a whole continues to uphold the sanctity of arbitrators' awards any time those awards can be construed as consistent with the parties' agreement to arbitrate, even where the threads of consistency are relatively thin. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

I had the most moronic case of my career recently. In 23 years of arbitrating labor cases I have never seen more time, effort and money squandered on a less meritorious claim. The case is a matter of public record so I am not disclosing anything confidential. And since I have been removed from the panel I have no personal financial interest in remaining silent. I can spill the beans.

The facts are these. On the morning of Monday October 3, 2011 at 8:15 AM it was 65 degrees in the offices of the Social Security Administration Teleservice Center in Indianapolis, Indiana. At 1:00 PM it was 68 degrees.

That's it.

The Union, the Association of Federal Government Employees (AFGE), filed a grievance on the grounds that these facts exposed employees to unsafe or unhealthy working conditions and therefore constituted a violation of the CBA. The Employer pointed out that the weather is hard to predict over the weekend in October, and sometimes it is a little chilly or a little warm for a few hours on Monday mornings while the HVAC system gets up to speed. Further, the Employer said, it doesn't own the building and doesn't control the heating system. When management saw that the office was chilly, they called the landlord and complained, and the situation was brought under control within a few hours. In the Employer's view, this satisfied the contractual requirement that they "make every reasonable effort" to address the problem. And besides, while the situation may have been mildly annoying for a few hours, there was no danger to anyone's health or safety. Management denied the grievance.

The Union took the matter to arbitration.

Lawyers were flown in from Chicago and witnesses from Washington. I drove down from Detroit. A hearing was held. I listened to openings and took the lawyers into the hall. I told them 65 degrees was not a danger to health or safety. The Union people held a caucus and elected to proceed. Witnesses were called. I listened to testimony.

When it was over I asked the parties if an oral closing would suffice. It would not. A transcript was ordered and briefs were written.

A month later I read the briefs. I ruled that 65 degrees was not a danger to health or safety.

The Union filed exceptions and appealed to the Federal Labor Relations Authority, a three-person board appointed by the President of the United States. Another round of briefs was prepared. The FLRA ruling was nine pages long and contained 75 footnotes. Many federal regulations were discussed. Ultimately the FLRA ruled that 65 degrees was not a danger to health or safety and upheld my decision.

Actually, the FLRA didn't say I was right. They said "the Union has not demonstrated that the Arbitrator's interpretation is irrational, unfounded, implausible or in manifest disregard of the agreement."

Knowing that is the standard that would be applied, how could a reasonable, responsible union bring the appeal? The answer has to be that the goal was not to win the case but to harass the enemy.

I make my living writing labor arbitration decisions. If the parties want to file silly cases that's their business. In this case they saw fit to pay me to drive to Indianapolis, stay in a hotel, listen to their testimony, drive back, read their briefs, and write a decision. As a matter of personal financial interest, I have to say God bless them. But as a rational human being I'm dumbfounded, and as a taxpayer I'm horrified.

There are several problems here. One is that no one involved in this idiocy was spending his own money. Another is that the AFGE and the SSA are stuck in the equivalent of a blood feud. Another is that the federal government is paralyzed with bureaucratic procedures and pointless rules. And a fourth is what the literature calls irrational escalation of commitment and I'm calling a tuk aholt problem. The name comes from a bluegrass musician I heard many years ago talking about his uncle. He said once his uncle tuk aholt of an idea in his mind there wasn't nothin' could shake it a'loose. ■

MERC/BUREAU PENDING ENDEAVORS

Ruthanne Okun
Bureau Director

Sidney McBride
Labor Mediator

2013 Annual Report

The Michigan Employment Relations Commission recently published (what is believed to be) our first Annual Report. The Report covers the 2013 fiscal year from October 1, 2012 through September 30, 2013 and is available exclusively from the agency's website at www.michigan.gov/merc. Be one of the first readers of this web-publication, which was prepared with pride by the Commission and Bureau Staff.

MERC Advisory Committees

As noted in a previous *Lawnotes* edition, the Commission established two Advisory Committees during 2013. The first committee, the "Act 312/Fact Finder" or "Panel Member" Advisory Committee, presented its recommendations to the Commission in the Fall of 2013. Several of those recommendations dealt with refining the work product of individuals appointed by MERC to issue awards/reports in Act 312 and Fact Finding cases. Other recommendations focused on enhancing the efficiency of both dispute resolution processes. Many of this group's recommendations have already been implemented by the Commission, including the web posting of the respective lists of individuals eligible to receive appointments on Act 312, Fact Finding and Grievance Arbitration matters.

The second committee — the Advocates' Advisory Committee — is tasked to consider a wide array of issues relative to MERC/Bureau operations including: agency procedures, training programs, website improvements, and panel selection concerns. This group recently submitted recommendations to the Commission. Some of the recommendations being considered are: posting ALJ Decisions and Recommended Orders as soon as they are issued; providing an option for regional panel appointments; and accepting applications of out-of-state grievance arbitrators to service constituents located near the State border. Final approval and implementation of this group's recommendations by the Commission is slated for this Spring.

Revisions to MERC's Act 312 and General Administrative Rules

As you may be aware, MERC has been engaged in two separate rulemaking projects: one to amend the Act 312 Rules and, the other, the General Administrative Rules. Public Hearings took place at Cadillac Place in Detroit on December 10, 2013 for the Act 312 Rules and on April 8, 2014 for the General Rules. We anticipate final approval and implementation of both sets of rules to occur no later than the end of this calendar year. Stay tuned to the MERC webpage for details as they occur.

Act 312 Arbitrator/Fact Finders/Constituent Training Conference in Fall 2014

Plans are underway for the 2014 MERC Training Conference in the Fall of 2014. Emphasis will be given to recent updates regarding MERC's processes and rulings in light of statutory amendments and Administrative and Act 312 rule changes. A "Back to Basics" MERC Course is also being developed with the cooperation of Wayne State University (Labor@Wayne) to aid those represen-

(Continued on page 16)

WORDS MATTER

Stuart M. Israel
Legghio & Israel, P.C.

At the library recently, I picked up Bryan A. Garner's *The Elements of Legal Style* (2d ed. 2002). Garner is editor-in-chief of *Black's Law Dictionary* and a ubiquitous commentator on legal writing. He knows lots of rules. This paragraph, quite possibly, violates his rules on hyphens, citations, capitalization, and using simple words.

Anyway, going through the chapter called "Words and Expressions Confused and Misused," I came across Garner's warning about the term *Hobson's choice*. He writes:

> **Hobson's choice**. The phrase refers not to two or more undesirable choices, but to the option of taking the one thing offered or nothing at all. Thomas Hobson, who rented horses in Cambridge, is reputed to have compelled customers to take the horse closest to the stable door or else go without. In referring to *the Hobson's choice between continuing trial with a tainted jury and facing the expense and delay of a new trial*, the writer betrays an ignorance of the source of the allusion.

Good to know. What legal writer would not want to avoid the ignominy of misusing *Hobson's choice* or, for that matter, any other word or expression?

Ruminating on *Hobson's choice* and the other words and expressions on Garner's confused-and-misused list—at pages 99-147 of his book—reminded me of two lessons learned about the careful use of words and expressions.

1.

The first lesson came in a conversation some decades ago with my then-law-partner, and future-accomplished-labor-arbitrator, Donald F. Sugerman. I was under the weather. I apparently looked the part, as Don asked about my health. I said I was feeling nauseous. Don produced *The Elements of Style* by William Strunk Jr. and E.B. White, and pointed out my error. In the chapter titled "Words and Expressions Commonly Misused," Strunk and White explain:

> ***Nauseous. Nauseated.*** The first means "sickening to contemplate"; the second means "sick at the stomach." Do not, therefore, say, "I feel nauseous," unless you are sure you have that effect on others.[1]

Don pointed to the book and beamed. I stood corrected, embarrassed, and still nauseated.

I was also cursed for life. Since then, whenever anyone says "I am nauseous," I am there to invoke Strunk and White. Once you are attuned to the distinction between *nauseous* and *nauseated*, you realize that opportunities to correct others' misuse of the former occur quite frequently.

Of course, queasy colleagues, family members, friends, acquaintances, and pregnant women encountered in the grocery store always are grateful to be straightened out on their mistaken word choice. The correction momentarily distracts them from the stress of searching for a convenient wastebasket or paper bag.

So, the compulsion to correct the misuse of *nauseous* is not really a curse. I was just being ironic. Enlightening the benighted is a calling. But don't take my word for it. You can decide, as I have now passed the Sugerman Curse on to you.

2.

Even the correct use of words or expressions can cause confusion. I learned this lesson decades ago, too, at the Michigan Court of Appeals. I was there to ask the court to rectify some injustice visited on a felon. I don't remember the details now; he may have been faced with a *Hobson's choice*. In any event, the jury applied *Occam's razor* and convicted him.

I responded to a pointed question from the bench by explaining that the prosecution unfairly put my client into a *Catch-22* situation. My judicial interlocutor replied: "I am not familiar with that citation, counsel." After an awkward pause, during which I felt a little nauseated, I eloquently responded: "Uh, umm, it's a term from, you know, a novel. It means, like, you're damned if you do, and damned if you don't. Like a no-win situation."

The judge, no doubt grateful that I filled the gap in his cultural knowledge, replied: "Thank you, counsel."

I probably violated a number of style rules in that argument. I used a literary allusion that perhaps was not as universal as, say, one from the bible, or Shakespeare, or Elvis. I used *damned*, twice. You can consult Strunk and White and Garner for the governing rules. In the meantime, the global point is this: words matter.

—END NOTE—

1 The above excerpt is from William Strunk Jr. and E. B. White, *The Elements of Style* (4th Ed. 2000) at 53. The first "Strunk and White" was published in 1959. A note from the fiftieth anniversary edition, published as you might expect in 2009, calls it "the best-known and best-selling book about writing ever published." ■

MERC/BUREAU PENDING ENDEAVORS

(Continued from page 17)

tatives (management and labor) who are relatively new to the field of labor management relations. This concept resulted from a recommendation received from the Advocates' Advisory Committee. It furthers our goal to provide education and training to our constituents to ensure that the agency's processes work well for all who utilize MERC's services. Stay tuned to the MERC website for training dates and registration details as the program details develop.

Technology Enhances Agency's Web Friendliness

A major commitment of the Commission and BER staff is to continue exploring and implementing technological enhancements to MERC's website in order to provide greater customer access to agency information. To assist in this effort, your suggestions and comments are needed on what improvements or changes could make the MERC website more customer friendly or useful. Email your thoughts and suggestions to: berinfo@michigan.gov.

Also, your assistance is still needed to help the agency provide web access to MERC case decisions issued between 1988 through 1997. If you have a hard copy(ies) of any signed MERC decision(s) issued during this time period, please contact us so we can arrange to obtain a copy to upload to our webpage. Note: We are not seeking any reformatted decisions contained in third party publications – e.g. MERC Labor Opinions. We need the actual signed hard copy (original or photocopy) of the decision issued from this agency. Contact us at berinfo@michigan.gov with your ideas for obtaining these documents or if you have a hard copy of the decision. ■

SIXTH CIRCUIT UPDATE

Scott R. Eldridge
Brian M. Schwartz
Michael K. Jackson, II
Miller, Canfield, Paddock and Stone, P.L.C.

Employer's Opinion Just One Factor Whether a Job Function is Essential Under the ADA

In *Henschel v Clare County Road Commission*, Docket No 13-1528 (Dec. 13, 2013), the plaintiff, Wayne Henschel, was a former employee of the Clare County Road Commission, who worked as an excavator operator, responsible for operating a piece of heavy equipment used for digging ditches and trenches. At times, Henschel would have to haul the excavator to work sites using a trailer pulled by a manual transmission semi-truck. He sued the Road Commission alleging discrimination under the Americans with Disabilities Act, after he was not allowed to return to work following a motorcycle accident that caused him to lose his left leg. According to the Road Commission, Henschel could no longer perform his job. The U.S. District Court for the Eastern District of Michigan granted the Road Commission's motion for summary judgment, ruling that Henschel could not perform the essential function of his job requiring him to haul the excavator, and that no reasonable accommodation was possible.

The Sixth Circuit reversed and remanded. According to the Court, a fact dispute exists whether hauling an excavator was an essential function of Henschel's job because there was sufficient evidence that hauling the excavator did not take much of Henchsel's time and was a relatively marginal function not identified on the job description. Noting that the district court's decision was predicated largely on the Road Commission's opinion that hauling was an essential function and its own conclusion that the position would fundamentally change if that task were given to another employee, the Sixth Circuit explained that an employer's opinion in that regard "carries weight but is only one factor to be considered." Additionally, according to the Court, that the job description included "other duties assigned" as a job duty does not make every job duty assigned an essential one. "To reach that conclusion would make the various job descriptions meaningless." Explaining, however, that the district court never addressed whether Henschel could operate the excavator safely, the Sixth Circuit also instructed the district court to determine on remand whether a fact dispute exists for that issue.

Successful ERISA Plaintiff May Also Recover Disgorgement of Profits As Damages

In *Rochow v Life Insurance Company of North America*, Docket No 12-2074 (Dec. 6, 2013), Daniel Rochow, a participant in a long-term disability plan administered by Life Insurance Company of North America, filed an Employee Retirement Income Security Act ("ERISA") action against the insurer, challenging the insurer's denial of benefits. The U.S. District Court for the Eastern District of Michigan ruled that the insurer's decision was arbitrary and capricious. Subsequently, Rochow died and the administrators of his estate were substituted as plaintiffs. They moved for an equitable accounting and disgorgement of profits that the insurer earned on the wrongfully retained benefits. The district court adopted the plaintiffs' expert's metric as the basis for determining profits. Eventually the district court ordered the insurer to disgorge $3.8 million under an equitable theory of unjust enrichment.

A divided panel of the Sixth Circuit Court held that disgorgement was an appropriate equitable remedy under ERISA and the district court did not abuse its discretion in adopting a return-on-equity metric to calculate the insurer's profits. It explained further that equitable disgorgement of profits cannot fairly be characterized as punitive because it leaves the insurer no worse off than it would have been had it paid benefits to the participant when they were due as the law required. Nor does such an award "offend the doctrine against double recovery." The dissenting judge opined that the disgorgement of profits undermines ERISA's remedial scheme because ERISA does not seek to punish violators, but rather, attempts to place the plaintiff in the position he or she would have occupied but for the defendant's wrongdoing.

Involuntary Transfer to Position For Which Employee Previously Applied is An Adverse Employment Action

In *Deleon v. Kalamazoo County Road Commission*, Docket No 12-2377 (January 14, 2014), the Sixth Circuit considered whether a lateral transfer to a position for which an employee had previously applied constituted an adverse employment action under Title VII and the Age Discrimination in Employment Act. The plaintiff, Robert Deleon, had applied for the position of Equipment and Facilities Superintendent, but did not get the job. Nine months later, the defendant, the Kalamazoo County Road Commission, involuntarily transferred him to that position. The U.S. District Court for the Western District of Michigan granted the Road Commission's motion for summary judgment.

A split Sixth Circuit panel reversed and remanded, explaining that a transfer may constitute an adverse action "so long as the particular circumstances present give rise to some level of objective intolerability." Because the working conditions of the new position were more arduous and dirtier than the plaintiff's prior position as Area Superintendent, the majority concluded that there was a genuine issue of material fact as to whether the transfer was materially adverse to a reasonable person. That Deleon had applied for the position, according to the Court, did not prevent the transfer from being considered an adverse employment action. It stated, "an employee's opinion of the transfer, whether positive or negative, has no dispositive bearing on an employment action's classification as 'adverse'." ■

JANET C. COOPER, LABOR AND EMPLOYMENT LAW SECTION DISTINGUISHED SERVICE AWARD RECIPIENT

Sheldon J. Stark

Janet Cooper was everything the Labor and Employment Law Section's Distinguished Service Award stands for. Thanks to the Section Council and to Gloria Hage, Chair of the Distinguished Service Award Committee, for making this happen.

Janet Cooper was an administrator, a teacher, a leader, a mentor, a role model, a civil libertarian, an activist, a labor and employment lawyer, and a public servant extraordinaire.

Janet was all those qualities and always maintained her basic humanity. She was warm, she was funny, she was passionate, and she was caring. She was upbeat, positive, down to earth, sardonic and FUN! She loved her family, she loved her friends, she loved her causes of civil rights and civil liberties, and she loved her work.

Janet Cooper was born in Detroit May 28,1931. She passed away from complications of cancer on December 8, 2002. She earned a degree in journalism from the University of Detroit in 1953; and a Masters in International Politics and Economics from U of D in 1962. She went back to law school almost a decade later and earned her Juris Doctor from Wayne State University Law School in 1974.

Her earliest employment was for non-profits. With a life-long passion for civil rights, however, Janet was one of the first people hired by the then brand new Michigan Department of Civil Rights, created by the Michigan Constitution of 1963. She started as a field investigator. Part of her job was educating the public. I first met Janet in 1968 when she came to Port Huron where I was a member of the Community Relations Board, appointed by Port Huron's mayor to improve race relations in the community. We gave an award that night to an individual who said in his acceptance speech, "It's hard to believe they give you an award for NOT discriminating!" Janet was invited to be our keynote speaker and talked about the work of the Department, the Civil Rights Commission, and civil rights enforcement. Neither of us had yet been to law school. She was awesome.

Janet's talent, commitment, and ability were quickly recognized and she moved up in the Department to ever-increasing positions of authority and responsibility. During the course of her 32-year career, she became Director of the Conciliation and Hearings Division, where she championed settlement of cases. She was promoted to Director of the Enforcement Bureau, then Director of the Legal Bureau, and finally, Deputy Director of the Department, the highest level civil service position within the government. The only position higher is the Director, a gubernatorial appointment. When Janet retired, her colleagues characterized her as "a living legend!" Can you imagine that?

For more than 20 years, Janet also served as a popular adjunct professor at Wayne Law School, teaching employment discrimination law. She inspired many students to take up the practice, including Mimi Helveston, long-time, plaintiff-side employment law practitioner, and Gail Cober, Director of the Detroit office of the Equal Employment Opportunity Commission.

Janet was a beloved mentor, as well. She was great at spotting talent and encouraging people to be the best they could be. She encouraged one subordinate after another to improve themselves and attend law school. You may know some of their names. You may not know the role Janet played in their careers.

Nick Rine, now a clinical law professor at the University of Michigan Law School; Nicki Tsagaris, who went on to work at the Honigman law firm before moving to New York City to practice; Remona Green, a long time public servant at the Department of Civil Rights, who worked closely with and was a friend of Janet's; Bill Mann, now with the Oakland County Corporation Counsel's office; John Obee, a fair housing and commercial litigator, who now has his own firm; and the late George Wirth, who became Director of the Legal Bureau, and later Chair of this Section.

Janet Cooper

Janet also mentored and encouraged a young African American lawyer in the Attorney General's office named Ron Robinson. Today Ron, head of the Civil Rights Division, fondly remembers all the encouragement and help she gave him. Janet was a resource, a friend, and a counselor we could always rely on for good advice, common sense, and wise counsel. John Runyan remembers that no matter how busy she was, she always returned phone calls. She had excellent judgment and was loved and respected by lawyers on both sides of the "vs." sign. The late John Brady and I disagreed about many things, but one thing on which we were totally united: Janet Cooper was our go-to person for advice on the thorniest of issues.

Janet served on the Labor and Employment Law Section council with distinction, moving through the officer positions until she herself became Chair,

As passionate as Janet was about civil rights, she was equally passionate about civil liberties. She served first as Chair of the Metro Detroit Branch of the American Civil Liberties Union; and eventually chaired the ACLU of Michigan State Board. When she left the Detroit Board, she encouraged a young African American lawyer to replace her: Ralph Simpson went on to serve as chair of the Detroit Branch for many years. When she stepped down as chair of the State Board, she helped elect Jackie Washington, the first African American woman to chair the board. During her ACLU tenure, Janet lead the organization to adopt affirmative action standards and guidelines which are still in place. And when long time ACLU Executive Director Howard Simpson resigned, she helped identify and recruit Kary Moss to replace him. Under Kary's leadership, the ACLU has grown from a small 4-person staff to an organization to be reckoned with; 20 full time employees, at least 8 lawyers, and offices in Detroit, Lansing, and Grand Rapids.

Janet was also active in the League of Women Voters, Emily's List, the Michigan Women's Hall of Fame, and civic affairs in Livonia, where she resided with her sister Marge. Janet drafted Livonia's code of ethics for public officials.

I could talk about Janet for hours. I even know here favorite white Bordeaux — Verdiac — which she bought by the case with her friend Micki Levin.

Janet Cooper was my friend and it is a high honor to present our Distinguished Service Award posthumously to her sister Marge Cooper. ■

MERC UPDATE

William C. Camp
White, Schneider, Young & Chiodini, P.C.

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.

Unfair Labor Practices

Decatur Public Schools -and- VanBuren County Education Association, MEA/NEA and Decatur Educational Support Personnel Association, MEA/NEA, Case Nos. C12 F-123 and C12 F-124 (issued January21, 2014).

MERC decisions issued in January normally appear in the summer update, but the importance of this decision and the amount of litigation on the issue, prompted its expedited dissemination.

Public Act 152 of 2011 was enacted to limit public employers' expenditures for employee medical benefit plans. Section 3, MCL 15.563, sets specific dollar limits referred to as "hard caps" on the amounts public employers can pay for employee medical benefit plans. Upon a majority vote of its governing body, a public employer may comply with the requirements of Section 4 of PA 152 instead of Section 3. Section 4, MCL 15.564, limits a public employer's share of health care costs to 80% of the total costs of all the medical benefit plans it offers. This option is often referred to as the 80/20. Section 5 of PA 152 expressly states the statute does not apply where parties are covered by a collective bargaining agreement in effect prior to the effective date of the Act, September 27, 2011. Public employers failing to comply with the requirements of Act 152 are subject to financial penalty under Section 9 of the Act.

The facts in this case are not materially in dispute. The collective bargaining agreements between Respondent Decatur Public Schools, and petitioners VanBuren County Education Association, MEA/NEA and Decatur Educational Support Personnel Association, MEA/NEA, each expired in June 2012. On or about may 9, 2012, Respondent sent a memorandum to members of the Decatur Educational Support Personnel Association (DESPA), informing them it would implement the hard caps as set forth in Section 3 of PA 152 on July 1, 2012. This memorandum and a subsequent June Memorandum notified these employees of deductions that would be taken from their pay based on the hard caps. Respondent implemented the hard caps on the support unit members on July 1, 2012, as indicated in the memoranda. Respondent and DESPA did not negotiate over the implementation of the hard caps or the deduction from employee paychecks prior to their implementation. DESPA did not demand to bargain on these issues. Charging parties filed Unfair Labor Practices following the implementation alleging Respondent violated its duty to bargain in good faith under the public Employment Relations Act (PERA).

The ALJ found, in reconciling bargaining obligations regarding health insurance with the new mandates under 2011 PA 152, the new statute essentially sets a clock on this bargaining obligation to which the Legislature set a deadline on bargaining, that deadline being the expiration date of the pre-existing contracts. In the absence of a negotiated deal upon contract expiration, the obligations of PA 152 kick in. The selection of the hard caps versus the 80/20 was subject to the duty to bargain, but the default in absence of that agreement is the hard caps.

The ALJ found, in order to give PERA and PA 152 full effect, covered public employers must comply with PA 152. Those with bargaining obligations must meet that obligation as traditionally analyzed under PERA, but the deadline for implementation set by the Legislature must be met. The ALJ further found there is no duty under PERA for an employer to propose or demand bargaining over how to comply with PA 152 nor is there an obligation for an employer to secure agreement with the union prior to taking steps to comply with PA 152. There remains a duty to bargain in general over the nature of health insurance options, notwithstanding the passage of PA 152.

Following the ALJ's Decision, Charging Parties filed Exceptions and Respondent filed Cross Exceptions.

As for the claim brought by DESPA, the Commission found the Association did not demand bargaining; therefore Respondent had no duty to bargain over its choice between the hard caps and 80/20 contribution. The Commission found DESPA failed to state a claim upon which relief could be granted under PERA and dismissed their Charge.

As to the Charge field by the VanBuren County Education Association, MEA/NEA (VBCEA), the Commission engaged a much longer analysis. The Commission attempted to reconcile the differences between PERA and PA 152. The Michigan Supreme Court has consistently held that PERA is the dominant law regulating public employee labor relations and therefore must supersede any other law in conflict with it. See *Rockwell v Crestwood School Dist Bd of Ed*, 393 Mich 616, 629; 227 NW 2d 736, 741 (1975); *Detroit Bd of Ed v Parks*,98 Mich App 22, 36; 296 NW 2d 815 (1980). In its attempt to reconcile PERA and PA 152, the Commission found that with the exception of granting exemptions of its requirements for public employers subject to collective bargaining agreements in effect at the time the Act was passed, PA 152 does not address collective bargaining and therefore PERA and PA 152 do not have a common purpose nor do they relate to the same subject matter. Without such commonalities, the Commission found no reason to diminish the effect of PA 152 in light of PERA as the dominant law.

The Commission found that PA 152 makes it clear that the public employer's costs are not determined by the amount the public employer pays for particular bargaining units or groups of employees, but for all employees and public officials as a single group. In light of this, the public employer must choose with respect to all of its employees and public officials whether to adopt the hard caps or 80/20 employer share. To that effect, the ALJ erred in finding a choice between the hard caps and 80/20 was a mandatory subject of bargaining. Public employers may bargain with labor organizations over the choice between the hard caps and 80/20, but are not required to do so. The employer's choice of the options under A 152 is a policy decision to be made by the employer.

Charging Parties contended the ALJ erred in concluding PA 152 created a statutorily imposed impasse upon expiration of a prior collective bargaining agreement concerning health insurance cost sharing. Here, the employer implemented the hard caps at contract expiration over the contentions of Charging Parties that it could have delayed implementation of the hard caps and engaged in further bargaining. The Commission concluded that had the employer elected to delay implementation of the hard caps, it would have risked violating PA 152 and may have been subject to the penalties of Section 9 which reads in relevant part:

(Continued on page 22)

MERC UPDATE

Continued from page 21)

> If a public employer fails to comply with this Act, the public employer shall permit the State Treasurer to reduce by 10% each economic vitality incentive program payment received under 2011 PA 63 and the Department of Education shall assess the public employer a penalty equal to 10% of each payment of any funds from which the public employer qualifies under the State Aid Act of 1979, 1979 PA 94, MCL 388.1601-388.1772, during the period that the public employer fails to comply with this Act.

In its final analysis, the Commission examined an employer's legitimate concern over management of public funds in compliance with state law against the statutory duty to bargain over its employees' conditions of employment. Charging Parties contended Respondent could have delayed implementation of the hard caps without being subject to penalties under PA 152, but the Commission found it was not clear that this assertion is correct. The employer has no guarantee that delaying implementation would not jeopardize its ability to comply with PA 152 or subject it to penalties. The Commission found Charging Parties showed no benefit likely to accrue to employees from the employer accepting substantial risk of delaying compliance with PA 152. The potential harm to the employer resulting from delaying compliance is clear.

> Accordingly we find that the employer's decision on whether to accept the risk that would result from delaying compliance with PA 152 is a policy choice within Respondent's managerial prerogative. Here, it was up to the employer to determine the steps it was required to take to ensure compliance with PA 152. The employer's choice not to delay implementation of the hard caps on health care costs is not a breach of its duty to bargain.

This decision is on appeal to the Michigan Court of Appeals.

Election Issues

Delhi Charter Twp -and- Delhi Twp Firefighters IAFF Local 5358, Case no. UC11 J-018 (October 31, 2013).

In October 2011, Delhi Township Firefighters IAFF Local 5359 petitioned for the inclusion of a newly-created position in its unit of full-time firefighters. Delhi Township operates a fire department with 12 full-time firefighters who are represented by petitioner Local 5359 of the International Association of Firefighters. The only excluded full-time employees are the Fire Chief and Fire Marshall. The Township also employs part-time paid on-call volunteer firefighters. An existing bargaining unit full-time firefighter was transferred to fill this new position, of Retirement and Retention Coordinator.

The union asserted the position shares a community of interest with the other full-time firefighter positions. No other unit seeks the inclusion of the position and the employer has not proposed placement in another unit. The employer opposes inclusion of this position because it believes the duties of the position are inconsistent with policy positions taken by petitioner's parent labor organization, the International Association of Firefighters (IAFF). The IAFF, opposes having full-time firefighters also serving as paid part-time volunteer firefighters. The employer asserted the policy level opposition of the IAFF to the uses of part-time firefighters would place the recruitment and retention coordinator in an untenable position of conflict between his obligations to the employer and his obligations or loyalties to the union that seeks to represent the position he holds. The employer further posited that volunteer firefighters, who might be aware of the IAFF's position regarding part-timers, would not trust or feel comfortable relying on a recruitment coordinator in a bargaining unit represented by the IAFF. This distrust, the employer believed, might diminish the usefulness of the position.

The Commission found this coordinator position is newly-created, is not supervisory, is not assigned to confidential labor relations functions, nor does another appropriate unit exist. This position reports to the Fire Chief and works out of the same location as the other firefighters. The employer's promulgated job description identified the primary function of the position as providing support to existing part-time on-call staff and new recruits; coordinating participation in education and training; conducting new hire orientations; conducting public relations efforts to support fire and EMS operations; and to serve as needed as a firefighter or emergency medical technician. The employer's job description expressly required that the coordinator be able to provide both fire/rescue and EMS support at incident scenes as may be required. The job description further requires licensure in Michigan as a paramedic, certification by the State of Michigan as a Firefighter I and Firefighter II with a minimum three years experience as a firefighter/paramedic in the fire services. An incumbent experienced full-time firefighter from the bargaining unit was offered and accepted the position.

The Commission found, in designating a unit as appropriate for collective bargaining under Section 13 of PERA, a primary objective is to constitute an appropriate unit that is most compatible with the effectuation of the purposes of the law and that includes within a single unit all employees sharing a community of interest. *See South Lyon Community Schools,* 19 MPER ¶33 (2006) A community of interest is determined by examining a number of factors, including similarities in duties, skills, working conditions, similarities in wages and benefits, interchange or transfer between groups of employees, centralization of the employer's administrative and managerial functions, degree of control over labor relations, common promotion ladders, and common supervision. *See Saginaw Valley State University,* 19 MPER ¶36 (2006); *Convert Public Schools,* 1997 MERC Labor Op 594, 601; *Grand Rapids Public Schools,* 1997 MERC Lab Op 98, 106. Commission policy seeks, whenever possible to avoid leaving positions unrepresented, especially isolated ones. *See Charlotte Public Schools,* 1999 MERC Lab Op 68. When a newly-created position shares a community of interest with the unit that seeks to include it, the Commission will accrete the position to the existing unit rather than leave it with a residual group of unrepresented employees. *See Lake Superior State University,* 17 MPER ¶9 (2004).

The employer contended that it preferred to treat the position as an exempt member of management. PERA precludes MERC from treating as supervisory, and exempting from a bargaining unit, any individual who is engaged in firefighting functions and, as here, is subordinate to the Fire Commissioner, Safety Director, or other administrative agency or administrator. The coordinator position is a full-time employee required to have firefighting background and the capability to actually engage in firefighting activities. The position is subject to the hazards of firefighting and is therefore subject to Act 312 such that placement in the unit would not be inappropriate. Concerns related to asserted differences in hours and compensation do not preclude the requested unit clarification. Placement of a position within an existing bargaining unit does not determine all of the working conditions to be applied to that position, nor do incidental differences in modes of compensation preclude a finding of a community of interest.

In addressing the employer's express concerns regarding the demands of the position arguably conflicting with some policy positions of the union, the Commission found placement of a po-

sition in an appropriate unit is not driven by an individual employee's hypothetical later decision whether or not to join a union. Moreover, it would be speculative to presume that an individual who chooses to join a particular union will then feel bound to any degree to agree with or carry out a particular policy position promoted by that union. It is not uncommon for members of a bargaining unit to have duties which could place them in conflict with the interests or views, of other members of the bargaining unit. To put a sharper point on the issue, it is not the Commission's policy to exclude from bargaining units employees who investigate activities of their co-workers, nor is the definition of confidential or executive employee extended to cover such positions. *See City of Detroit*, 1980 MERC Lab Op 182, 188. Such investigative positions illustrate much stronger actual conflicts between the interests of different members of the unit, than present here.

The employer relied on speculation that the coordinator's attitude toward part-time on-call firefighters would be tainted by his association with the IAFF. This assumes first that the person filling the coordinator position would be voluntarily associated with the IAFF. It also requires speculation that it would be publicly known the coordinator associated with the IAFF and that he or she shared its views on a particular topic. Such arguments assert that the mere perceived association of the recruitment coordinator with a particular union could be viewed disfavorably by the relevant public. While such subjective concerns may have some grounding in fact, the Commission has rejected similar arguments that unionization of a particular portion of an employer's workforce would negatively affect the employer's reputation and competiveness. *See University of Michigan*, 25 MPER ¶45 (2011).

The Commission refuses to engage in vetting a particular union's policy positions for potential conflicts with employees as it would be unacceptably intrusive to do so. The IAFF policy at issue is an internal union policy that has no bearing on whether a newly-created position of recruitment and retention coordinator has a community of interest with petitioner's bargaining unit. Though the employer may anticipate a conflict between the union policies and the duties of the recruitment and retention coordinator, it is for the employer to set those policy choices that are part of the job duties to be carried out by its employees in the workplace. It is the employees' obligation while on the job, to carry out the employer's policies, notwithstanding any personal disagreement as to such policy choices.

The Commission found no statutory basis for excluding the newly-created position of recruitment and retention coordinator from the existing and appropriate bargaining unit. As such, the petition filed by Local 5359 of the IAFF was granted and the bargaining unit was clarified to include the newly-created position of recruitment and retention coordinator. ■

POLICE OFFICER'S CRITICAL FACEBOOK POSTS NOT PROTECTED SPEECH

Marlo Johnson Roebuck,
Jackson Lewis PC

A 26-year veteran police officer's "venting on Facebook" about her department's decision not to attend the funeral of an officer killed in the line-of-duty was not protected speech under the First Amendment, the federal District Court for the Northern District of Mississippi ruled. *Graziosi v. City of Greenville*, No. 4:12-CV-68-MPM-DAS (N.D. Miss. Dec. 3, 2013). Granting summary judgment in favor of the employer, the court ruled that the plaintiff, who was terminated following the Facebook post, failed to establish a claim for retaliatory discharge in violation of her First Amendment rights.

Facts

Susan Graziosi served as a police officer of the Greenville Police Department ("GPD") in Mississippi for 26 years until she was terminated for posting comments on Facebook regarding the Chief of Police's decision not to attend a police officer's funeral in a neighboring town. Graziosi wrote on the Mayor of Greenville's Facebook page:

> I just found out that Greenville Police Department did not send a representative to the funeral of Pearl Police Officer Mike Walter, who was killed in the line of duty on May 1, 2012. This is totally unacceptable. I don't want to hear about the price of gas . . . . Dear Mayor, can we please get a leader that understands that a department sends officers [to] the funeral of an officer killed in the line of duty?

Graziosi also made other comments on Facebook disparaging the Chief of Police's leadership, including: "we had [something] then that we no longer have – LEADERS . . . . If he suddenly decided we 'couldn't afford the gas' (how absurd – I would be embarrassed as a chief to make that statement)[,] he should have let us know so we could have gone ourselves;" and "If you don't want to lead, can you just get the hell out of the way."

First Amendment Claim

To prevail on a First Amendment retaliation claim, a public employee must establish that (1) she suffered an adverse employment action; (2) her speech involved a matter of public concern; (3) her interest in speaking outweighed the governmental defendant's interest in promoting efficiency; and (4) the protected speech motivated the defendant's conduct. *Gibson v. Kilpatrick*, 2013 WL 5806947 (5th Cir. Oct. 29, 2013).

Not Protected

The district court ruled Graziosi's speech was not protected by the First Amendment as it did not involve a matter of public concern. The court observed Graziosi's posts, although on a sensitive subject, were related to her own frustration regarding the Chief's decision and were not intended to help the public.

The court also ruled that they even if she could establish her comments were a matter of public concern, the "ability of a police department to maintain discipline and good working relationships" was a "legitimate governmental interest" that outweighed her interest. It found Graziosi's comments disrupted the Chief's leadership within the department and had the ability to divide the department. Thus, Graziosi's comments did not enjoy First Amendment protection, and the court granted summary judgment to the police department on her retaliatory discharge claim.

While this case did not originate in Michigan, because of the dearth of case law on social media issues, it is a useful tool in analyzing similar employment scenarios. Importantly, this case demonstrates that social media issues continue to impact the employment arena in both the private and public sectors. It also highlights for employers the importance of having policies and procedures in place to address employee misconduct consistently. ■

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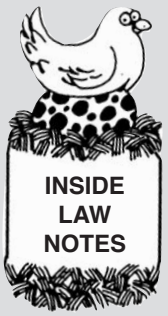

- Tom Barnes addresses the use of bargaining history in arbitration.
- Michelle Harrell and the SBM Committee on United States Courts review proposed federal rules amendments.
- Shel Stark remembers the late Janet Cooper, recipient of the LEL Section Distinguished Service Award.
- John Holmquist writes about the NLRB and the federal appeals courts.
- June Adams discusses *Burrage* and "but for" liability in ADEA and Title VII cases.
- Dick Hooker and Regan Dahle address, respectively, decisions from the Michigan and U.S. Supreme Courts.
- Lee Hornberger reviews recent court decisions affecting arbitration and mediation.
- Barry Goldman writes about the "most moronic case" of his distinguished career as a labor arbitrator.
- Stuart Israel writes about cross-examining the recollection-impaired deponent and why words matter.
- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, MIOSHA, MDCR and EEOC news, websites to visit, a Kelman cartoon, and more.
- Authors June Adams, Thomas J. Barnes, William C. Camp, Regan K. Dahle, Scott R. Eldridge, Barry Goldman, Michelle C. Harrell, C. John Holmquist, Jr., Richard A. Hooker, Lee Hornberger, Stuart M. Israel, Maurice Kelman, Michael K. Jackson, II, Sidney McBride, Ruthanne Okun, Marlo Johnson Roebuck, Brian M. Schwartz, and Sheldon J. Stark.