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LABOR AND EMPLOYMENT LAWNOTES

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WILL PRESIDENT TRUMP ENFORCE PRESIDENT OBAMA'S TARGETING OF NON-COMPETES AND WAGE COLLUSION?

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On October 25, 2016, the Obama Administration issued a Fact Sheet announcing "new steps to spur competition in the labor market and accelerate wage growth."[1] The steps set forth addressed wage collusion, unnecessary non-compete agreements, and other anti-competitive practices in response to the President's Executive Order issued on April 15, 2016.[2]

The Fact Sheet claimed that there is a gross overuse of non-compete agreements by employers, which hinder wage growth, entrepreneurship, and broader economic growth. The Obama Administration encouraged states and Congress to pass legislation to eliminate non-competes for certain categories of workers, including workers (1) under a certain salary threshold; (2) in certain occupations that promote public health and safety; (3) who are unlikely to possess trade secrets; and (4) who are laid off or terminated without cause.

In addition to legislation banning certain non-competes, the Obama Administration proposed "best practices" for state non-compete reform to improve and ensure "transparency and fairness" of non-compete agreements. It recommended that employers be required to notify the individual of the non-compete clause prior to the job offer or promotion, provide additional consideration for the non-compete (rather than mere continued employment), and educate the individual as it relates to the legal implications.

The Obama Administration's call to action may well be undone by President Trump as swiftly as it was made. While the Trump Administration has not yet articulated a clearly defined position on non-compete agreements, it is likely that it will support the autonomy of the parties involved to enter into such agreements, given the Trump campaign's requirement that its own employees and volunteers sign a non-disclosure and non-compete agreement that lasted the duration of the election, so long as Donald Trump was still running for the Presidency—described by the *Washington Post* as the "adhesion contract from hell."[3]

When it comes to non-federal employment, issues concerning the validity of non-compete agreements have been entrusted to the states. Non-compete clauses are enforceable in Michigan, so long as they are reasonable as to duration, geographical area, and type of employment or line of business.[4] In February 2015, there was proposed legislation in the Michigan House of Representatives to eliminate non-compete agreements, which was not passed.[5] While non-compete agreements have survived attack in Michigan, states that independently support the Obama Administration's call to action will presumably continue to target non-competes.

The Obama Administration also specifically addressed collusion among employers to suppress wages and limit workers' mobility. The issue relates to firms in a specific field or area, who compete over the same workforce, artificially suppressing wages below market rates and also agreeing not to hire each other's employees. The former is a type of collusion that is tantamount to price-fixing and is unlawful under the antitrust laws. The latter is often referred to as "no-poaching," and is also a violation. Violation of the antitrust laws could result in the U.S. Department of Justice (DOJ) bringing a criminal prosecution against the company, individual actors, or both. Additionally, it could result in civil enforcement actions brought by the Federal Trade Commission (FTC) as well as civil lawsuits brought by individual employees that could result in treble damages. Although civil actions by the DOJ, the FTC, and individuals have been widespread in recent years, criminal actions have been rare.

This past October the DOJ and FTC announced new Guidance to employers to help eradicate these unlawful behaviors, entitled "Antitrust Guidance for Human Resource Professionals,"[6] which provides general principles to assist human resource professionals as they represent their companies to avoid violating the antitrust laws when communicating with competitor companies. The Guidance warned that the DOJ intends to criminally investigate and prosecute employers and individuals engaged in wage-fixing or no-poaching agreements. Even in the absence of smoking gun agreements between companies, both the DOJ and FTC will treat circumstantial evidence of parallel behavior and data exchange that results in a decrease in competition as establishing an antitrust violation.

The message for HR departments is to avoid sharing sensitive information with competitor companies as it relates to compensation and benefits. Similarly, agreements to not solicit or hire a competitor company's employees should be avoided. In a situation in which competitors are involved in a proposed merger or acquisition, a joint venture, or other collaborative activity, the same antitrust laws control. However, the federal agencies recognize that sharing sensitive information may be necessary when making the ultimate decision as it relates to the merger or acquisition. Still, the information gathering and exchange must be in connection with a legitimate merger or acquisition proposal, and appropriate confidentiality precautions must be taken.

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STATEMENT OF EDITORIAL POLICY

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

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WILL PRESIDENT TRUMP ENFORCE PRESIDENT OBAMA'S TARGETING OF NON-COMPETES AND WAGE COLLUSION?

(Continued from page 1)

The largest wage collusion case to date involved three civil enforcement actions brought by the DOJ in 2010 against eight Silicon Valley technology employers, including eBay, Intuit, Lucasfilm, Pixar, Adobe, Apple, Intel, and Google for collusion to suppress the wages of programmers and engineers.[7] The companies had entered into "no-poaching" agreements in which they agreed not to cold call each other's employees and also limited the hiring of employees who currently worked at a competitor. The case involving Adobe, Apple, Google, and Intel resulted in a settlement for $415 million in addition to a $20 million settlement with the other defendants.[8]

Another large class action involved metro Detroit nurses who brought a civil suit in 2006 against eight hospitals for wage collusion, resulting in settlements that totaled over $90 million.[9] The nurses alleged that the hospitals conspired for years to depress compensation levels of registered nurses employed at their hospitals by exchanging detailed and non-public information about compensation.

At this writing it is unclear how President Trump will address the recent pronouncements from the DOJ and FTC. The lesson for employers and HR professionals remains the same: steer clear of any improper communications with competitor companies that could be construed as information exchange to artificially depress employees' wages, or agreements not to hire or solicit a competitor's employees.

—END NOTES—

1 *Fact Sheet: The Obama Administration Announces Steps to Spur Competition in the Labor Market and Accelerate Growth*, THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY (October 25, 2016), https://www.whitehouse.gov/the-press-office/2016/10/25/fact-sheet-obama-administration-announces-new-steps-spur-competition

2 *Executive Order—Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy*, THE WHITE HOUSE: OFFICE OF THE PRESS SECRETARY, (April 15, 2016), https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers

3 *Trump's adhesion contract from hell*, The Washington Post, (September 3, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/03/trumps-adhesion-contract-from-hell/?utm_term=.6e31bd469551

4 Mich. Comp. Laws § 445.774a

5 House Bill No. 4198 (February 12, 2015, Introduced by Rep. Lucido and referred to the Committee on Commerce and Trade).

6 Department of Justice Antitrust Division and Federal Trade Commission, *Antitrust Guidance for Human Resources Professionals* (October 2016), https://www.justice.gov/atr/file/903511/download

7 *See* U.S. v. Adobe Systems Inc., et al, https://www.justice.gov/atr/case/us-v-adobe-systems-inc-et-al; U.S. v. LucasFilm, https://www.justice.gov/atr/case/us-v-lucasfilm-ltd; In re: High-Tech Employee Antitrust Litigation no 11-CV-02509, (N.D. Cal. October 24, 2013).

8 http://www.hightechemployeelawsuit.com/

9 *See* Cason-Merenda v. Detroit Medical Center, 862 F.Supp 2d 603 (E.D. Mich. (2012). ■

IMPLIED REQUESTS FOR ACCOMMODATION: MUST EMPLOYERS BECOME MIND READERS?

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One recent decision arising out of the United States Court of Appeals for the 8th Circuit appears to suggest that employers might have to brush up on their mind-reading skills to determine when an employee might need a reasonable accommodation under the Americans with Disabilities Act (ADA).

In *Kowitz v. Trinity Health*, 839 F.3d 742 (8th Cir. 2016), the plaintiff was employed by the hospital as a respiratory therapist. She suffered from spinal stenosis (a degenerative spinal disease) and underwent corrective neck surgery and returned to work after exhausting her medical leave under the Family and Medical Leave Act (FMLA). Upon her return, Kowitz provided her employer with a doctor's note outlining several physical restrictions, all of which were accommodated. A month later, the hospital required all of its respiratory therapists to provide updated copies of their basic life support certifications, consisting of a written exam and a physical demonstration of CPR. Kowitz passed the written exam, but submitted a letter from her physician indicating that she could not complete the physical demonstration of CPR until cleared by her physician. After meeting with her physician, Kowitz informed the hospital that she could not perform the physical CPR demonstration until she had completed an additional four months of physical therapy. Because the ability to perform basic life support was an essential function of her position, the hospital terminated her employment the following day.

Kowitz sued the hospital, alleging that it violated the ADA when it did not afford her an accommodation of extra time to complete her CPR certification or transfer her temporarily to another position that did not require this certification. Trinity Health asserted that she never requested any such accommodations. The district court granted summary judgment in favor of the employer on the grounds that Kowitz failed to establish that she could perform the essential functions of the position and that there was no evidence that she ever requested an accommodation for her inability to perform basic life support. The 8th Circuit Court of Appeals reversed and remanded the case for further proceedings, Citing a long-established rule that there are no "magic words" that an employee must use to request a reasonable accommodation, the appellate court found that because Trinity was aware of her specific condition, recent surgery, and ongoing work restrictions, a reasonable jury could conclude that it "should have understood – or did understand – Kowitz's communications to be a request for an accommodation." 839 F.3d at 747. The Court found that her notification to the hospital that she could not complete her CPR certification until she finished physical therapy "implied that an accommodation would be required until then." *Id.*

The dissent expressed concern that the majority decision "collapses two elements of a disability discrimination claim," i.e., that "the court conflates the employer's knowledge of an employee's disability with the requirement that an employee must make a clear request for accommodation." 839 F.3d at 748-49. In other words, an employer is not required to provide a reasonable accommodation simply because it is aware that an employee has a disability; rather, the employee has an affirmative legal obligation to notify the employer that an accommodation is needed to perform an essential function of the job. The dissent noted, "[e]ven where an employer has previously made reasonable accommodation, an employee who wants additional assistance cannot 'expect the employer to read her mind and know she secretly wanted a particular accommodation and then sue the employer for not providing it.'" *Id.* at 750 (internal citations omitted).

Although this case is not binding on the 6th Circuit, the 8th Circuit's rationale poses an interesting issue for employers in any jurisdiction. The 8th Circuit's decision focused on the notion that Kowitz "implied" a need for an accommodation, unnecessarily creating uncertainty where the law is fairly clear. Arguably, there exists a level of implication whenever an individual informs his/her employer of a disability status. In *Kowitz*, the plaintiff gave the hospital notice that she was unable to perform basic life support – an essential function of her position. She did not expressly seek an accommodation, but implied that she should be allowed to go without completing her CPR certifications until she had been cleared by her medical treaters after completing 4 weeks of physical therapy. What this case really hinged on was whether this statement provided sufficient information to cause Trinity to inquire further. The EEOC's Enforcement Guidance[1] on reasonable accommodations suggests that such a statement is likely sufficient to get the ball rolling on the interactive process.

To answer the question posed above: employers have, to some degree, always had to engage in some mind reading when it comes to disability accommodations. This is not new. It has long been established that there are no "magic words" to request an accommodation. Simply because the employee does not expressly state that he/she is seeking an accommodation does not mean that the employee has not expressed a need for one. In *Kowitz*, had the employer engaged in the interactive process to clarify what the plaintiff was seeking, it could have avoided this messy (and costly) litigation. The key to defending against a denial of accommodation claim continues to be reasonableness: the employer must act reasonably when engaging in the interactive accommodation process. At its most basic level, the employer in *Kowitz* could not show that its actions were reasonable.

—END NOTE—

1 EEOC Enforcement Guidance: Reasonable Accommodations and Undue Hardship Under the Americans with Disabilities Act, available at https://www.eeoc.gov/policy/docs/accommodation.html. ■

WHY I MOVED OUT OF THE CLOSET AND WENT TO LAW SCHOOL

Anthony Michael Dillingham

I. Why Not?

As far back as I can remember, I wanted to be an actor. My parents told me that I should have a backup plan. I figured a medical degree would do the trick. Then I took a chemistry class. I liked *My Cousin Vinny* and other lawyer movies, so I figured maybe a law degree would do the trick. See Exhibit A, my personal statement that I attached to my Pitt Law application:

> I first saw the film, *A Few Good Men*, and then recited the line, "I want the truth!" to my friend on the witness stand in a junior high school mock trial. I was the mock lawyer. Of course, we arranged it so that he answered back, "You can't handle the truth!" in front of the entire student body. We were very cool. He got detention for making a mockery of the mock trial. I won the case. Ever since, I've been hooked.

Lawyers looked cool, even if many are would-be doctors who couldn't deal with chemistry.

When I decided on law school, I was working for Pepsi Beverages Company, selling Mountain Dew varieties you've never heard of to local grocery store owners you'd never want to meet. I began each workday on the back of a semi-truck, unloading wooden pallets stacked-full with Pepsi products. I would then stock grocery store shelves with Mug Root Beer, Orange Crush, and bottled Starbucks Frappuccino. The workdays were 12 hours long. We were lucky if we had a day off for every 10 that we worked. We always worked weekends. I had crazy-huge calluses on my hands, and horrible back problems, but the work made honest, common sense. People wanted sugary, super-syrupy, high-calorie, carbonated beverages, and I delivered those beverages to those people. Simple.

It wasn't the work at Pepsi that wore me out, but the nagging feeling that I could be doing more with my life. My parents were union workers, like their parents before them. I was the first in our family to finish college. Compared to that Pepsi-kind-of-work, the legal profession seemed quite prestigious, even if prestige is a bad reason to do anything. For the record, I didn't go for the prestige.

I thought a law degree could help me become something more than I was – not any better or worse – just *more*. And honestly, I was pretty broke and living with my parents. I worked at Pepsi in college, so that I could pay my own way. But after I graduated, I couldn't afford rent for an apartment. In my family, we all chipped in financially because times were tough, a lot tougher on other families to be sure, but tough enough for us.

I actually lived in my parents' closet. Yes, I was a 20-something college grad sleeping on a twin bed where my dad hung his blue jeans. To be fair, it was a walk-in closet, but I was eager for something *more*: even my own tent or toolshed, or the heated corner of a well-kept garage. One more reference to my law school application:

> Throughout my life, the number one priority was always academics. My parents, undoubtedly, were the number one reason for this. They wanted me to have options that they simply didn't. There were constant arguments about money in my family, or more specifically, us not ever having enough. In spite of their financial hardship, they always stressed a career and life choices that would make me happy, not rich. I remember being a kid and running up to my dad's throne-like recliner after school to show him my fourth-grade report card: all A's except for a single A-minus. He asked why I couldn't do any better. Why the A-minus? What had I done wrong? I didn't have an answer.

So, I applied to law school because of movies I watched, money I didn't have, and my parents' reverence for education. Lawyer? Why not? It was time to leave the closet for bigger and better things.

II. LSAT

I remember one question from the LSAT. It was this:

> Busy bumble bees buzz around their beehive; seven of them to be exact. Six worker bees – Brutus, Baba Booey, Biff, Bluto, Barney, and Blake Lively – and one Queen Bee – Beyonce. Along comes a monorail (assume that the monorail is miniature). The monorail crashes. The bees wait patiently. Along comes a bus. The bus runs out of gas. Along comes a plane (assume that the bees prefer jetliners to all other forms of flight-based travel). Assume, *arguendo*, that the plane is divided into the following sections: Cockpit, First-Class, and Coach. Beyonce must ride in the Cockpit. Blake Lively must either ride in First-Class or the Cockpit, but only if her doing so does not offend Beyonce. Brutus and Bluto are brothers, but Bluto must not sit in the same section as Brutus. Biff, Barney, and Baba Booey have motion sickness; they must never fly on a plane.
>
> QUESTION 1: Why is Beyonce so overrated?
>
> (A) How Dare You.
> (B) You Must Be Kidding.
> (C) To the Left, to the Left.
> (D) Everything You Own in a Box to the Left.

I cannot recall the answer, but I knew I had a knack for this law stuff.

III. Hemingway's Café

The wooden floors were sticky with beer, the wooden walls cluttered with sports memorabilia and framed pictures of loyal patrons. Penguins. Steelers. Pirates. Panthers. Glorified buckets of alcohol – shot-pitchers – were served regularly at Hemingway's; plastic pitchers filled with mixed-liquor, packed with ice cubes, and served with plastic shot cups. Depending on its liquor combo, each shot-pitcher had a distinct name. Miley Cyrus. Sweet Caroline. The Walking Dead.

Speaking of the walking dead – me. I had turned in my final assignment as a law student – slipped the paper under my professor's office door – and headed across the street to Hemingway's for one last drink with law school friends. The study-study-drink rhythm was all too familiar, and the back-and-forth between Pitt Law and Hemingway's had become all too routine over the past three years.

We sat in the back. We reminisced about the past. We worried about the future. We knew a ton about torts, how to "brief" a case, and learned to suffer public humiliation via the Socratic method. But knew nothing about how to be lawyers – clueless about filing legal complaints, drafting motions, or counseling clients; you know, lawyer stuff. And between the five of us 20-something juris doctors, we had accumulated over $57 million in student debt.

Law school teaches you how to be a law student. If I did it all over again, I'd be the best damn law student anyone had ever seen. But enough nostalgia, we had the dreaded bar exam to conquer. Somebody order another Miley Cyrus!

IV. The Funeral and the Hoodie

I'm not uncomfortable around dead bodies. Never have been. This was different, though. She was my grandmother. In a daze, I waited by the casket. Family and friends formed a line and offered their condolences with hugs and handshakes.

"I'm sorry for your loss. She was a special lady." Kind man.

"I grew up with Norma. Lovely woman. So sorry." Nice lady.

"So, so sorry about your grandma. Good luck on the BAR EXAM." *What a buzz kill.*

In my mourning and malaise, I had forgotten, momentarily, that I was behind in my Themis bar-study coursework. At 62% completion with only a few weeks to go until exam day, I had no time for dead relatives! When a funeral feels like a welcome reprieve, you know you're studying for the bar exam.

Drills. Quizzes. Practice Problems. Practice Questions. Practice Tests. Hooked On Phonics. Comprehension Guides. Help Hotlines. Funeral. Video Lectures. More Video Lectures. Additional Video Lectures. Existential Crises. Outline. Outline. Outline. And finally, on one fateful day in July, the dreaded bar exam. Rather, on *two* fateful days in July, I would be tested on three years of legal study and eight weeks of cramming. Two days is plenty.

The bar exam was given at Michigan State University – on the basketball court. I worried that I had the same odds of passing the bar as I did dunking against the Spartans. Rows and rows of foldaway tables, segmented by 800–plus pieces of laminated paper designating assigned seat numbers. We all settled in. An hour until test time. Most people just stared at one another. A few repeat test-takers recognized each other.

"There he is! Back again? How many is this now? Three?" asked Seat 758.

"Nah, man. Four. This is the one, though. I can feel it," answered Seat 762.

It was freezing cold. A woman sat across from me, shivering in her hooded-sweatshirt, shrugging her shoulders up and down to stay warm.

"No hoodies. Ms. – your hoodie. The hoodie must go." One of the 3,000 bar exam proctors had caught her red-handed – shivering woman, *with* a hoodie. Busted.

The woman pleaded. "Oh, I am so sorry. I forgot about the NO HOOD rule. Maybe if you have a pair of scissors, I could just cut off the hood?"

"No scissors here. And hoods are hoods. I'll let you throw it into the bleachers. Save you a trip back to your car."

The shivering woman flung her hoodie into the rafters. Near the Izzone.

The bar exam began. Then it ended. Somewhere in between, I suffered brain freezes, psychotic breaks, and answered some questions about various legal scenarios. And, the shivering woman eventually stopped shivering. I think she died of exposure.

Several decades passed as I anxiously awaited my bar exam results. When the bar examiners finally released the results, they weren't quilled onto parchment, sealed in hot wax, or delivered by owl. They weren't even mailed. Instead, an email arrived, which directed me to a website, which directed me to a link, which directed me to a list – The List. No names. Just seat numbers. Unlike Santa's Naughty List, this was the List you wanted to be on. If you saw your seat number on the List, you passed. If not…

My seat number was on the List. I felt relieved. Not proud. Not accomplished. Just relieved. Some of my colleagues weren't so lucky. They thought about Bar Exam II: The Sequel, or Bar Exam III: The Trilogy. Good thing I left my hoodie at home.

V. What Now?

Many of my law school friends are still looking for work. Smart people, tenaciously looking for lawyer jobs. Melissa works at Macy's. Brian is a bartender. I interviewed for a job at a corporate law firm. Phase two of the interview process – a meeting with the firm's newest associate. You know, so the youngsters could do some millennial bonding.

We chatted about Twitter, Taylor, and Beyonce. And Buzzfeed. Then down to business. The associate mentioned that the employees at the firm were like a family. Even the senior partners weren't so bad. "No partner *here* has ever thrown a stapler at my head," he said. I laughed. He didn't.

I found out that while he was working for a few Big Law firms over the past couple of years, he'd had a variety of office supplies thrown at his head. Didn't quite address the second issue in a memo to the senior partners? Uncapped Sharpie marker. Didn't rack up enough billable hours for the week? Paper-weight. Poorly worded client letter? Stapler.

A bronze bust of Abraham Lincoln sat just behind the associate's desk. I wondered if some 19th century senior partner had ever thrown an inkwell at Honest Abe's head. Anyway, the associate was finally safe at *this* firm, and he was proud. Out of habit, he still wore his yellow hard hat. I never got that corporate job, though.

Nonetheless, I am a lawyer. I have the coveted P-Number. To the uninitiated, I've been initiated.

But I have a confession: I did not actually go to law school because of a Joe Pesci movie, and certainly not because of a Tom Cruise movie. And I am proud of my choice. Lots of lawyers attend law school and become something *more*. In that spirit, I will continue my journey in the legal profession, dodging staplers when I must, dabbling in dive bars when I can, and perpetually chipping away at that crushing pile of student debt. All the while, I will try to do right by my chosen profession and hopefully become something *more*.'

If things don't work out, I can always be an actor. ■

NLRB UPDATE

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The Board has been active in the last few months issuing decisions with potentially broad implications (backpay remedies and joint employers), and some of more limited application, albeit still significant to particular circumstances (employees asserting contractual rights and graduate assistants). To reach its conclusions in a couple of these cases, the Board had to reverse prior case law.

BACKPAY CALCULATIONS REVISED

In a case with implications for any case in which backpay is awarded to discriminatees, the Board adopted a new remedial policy of awarding search-for-work and interim employment expenses regardless of discriminatees' interim earnings and separately from taxable net backpay, with interest. In *King Soopers***,** 364 NLRB No. 93 (Aug. 24, 2016), the Board decided to discontinue its eight decades old practice of treating discriminatees' reasonable search-for-work and interim employment expenses as an offset that reduces the amount of interim earnings deducted from gross backpay. Consequently, these types of expenses will be calculated and paid separately from backpay, regardless of whether discriminatees received interim earnings. The Board agreed with the General Counsel's argument that the traditional approach has discouraged discriminatees in their job search efforts and that it unfairly forces discriminatees to bear work-related expenses that result directly from a respondent's unlawful action. The Board believed there had never been an explanation or reasoned policy rationale for the Board's traditional treatment of search-for-work and interim employment expenses.

The Board pointed out that it imposes a duty on discriminatees to mitigate by engaging in reasonable efforts to seek and to hold interim employment. Thus, discriminatees do not receive backpay for any periods during which they fail to mitigate. The Board believed that the traditional approach not only fails to make victims of unlawful discrimination whole, but may discourage discriminatees in their job search efforts. Discriminatees, who have already lost their source of income, risk additional financial hardship by searching for interim work if their expenses will not be reimbursed should they not be successful in finding a job.

Despite being a departure from how backpay has been calculated previously, the Board emphasized that it has been awarding search-for-work and interim employment expenses for 80 years. In their opinion, the changes they are making only affect how the Board calculates search-for-work and interim employment expenses, not whether these expenses are a permissible remedy. Moreover, these changes are consistent with the Board's broad, discretionary authority under Section 10(c) to revise their remedial policies to ensure that discriminatees are made whole.

EMPLOYEE ASSERTION OF CONTRACTUAL RIGHT

The *King Soopers* case is noteworthy as well for its discussion of the *Interboro* doctrine in the context of the suspension and discharge of the discriminatee whose backpay award led to the new remedial policy discussed above. Pursuant to the Board's *Interboro* doctrine, an individual employee's assertion of a right grounded in a collective-bargaining agreement constitutes protected, concerted activity. 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). As the Supreme Court explained in *NLRB v. City Disposal Systems, Inc.*, "an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated." 465 U.S. 822, 840 (1984).

The discriminatee in *King Soopers,* who worked as a barista in the Starbucks kiosk at the Respondent's grocery store, questioned whether she should be required to assist in bagging groceries in the front of the store. The discriminatee had never been asked to bag groceries before and as a barista was covered by a separate meat contract, whereas employees in the store, who performed bagging and other grocery store duties, were covered by a retail contract. Each contract described the work to be performed by employees covered by each agreement. Consequently, the discriminatee questioned whether she should be bagging groceries because the work belonged to a different bargaining unit or union.

The Respondent and a dissenting member of the Board contended that when questioning the directive to bag groceries, the discriminatee was not invoking a right grounded in the meat agreement. The contention was that "the type of mistake that is permitted under the *Interboro* doctrine is a reasonable mistake *about the facts* . . ., and the *Interboro* doctrine does *not* protect an employee who invokes a non-existent right."

The majority of the Board rejected that contention believing that the Supreme Court in *City Disposal* neither adopted nor suggested such a limited interpretation of the *Interboro* doctrine. In fact, the Court noted that the employee's conduct is concerted so long as "the complaint does, in fact, refer to a reasonably perceived violation of the collective bargaining agreement." Id. at 839–840. Further, the Board and the courts have interpreted the *Interboro* doctrine to cover mistakes about contractual rights, and not just about mistaken facts as to a contract violation.

CONSEQUENTIAL ECONOMIC DAMAGES

Worth noting is that the Board's *Kings Sooper* modification of the decades old approach to the calculation of search-for-work expenses was first proposed by the General Counsel of the NLRB. Without the General Counsel initiative and arguments, it is unlikely the Board would have considered revising its backpay remedy. For that reason, it is important to note that the General Counsel is now seeking, as part of future backpay remedies, the reimbursement for consequential economic harm incurred as result of a respondent's unlawful conduct—for example, expenses resulting from repossession due to failure to make car payments, penalties for early withdrawal from retirement accounts in order to cover living expenses, and loss of home equity in a foreclosure action due to missed mortgage payments. *Seeking Reimbursement for Consequential Economic Harm,* Memorandum OM 16-24 (July 24, 2016).

Regions have been instructed to argue in briefs to administrative law judges that under the Board's present remedial approach, some economic harms that flow from a respondent's unfair labor practices are not adequately remedied. The General Counsel believes that reimbursement for

consequential economic harm, in addition to backpay, is well within the Board's remedial power since the Board has "broad discretionary" authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act. The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. In other words, a Board order should be calculated to restore the situation, as nearly as possible, to that which would have occurred but for the illegal discrimination.

Thus, if an employee suffers an economic loss as a result of an unlawful elimination or reduction of pay or benefits, the employee will not be considered made whole unless and until the respondent compensates the employee for that consequential economic loss, in addition to backpay. Besides the types of consequential economic losses mentioned above, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act. Additionally, the employee should be compensated for the cost of restoring the old policy or purchasing a new policy providing comparable coverage, and any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board.

JOINT EMPLOYER BARGAINING UNITS

The pendulum swung with the reversing of prior Board law in *Miller & Anderson, Inc.***,** 364 NLRB No. 39 (July 11, 2016). The Board returned to the position that consent of the employers involved is not necessary for petitioned-for collective-bargaining units that combine jointly employed and solely employed employees of a single user employer. *Oakwood Care Center*, 343 NLRB 659 (2004) was overruled and the Board returned to the earlier position in *M.B. Sturgis, Inc.*, 331 NLRB 1298 (2000), which had been overruled by *Oakwood.* As a result, the Board will apply traditional community of interest factors to decide if such combined units are appropriate, which it believes is consistent with Section 9(b) of the Act and effectuates fundamental policies of Act that *Oakwood* frustrated.

To recap prior law under *Oakwood*, employees who worked for a user employer—both those employees the user alone employed and those employees it jointly employed (along with a supplier employer, i.e. employment service)— employer consent was required to be obtained if they wished to be represented for purposes of collective bargaining in a single unit. This was the case even if both groups of employees shared a community of interest with one another under the Board's traditional test for determining appropriate units. The logic employed was that Congress had not authorized the Board to direct elections in units encompassing the employees of more than one employer, and that the bargaining structure contemplated by *Sturgis* gave rise to significant conflicts among the various employers and groups of employees participating in the process.

This issue takes on more importance in the modern workplace as employers rely more and more upon employment services to supplement its workforce. As cited by the Petitioner Union in *Miller*, while the temporary help services industry is historically associated with clerical positions, by 2008 temporary workers in clerical positions represented less than one quarter of employment in this industry and only 16 percent of the industry's revenue. Industrial and factory staffing is now the single largest source of revenue for the employment services industry, which includes both temporary staffing agencies and more permanent employee leasing firms, further evidence of the massive changes it has undergone since 1990. The Petitioner also claimed that over 10 percent of contingent workers were employed in the construction industry, and contingent workers were approximately twice as likely as other workers to be employed in construction and extraction occupations. The Board itself noted that, as of August 2014, the number of workers employed through temporary agencies, a subset of contingent work, had grown to 2.87 million workers, a not insignificant number. A recent report projected that the number of jobs in the employment services industry, which includes employment placement agencies and temporary help services, will increase to almost 4 million by 2022, making it one of the largest and fastest growing industries in terms of employment.

Because of the contentiousness of the issue, before reversing *Oakwood*, the Board issued a Notice and Invitation to File Briefs to any entity interested in the issue. Among those entities that filed briefs were the Chamber of Commerce, National Right to Work, American Staffing Association, and the AFL-CIO. One of the questions the Board wished addressed was how, if at all, had the Section 7 rights of employees in alternative work arrangements, including temporary employees, part-time employees and other contingent workers, been affected by the Board's decision in *Oakwood*.

The Board answered the question by concluding that given their "responsibility to adapt the Act to the changing patterns of industrial life," the change in the nature of the workforce was reason enough to revisit the Board's then current joint employer standard. The Board believed that *Oakwood* imposed additional requirements that were disconnected from the reality of today's workforce and were not compelled by the Act. Thus, even if the jointly employed employees and their coworkers who are solely employed by the user employer wished to be represented for purposes of collective bargaining in the same unit, and even if both groups share a community of interest with one another, *Oakwood* prevented them from so organizing unless the employers consent. As such, the Board concluded that *Oakwood* denied employees in an otherwise appropriate unit full freedom of association. Consequently, the Board found that to fully protect employee rights, the Board should return to the standard articulated in *Sturgis*.

Despite the Board's empirical support for its reversal of *Oakwood*, expect the pendulum to swing in the other direction should the Democratic members of the Board lose their majority.

GRADUATE STUDENT ASSISTANTS

In another reversal of prior case law, albeit in an area of much more limited application, the Board in *Columbia University***,** 364 NLRB No. 90 (Aug. 23, 2016), determined that student teaching and research assistants who meet the common law test for employment can be found to be employees . To do so, the Board had to overrule *Brown University*, 342 NLRB 483 (2004), which categorically excluded graduate assistants from

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NLRB UPDATE

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the Act's coverage based on policy reasons. It should be no surprise that *Brown University* was not the first case to decide the issue. To reach its decision, *Brown University* had reversed the decision in *New York University*, 332 NLRB 1205 (2000). And so the pendulum swings.

Bottom line, the Board in *Columbia University* disagreed that student assistants could simply be excluded from coverage of the Act. In their mind, *Brown University* deprived an entire category of workers of the protections of the Act, without a convincing justification in either the statutory language or the policies of the Act. The *Brown University* Board held that graduate assistants *cannot* be statutory employees because they "are primarily students and have a primarily educational, not economic, relationship with their university." The *Columbia University* Board disagreed, pointing out that the broad language of Section 2(3) of the Act, provides that "[t]he term 'employee' shall include any employee," subject to certain exceptions—none of which addressed students employed by their universities. Thus, the Board concluded they have the statutory authority to treat student assistants as statutory employees, where they perform work, at the direction of the university, for which they are compensated. Statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach.

Furthermore, the Board was not persuaded by the *Brown University* Board's self-described fundamental belief that the imposition of collective bargaining on graduate students would improperly intrude into the educational process and would be inconsistent with the purposes and policies of the Act. The Board concluded that this "fundamental belief" is unsupported by legal authority, by empirical evidence, or by the Board's actual experience. Indeed, the *Brown University* Board failed to demonstrate that collective bargaining between a university and its employed graduate students cannot coexist successfully with student-teacher relationships, with the educational process, and with the traditional goals of higher education.

—END NOTES—

*The views expressed are those of the author and not those of the NLRB's General Counsel or the Board. ■

WRITER'S BLOCK?

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

FREE ADVICE ON HOW TO BE A BETTER LEGAL WRITER

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

To paraphrase Mark Twain, everybody talks about the sorry state of legal writing, but nobody does anything about it. I will do something: offer free advice.[1]

1.

I begin with an exercise in editing. Consider the following "introduction" to a brief responding to a summary judgment motion.

> Plaintiff and Counterdefendant Total Waste Management, Inc. (hereinafter "Total Waste Management" or, alternatively, "Plaintiff-Counterdefendant") as a preliminary matter, by way of introduction, would like to note for the Court's consideration and review that, in order for the movant Defendant and Counterplaintiff Fragrant Kimchi Products Manufacturing Company (hereinafter "Fragrant Kimchi Products Manufacturing" or "Defendant-Counterplaintiff") to prevail on the merits of its pending Motion for Summary Judgment (Docket 68) (hereinafter "Defendant-Counterplaintiff's Summary Judgment Motion"), filed in this matter on March 13, 2017 pursuant to Fed. R. Civ. P. 56 (hereinafter "Rule 56"), must show and prove to this Court "that there is *no* genuine dispute as to *any* material fact" *and*, in addition thereto, that Fragrant Kimchi Products Manufacturing "is *entitled* to judgment as a matter of law." Rule 56(a) (emphasis added).
>
> In the following Brief in Opposition to Defendant-Counterplaintiff's Summary Judgment Motion, Total Waste Management will definitively and unequivocally show that in the matter before this Court, based on the record set forth in detail in the declarations and affidavits, deposition transcript excerpts, interrogatory answers, and other evidence presented, pursuant to Rule 56(c), by the parties to this litigation, and in great part included in the appendix accompanying this Brief in Opposition to Defendant-Counterplaintiff's Summary Judgment Motion, Fragrant Kimchi Products Manufacturing cannot, by any measure or standard, prove *either* that there is, in the words of Rule 56(a), "no genuine dispute as to any material fact" *or* that Fragrant Kimchi Products Manufacturing is, also in the words of Rule 56(a), "entitled to judgment as a matter of law."
>
> Indeed, to the contrary, it is fully manifest in the record that there is a very highly contested dispute as to not just one material fact, but as to *many* material facts, and, moreover, also to the contrary, that pertinent legal precedent establishes beyond peradventure that Fragrant Kimchi Products Manufacturing is not—repeat *not*—"entitled judgment as a matter of law."
>
> Therefore, Total Waste Management will ask that this Court find that Fragrant Kimchi Products Manufacturing

> has not met, and cannot meet, its burden to satisfy the requirements clearly set forth in, and mandated by, Rule 56(a), as those Rule 56(a) requirements have on many occasions and in similar and analogous circumstances been interpreted and applied by the United States Supreme Court and many other authorities governing Rule 56 motions in the Sixth Circuit and, in particular, in this District, as discussed further and at length in greater detail in Argument I of this Brief in Opposition, *infra*.
>
> For these reasons, as set forth with greater particularity ahead, Plaintiff-Counterdefendant Total Waste Management asks that this Honorable Court deny Defendant-Counterplaintiff Fragrant Kimchi Products Manufacturing's Summary Judgment Motion in the Motion's entirety, and in all respects, under the Rule 56 standards and pertinent precedent, and enter this Court's order accordingly and forthwith, denying the Motion and awarding Plaintiff-Counterdefendant such other relief as may be warranted by the facts and the law, pursuant to Rule 56 and otherwise.

Is this example exaggerated? Maybe, but not by much. Anyway, it will stimulate your critical editorial faculties. Use this three-step exercise.

First, try to imagine what its author was thinking. Maybe it was something like this. *Wow, my intro is on-point, hard-hitting, persuasive, and puts things into a nutshell. The judge will read this and see things my way or, at the least, think* "tell me more!" *This is just what a good intro ought to do. Plus, it provides the template for my oral argument. Nice work, if I don't say so myself.* What should its author have been thinking? Discuss and decide.

Second, use your red pen. Edit the "introduction." Eliminate redundancy, empty calories, condescension, and everything else that doesn't—to resort to sports metaphor—move the ball down the field. What's left?

Third, look in the mirror. Already you are a better writer. You will never write an introduction that remotely resembles the example.

2.

Many lawyers write badly. Even if *you* write well, you know others who don't—colleagues, litigation opponents, and even some black-robed public employees who, by election or appointment and random-draw assignment, hold your clients' fates—and yours—in their judicial hands.

It is not surprising that many lawyers write badly. Indeed, many smart, educated, accomplished people write badly. And most don't know they write badly. The late William Zinsser—writer, editor, and teacher—observed: "Few people realize how badly they write."[2]

Where should people learn to write well? In elementary school, high school, college, law school? Hah! Those places are full of smart, educated, accomplished teachers—with M.A.s, Ph.D.s, and J.D.s—who write badly and don't know it. Worse, many are not equipped to teach their hapless charges—many of whom are electronically-addled posters and tweeters—to write well.

You can't single-handedly make education great again. But you can intervene on behalf of your writing-challenged colleagues, friends, and relatives. How? You can pass on my free advice: read two of Zinsser's books.

The books to read are (1) *On Writing Well* (Collins, 30th Anniv. Ed. 2006) and (2) *Writing to Learn* (Harper, 1988). They are full of good advice. They are not law books, so they are reasonably priced. They are interesting, enjoyable, and easy to take. They offer sound principles, backed by examples in later chapters. You don't even have to read the examples; you can master the principles just by reading the earlier chapters.

Here is an executive summary of those principles: good writing—usually—is succinct, clear, simple, strong, direct, focused, and specific.

3.

Zinsser wrote that "the reader should be given only as much information as he needs and not one word more."[3] You are thinking: *Hey, Zinsser used the passive voice and only the male pronoun!* Good for you. You are reading critically. Anyway, Zinsser offers good advice: "Don't annoy your readers by over-explaining—by telling them something they already know or can figure out."[4]

Apply this advice to the "introduction" (hereinafter referred to as the "introduction") set out at the beginning of this essay.

Rule 56 motion readers are erudite, high-performing law clerks and, you hope, judges. They are likely to be annoyed by unnecessary explanations—like that Total Waste Management, Inc. will "hereinafter" be referred to as "Total Waste Management." They likely will be annoyed by references to "this matter"—as if your brief may be addressing some other "matter." They likely will be annoyed by repetition of the words of Rule 56, which almost all law clerks and judges know better than the words to the *Start-Spangled Banner*.

Law clerks and judges are not likely to read the introduction and think: *tell me more*! They are more likely to read some portion of the introduction, skip the rest, and think: *blecchh*!

4.

Here is more free advice, with references to Zinsser.

First, identify your objectives. What do you want to say? To whom? Zinsser wrote that "writing is a form of thinking" and: "Clear writing is the logical arrangement of thought."[5] Yogi Berra said: "If you don't know where you are going, you'll end up someplace else."

Second, rewrite. Write, read your writing critically, and then rewrite. Zinsser wrote that "the essence of writing is rewriting."[6] Or maybe he rewrote that.

Anyway, Zinsser observed that "few writers say on their first try exactly what they want to say." Zinsser offered the example of "an interoffice memo from a supervisor requesting 'a list of all employees broken down by sex.'"[7] That example probably came from a law-school-trained HR manager who was either investigating a Title VII claim or designing a wellness program. Zinsser observed: "Meaning is remarkably elusive."[8]

Third, rigorously edit. Good writing, Zinsser advised,

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FREE ADVICE ON HOW TO BE A BETTER LEGAL WRITER

(Continued from page 9)

requires "pruning and revising and reshaping"[9] to make the product "tighter, stronger and more precise, eliminating every element that's not doing useful work."[10] While Zinsser did not use a serial comma (!),[11] his advice is good. He wrote: "Most first drafts can be cut by 50 percent without losing any information or losing the author's voice." He summarized: "Simplify, simplify."[12]

Fourth, work hard. Critically reading—and rewriting and editing—your work, and critically reading others' writing, will improve your writing. This is not the work of a day; it is an arduous lifetime process, requiring time, attention, perspective, and commitment. Zinsser counselled: "Writing is hard work."[13] He observed: "Nobody becomes Tom Wolfe overnight, not even Tom Wolfe."[14]

Conclusion

In sum, my free advice on how to be a better legal writer—and helping others to do so—is: read Zinsser, identify your objectives, rewrite, rigorously edit, and work hard to make your writing succinct, clear, simple, strong, direct, focused, and specific.

Yes, mistakes will be made.[15] But "if at first you don't succeed, try, try again."[16] Your writing will be better and your readers will be better off.

—END NOTES—

This essay originally appeared in *The Practical Lawyer* (April 2017).

1 The sentiment, variously stated—that "We all grumble about the weather, but nothing is done about it"—is often attributed to Mark Twain. Mark Twain also lamented in *Roughing It* (1913) that "every effort I make to save the country 'misses fire.'" I previously attempted to do something about the sorry state of legal writing—see Stuart M. Israel, "Twelve Suggestions for Writing Well," Vol. 23, No. 3 *Labor and Employment Lawnotes* 16 (Fall 2013), collected in Israel and Goldman, *Opinions—Essays on Lawyering, Litigation and Arbitration, the Placebo Effect*, Chutzpah, *and Related Matters* (2016) at 206. My earlier effort, it seems, "missed fire." So, I offer more advice *pro bono publico*.

2 William Zinsser, *On Writing Well—The Classic Guide to Writing Nonfiction* (Collins, 30th Anniv. Ed. 2006) at 17.

3 William Zinsser, *Writing to Learn* (Harper, 1988) at 34.

4 *On Writing Well* at 91.

5 *Writing to Learn* at vii and viii.

6 *Id.* at 15.

7 *Id.*

8 *Id.*

9 *On Writing Well* at xii.

10 *Id.* at 11.

11 See Stuart M. Israel, "In Defense of the Serial Comma," in *Opinions* at 195. Did I mention that *Opinions* is available at amazon.com?

12 *On Writing Well* at 16.

13 *Id.* at 9.

14 *Id.* at 18. If you don't know Tom Wolfe, you might read *Radical Chic and Mau-Mauing the Flak Catchers* (1971) or *The Kandy-Kolored Tangerine-Flake Streamline Baby* (1965).

15 The late William Safire, in *Safire's Political Dictionary* (2008), defined the phrase "mistakes were made" as a "passive-evasive way of acknowledging error…"

16 William Edward Hickson advised: "'Tis a lesson you should heed: Try, try again. If at first you don't succeed, try, try again." ■

UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long

What to Expect from a Justice Gorsuch?

Tenth Circuit Court of Appeals Judge Neil Gorsuch, President Trump's nominee to fill the seat left vacant by the death of Justice Scalia, does not seem to particularly favor either employees or employers. He has authored opinions finding in favor of plaintiffs and defendants, as well as workers and business owners. There is a common thread running through many of his opinions however; they are well-written and instructive.

For instance, Judge Gorsuch authored an often-cited concurring opinion in *Hobby Lobby, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013). The issue in *Hobby Lobby* was whether the company could refuse the mandate of the Affordable Care Act to offer employee healthcare coverage that included coverage for birth-control drugs and devices. Judge Gorsuch wrote a concurring opinion focusing on the standing of the Green family, the controlling owners and operators of Hobby Lobby who had a strictly held religious belief that birth control is morally wrong. Judge Gorsuch concisely distilled from the facts the unique issue facing the Greens: "the mandate infringes the Greens' religious liberties by requiring them to lend what their religion teaches to be an impermissible degree of assistance to the commission of what their religion teaches to be a moral wrong." *Id.* at 1152. Judge Gorsuch concluded that the Greens had standing under the Religious Freedom Restoration Act and that the merits of their claim were "clear enough." *Id.* at 1156. He held that the Greens faced a true "Hobson's choice—an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief." *Id. citing Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010). Irrespective of one's view of Judge Gorsuch's opinion in *Hobby Lobby*, reading the case with an objective eye can provide insight into the kinds of opinions a Justice Gorsuch might author.

Hwang v. Kansas State University, 753 F.3d 1159 (10th Cir. 2014) is an interesting opinion for labor and employment lawyers because it helps resolve an often frustrating issue for employers and employees: at what point is a leave of absence no longer a reasonable accommodation. Hwang was an assistant professor at Kansas State University; she had cancer and took six months of leave to undergo treatment. At the end of that six-month period, Hwang could not return to work and asked for more leave. The University declined to provide further leave, effectively terminating Hwang's employment. Hwang sued under the Rehabilitation Act, 29 USC Sec. 794(a), claiming that the University failed to reasonably accommodate her disability. Judge Gorsuch in another well-written and reasoned opinion held that a leave of absence in excess of six months was not a reasonable accommodation. He wrote that the "Rehabilitation Act seeks to prevent employers from callously denying reasonable accommo-

dations that permit otherwise qualified disabled persons to work—not to turn employers into safety net providers for those who cannot work." *Id* at 1162. He further reasoned that "it's difficult to conceive how an employee's absence for six months—an absence in which she could not work from home, part-time, or in any way in any place—could be consistent with discharging the essential functions of most any job in the national economy today." *Id*. Judge Gorsuch's definitive ruling on this issue of reasonable accommodation suggests that he understands the importance of providing employers and employees with a clear road map for compliance with the federal discrimination laws.

Finally, while not an employment law decision, Judge Gorsuch's concurring opinion in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (2016) provides solid insight into Judge Gorsuch's views on the separation of powers. The issue in *Gutierrez* was whether an executive agency may retroactively apply a reasonable rule that overrules judicial precedent. The case involved the extent to which the Attorney General could exercise discretion in allowing individuals who have entered the country illegally more than once to apply for lawful permanent residency. Judge Gorsuch wrote the opinion of the court on the principal issue, but also authored a separate opinion to address "the elephant in the room," and that is the fact that "*Chevron and Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Id*. at 1149. Judge Gorsuch firmly believes that *Chevron* was wrongly decided and also believes that if it were overturned, the three branches of government would continue to operate the way the framer's intended. He writes:

> All of which raises this question: what would happen in a world without *Chevron*? If this goliath of modern administrative law were to fall? Surely Congress could and would continue to pass statutes for executive agencies to enforce. And just as surely agencies could and would continue to offer guidance on how they intend to enforce those statutes. The only difference would be that courts would then fulfill their duty to exercise their independent judgment about what the law *is*. . . . And an agency's recourse for a judicial declaration of the law's meaning that it dislikes would be precisely the recourse the Constitution prescribes—an appeal to higher judicial authority or a new law enacted consistent with bicameralism and presentment.

Id. at 1158.

Judge Gorsuch writes clear and instructive opinions. He understands that his audience is not only the lawyers arguing the cases before him, but the citizens living in his jurisdiction who likely have little patience for legalese. He believes in the separation of powers and the critical importance of checks and balances. And he understands that the judiciary must be independent of political forces. ■

SIXTH CIRCUIT UPDATE

Scott Eldridge
Brian Schwartz
Miller, Canfield, Paddock and Stone, P.L.C.

District Court properly dismissed claims alleging welfare plan was non-compliant with ACA benefit caps

In *Soehnlen v Fleet Owners Ins Fund*, Docket No. 16-3124 (December 21, 2016), a manufacturer, its president, and an hourly employee filed a lawsuit alleging that a multiemployer welfare benefit plan and its trustees violated the Employee Retirement Income Security Act ("ERISA"), the Affordable Care Act ("ACA") and §302 of the Labor Management Relations Act ("LMRA"), arguing that the plan did not comply with ACA requirements on annual and lifetime benefit caps. The U.S. District Court for the Northern District of Ohio dismissed the complaint for failure to state a claim and for lack of standing.

The Sixth Circuit affirmed the dismissal of the various ERISA claims for lack of standing because the plaintiffs failed to show a concrete injury. Although the plaintiffs argued that the benefit caps existed, they did not show that they suffered harm. The Court also concluded that, to the extent the plaintiffs were alleging they suffered an injury by remitting money into a non-compliant plan, they failed to state a claim under ERISA. Next, the court assumed that 29 U.S.C. §1149 provided a cause of action for false statements of fact, but held that the plaintiffs failed to satisfy their heightened pleading requirement of identifying the false statements with specificity. Affirming dismissal of the LMRA claim, the court relied on *Local 144 Nursing Home Pension Fund v Demisay*, 508 US 581 (1993), holding that plaintiffs could not bring a claim requiring the plan to be administered in accordance with §302(c)(5). Finally, the court held that the contract claims were preempted by ERISA.

Title VII's national security exemption does not apply to claims brought under the Rehabilitation Act

In *Hale v Johnson*, Docket No. 16-5475 (December 29, 2016), an employee of the Tennessee Valley Authority sued its president, alleging that he was discharged in violation of the Americans with Disabilities Act and the Rehabilitation Act after he failed a pulmonary function test, which was required by the TVA for employees to maintain medical clearance. The U.S. District Court for the Eastern District of Tennessee denied the TVA's motion to dismiss for lack of subject matter jurisdiction and the case was certified for interlocutory appeal.

On appeal, the Sixth Circuit rejected the TVA's argument that the national security exemption from Title VII applied to the Rehabilitation Act. Although the Rehabilitation Act incorporated certain provisions from Title VII, there was no explicit reference to the exemption and no legislative history or case law support to extend it to Rehabilitation Act claims. The Court also rejected the TVA's argument that *Department of the Navy v Egan*, 484 US 518 (1988), which precludes judicial review of security clearance decisions, should be extended to preclude review of physical-fitness judgments.

ERISA preempts state law negligence claim against third-party medical reviewer

In *Milby v. MCMC, LLC*, Docket No. 16-5483 (December 22, 2016), an ERISA plan participant filed a negligence claim in state court against a third-party medical reviewer after it rendered an opinion that was relied upon by the plan when denying the participant's claim for long term disability benefits. The participant alleged the reviewer was per se negligent for practicing medicine without a license. The case was removed to federal court under ERISA, and the U.S. District Court for the Western District of Kentucky dismissed the case under Rule 12(b)(6).

The Sixth Circuit affirmed, holding that the participant's claims were preempted by ERISA. It concluded that the reviewer was indisputably part of the ERISA benefit claim process even though the reviewer could not be a proper party in an ERISA lawsuit. The Court also ruled that the complaint relied solely on ERISA to establish the duty required for the negligence claim. Thus, the claim was completely preempted. ■

MERC UPDATE

Timothy J. Dlugos
White Schneider PC

A summary of two recent decisions coming out of the Michigan Employment Relations Commission ("Commission") follows. Decisions of the Commission may be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/merc.

***Kent County and Kent County Sheriff -and- Kent County Deputy Sheriff's Ass'n,* Case No. C15 F-084 (December 22, 2016) (no exceptions)(tape-recording of investigatory interviews).**

The Charging Party, Kent County Deputy Sheriff's Association (Union), filed an unfair labor practice charge on June 23, 2015, on behalf of its bargaining unit of corrections officers. The charge alleged the Employers, Kent County and the Kent County Sheriff, violated Sections 10(1)(a), (b), and (e) by unilaterally terminating a long standing practice of permitting Union representatives to tape-record investigatory interviews of bargaining unit members. The Union contended the unilateral action, without prior notice or an opportunity to bargain, was an unlawful interference with the members' Section 9 rights, and/or an unlawful interference with the administration of a labor organization. In the alternative, the Union asserted the issue, i.e., tape-recording of investigatory interviews, is a mandatory subject of bargaining. Heard before Administrative Law Judge (ALJ) Travis Calderwood, all charges were dismissed. No exceptions were filed.

As to the initial issues of whether the Employers' unilateral action unlawfully interfered with employee rights and/or internal administration of a labor organization, ALJ Calderwood determined there was no interference with the employees' free exercise of the rights protected by Section 9. The Union member involved was never denied representation at an investigatory interview, nor was the representative denied the opportunity to act as an active advocate. According to the ALJ, the act of recording an interview was not considered advocating on behalf of a bargaining unit member. As a result, the ALJ concluded that restricting a union from recording an investigatory interview did not constitute a violation of Section 10(1)(a) of PERA, nor was it in any way contrary to the principles set forth in *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1971), and its progeny.

Regarding the claimed interference with internal administration, the ALJ also disagreed with the Union that the tape-recording was necessary to protect itself from liability and paying damages to a member who might bring claims against the Union. He opined that prohibiting the Union from recording does not interfere with or prevent the Union from protecting itself from liability, leading to the conclusion that the Employers' prohibition on recording of investigatory interviews did not violate Section 10(1)(b) of PERA.

The ALJ concluded his discussion of the charge by addressing the issue of whether tape-recording in this context was a permissive or mandatory subject of bargaining. He regarded this situation to be one of "first impression," while noting that the Commission has dealt with other situations involving the recording of meetings or interactions. Those past situations, he explained, dealt both with situations intertwined with the bargaining process and situations outside that scope.

For this situation, the ALJ compared the facts to those of *Wayne County Community College*, 16 MPER 19 (2003)(no exceptions), wherein the recording of a termination hearing was at issue. There, the hearing was regarded as neither an inherent part of the bargaining process, nor an extension thereof. Therefore, insisting on the presence of a court reporter was considered a permissive subject of bargaining.

Like *Wayne County Community College*, the ALJ determined the present dispute involved a permissive subject of bargaining. As such, the next question to consider was whether the Employers could lawfully restrict the Union from recording the interview. On this issue, the ALJ concluded the investigatory interview was in furtherance of the Employers' duty to institute disciplinary actions against a unit member, and they may conduct that interview in whatever manner they see fit as part of their management prerogative, so long as those actions do not violate established law or contractual provisions. In light of the fact no *Weingarten* violation was found, nor any violation of Sections 10(a) or (b), the ALJ dismissed the charge in its entirety.

***Ferndale Firefighters Ass'n, Local 812, IAFF -and- Richard Kelly,* Case No. CU14 L-054 (November 18, 2016) (no breach of duty of fair representation for refusing to arbitrate grievance).**

Following the March 29, 2016 decision of Administrative Law Judge (ALJ) Julia C. Stern dismissing the charge against the Ferndale Firefighters Association, the individual bargaining unit member filed exceptions with the Commission. The ALJ had found the Association did not breach its duty of fair representation when it refused to arbitrate the grievance it had filed over a reprimand and a suspension issued to a bargaining unit member, or when it failed to file a grievance over another reprimand issued to the same member. On review, the Commission determined the exceptions to be without merit.

In rejecting the exceptions filed, the Commission noted the individual member must show that his employer breached the collective bargaining agreement (CBA) by issuing the discipline in question in order to establish the Association breached its duty of fair representation. Based upon an analysis of the specific facts in the record, the Commission determined the individual failed to produce evidence sufficient to establish that neither the reprimands nor the suspension issued by his employer breached the CBA.

As demonstrated in the Commission's discussion of one of the underlying incidents, the Association's representatives investigated the matters, sought legal counsel, and tried to persuade the employer to change its decision. The Association further attempted to reach a settlement with the employer to reduce the discipline. During this period, however, the Association had come to recognize that there was little likelihood of showing a lack of just cause for the discipline, and attempted to persuade the individual to accept the settlement offer. Ultimately, the Association's executive board, based on the advice of its attorney and the evidence regarding the incident, determined it would not be in the best interest of the Association to proceed to arbitration. The Commission concluded the Association had no duty to take the grievance to arbitration once it had determined it would be futile to pursue that grievance. As a result, the charge was dismissed in its entirety. ■

LAW GOVERNING LGBT WORKPLACE PROTECTION IS IN FLUX

Ryan D. Bohannon
Kienbaum Opperwall Hardy & Pelton, PLC

For decades, LGBT victims of workplace discrimination had no recourse. In 2001, for instance, the U.S. Court of Appeals for the Third Circuit held in *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3rd Cir. 2001), that "Title VII does not prohibit discrimination based on sexual orientation." In the past several months, the federal courts have been dramatically reversing their jurisprudence to expand Title VII's coverage, even in the face of controlling precedent. But recent decisions by the Eleventh Circuit, President Trump, and the U.S. Supreme Court may be attempting to buck that trend.

A Pennsylvania U.S. District Court recently concluded in *EEOC v. Scott Medical*, Case No. 16-225 (W.D. Pa. Nov. 4, 2016), that the 2001 *Bibby* precedent is questionable and outdated jurisprudence. In *Scott Medical*, the EEOC sued on behalf of a gay male employee who was allegedly the victim of repeated homophobic slurs and statements throughout his employment. The employer moved to dismiss on the ground that binding authority – *Bibby* – prevented the lawsuit. The court rejected the employer's argument, holding: "There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality." The court further stated that "[f]orcing an employee to fit into a gendered expectation – whether that expectation involves physical traits, clothing, mannerisms or sexual attraction – constitutes sex stereotyping and . . . violates Title VII."

Most courts that have adopted this reasoning find no difference between LGBT discrimination and gender non-conformity discrimination, so that LGBT discrimination is sex discrimination. In *Isaacs v. Felder Services, LLC*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015), for instance, an Alabama federal court ruled that claims of sexual orientation discrimination are cognizable under Title VII because "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination." And in *Videckis v. Pepperdine Univ.*, 100 F. Supp. 3d 927 (C.D. Cal. 2015), a California federal court similarly stated that "the line between discrimination based on gender stereotyping and discrimination based on sexual orientation . . . is illusory and artificial, and that sexual orientation discrimination is not a category distinct from sex or gender discrimination."

But this past March, the Eleventh Circuit said "not so fast." In *Evans v. Georgia Regional Hospital*, Case No. 15-15234 (11th Cir. March 10, 2017), a lesbian former employee brought suit claiming sexual orientation and gender non-conformity discrimination in violation of Title VII. The court ruled that her gender non-conformity claim may be viable and remanded to give her an opportunity to amend, but upheld its prior precedent that discrimination because of sexual orientation was not cognizable. Judge William Pryor, who was rumored to be one of the finalists for the Supreme Court nomination that went to Judge Neil Gorsuch, wrote separately "to explain the error" in the reasoning that "a person who experiences discrimination because of sexual orientation necessarily experiences discrimination for deviating from gender stereotypes." Judge Pryor believes this is untrue because not all gay individuals act the same:

> By assuming that all gay individuals behave the same way or have the same interests, the [EEOC] and the dissent disregard the diversity of experiences of gay individuals. Some gay individuals adopt what various commentators have referred to as the gay "social identity" but experience a variety of sexual desires. *E.g.*, E.J. Graff, *What's Wrong with Choosing to Be Gay*, The Nation (Feb. 3, 2014) (recounting experiences of gay individuals); *see also* Brandon Ambrosino, *I Wasn't Born This Way. I choose to Be Gay*, The New Republic (Jan. 28, 2014) (arguing against the belief that "none of us has any control over our sexual identities"). Like some heterosexuals, some gay individuals may choose not to marry or date at all or may choose a celibate lifestyle. And other gay individuals choose to enter mixed-orientation marriages. *See, e.g.*, Brief of Amici Curiae Same-Sex Attracted Men and Their Wives in Support of Respondents and Affirmance at 2-3, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-564). A gay individual may establish with enough factual evidence that she experienced sex discrimination because her behavior deviated from a gender stereotype held by an employer, but our review of that claim would rest on behavior alone.

Despite Judge Pryor's concurrence, it remains tough, if not impossible, to divorce discrimination because of sexual orientation and discrimination for deviating from gender stereotypes. Judge Pryor may have been trying to influence several federal appellate courts that are in the process of deciding similar cases.

There are three important developments in the federal appellate courts. First, in an unusual move, the entire U.S. Court of Appeals for the Seventh Circuit has overturned a three-member panel of that court's judges who found claims for sexual orientation discrimination not cognizable under Title VII. The *en banc* Seventh Circuit will rehear the case, *Hively v. Ivy Tech Community College*, 830 F.3d 698 (7th Cir. 2016), and issue a new opinion.

Second, in *Christiansen v. OmnicomGroup, Inc.*, 167 F. Supp. 3d 598 (2016), the Second Circuit will address the same issue. If one of those plaintiffs were to prevail, that would create a circuit split, and the U.S. Supreme Court might weigh in.

Finally, the Fourth Circuit will re-decide *GG v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), a case in which a school district is forcing a transgender boy to use his private bathroom. Although that case directly involves Title IX, a ruling would likely impact the meaning of "sex discrimination" under Title VII. The U.S. Supreme Court was expected to hear the case this term, but the Trump Administration reversed an Obama Administration policy that was central to the Fourth Circuit's prior ruling, so the Supreme Court remanded to the Fourth Circuit for a new opinion.

Barring an Act of Congress, the U.S. Supreme Court will likely have the final say regarding this area of the law. But given the current trends, and the fact that federal law prohibits sex stereotyping, employers would be wise to review their policies and practices. There are a number of topics to consider, including bathroom access rights, managing gender transitions, and making sure policies avoid stereotypes and discrimination. ■

MERC NEWS

Ashley Olszewski
Jennifer Fields, ***Wage and Hour Division Manager***
Bureau of Employment Relations

Wage and Hour – As reported in a previous issue of *Lawnotes*, effective May 9, 2016, the Wage and Hour Division, an agency formerly a part of MIOSHA, was transferred to the Bureau of Employment Relations for reasons of operational efficiency. The Wage and Hour Division investigates complaints alleging non-payment of wages and fringe benefits (Act 390); state minimum wage, overtime, and equal pay (Act 138); prevailing wage disputes (Act 166); and complaints that a required entity is not displaying the required posters under the Human Trafficking Notification Act (Act 62). Its mission also includes educating employers and employees on the requirements of the previously-mentioned statutes that it administers. Listed below are some of the most frequently asked questions posed to employees at Wage and Hour:

Q1 – How do I file a wage claim?

An employee who believes they are owed unpaid wages may file a claim in person, via facsimile, or online on at www.michigan.gov/wageclaim. Persons who need more information about how to file a claim may contact Wage and Hour personnel, who will promptly assist.

Q2 – What wage, hour or fringe benefit posters are required to be posted at our place of business?

The Michigan Workforce Opportunity Wage Act (WOWA) posters are required by law to be posted in the work place unless the employer is covered by the Federal Fair Labor Standards Act of 1938 (FLSA), or when federal minimum wage provisions would result in a lower minimum wage than provided in the Act (a situation that exists at present).

Q3 – Are all employees required to have a meal or break period?

There are no requirements for break, meal or rest periods for employees 18 years of age or older. Employees under 18 years of age may not work more than five continuous hours without a 30 minute uninterrupted rest period.

Q4 – Can my employer reduce my rate of pay without my consent?

Yes, if your employer informs you of the reduction before it goes into effect and before you work any hours under the new agreement. The employer may not reduce your rate of pay for hours that you have already worked.

Q5 – What deductions from my paycheck are considered legal?

Any deduction required by law (i.e. taxes, friend of the court payments) and union dues. All other deductions require the employer to obtain your signed authorization before the deduction is made. Also, the employer is required to itemize all deductions on your pay stub.

Q6 – Can an employer withhold wages for disciplinary action?

No, all earned wages are required to be paid on the scheduled pay date. Deductions, other than those required by law or by a collective bargaining agreement, require the employee's signed written consent.

Q7 – Does my employer have to pay me for training time?

On the job training that is directly related to the employee's job should be counted as hours worked and paid accordingly. A training wage of $4.25 per hour may be paid to *new* employees ages 16-19 for the first 90 calendar days of their employment.

A more comprehensive list of FAQ's and answers to those questions may be found on the agency's website. The Wage and Hour Division maybe contacted by telephone at its new toll free number (855) 464-9243, or online at www.michigan.gov/wagehour. ■

DEPOSITION SEQUESTRATION

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

Federal Rule of Civil Procedure 30(c)(1) provides that "examination and cross-examination of a deponent" are to "proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615." FRE 103 addresses evidentiary rulings at trials and hearings, inapposite to depositions, which almost always occur out of the presence of a judicial officer. FRE 615 addresses "excluding witnesses," *i.e.*, sequestration.

Generally, FRE 615 makes witness sequestration at trials and evidentiary hearings a matter of right, not judicial discretion. With specified exceptions—for (a) a party who is a "natural person"; (b) an "officer or employee of a party that is not a natural person," "designated as the party's representative"; (c) a person shown "essential to presenting the party's claim or defense"; and (d) a person authorized by statute to be present—at "a party's request, the court *must* order witnesses excluded so they cannot hear other witnesses' testimony." FRE 615(a)-(d) (emphasis added).

The 1972 Advisory Committee Notes to FRE 615 observe: "The efficacy of excluding or sequestering witnesses has been long recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion."

Rule 30(c)(1) exempts depositions from the upon-request sequestration right in FRE 615 but does not foreclose requesting––and getting—an order restricting deposition attendance. The 1993 Advisory Committee Notes explain that "other witnesses are not automatically excluded from a deposition simply by the request of a party" as they would be under FRE 615, but deposition attendance restrictions still "can be ordered" under Rule 26(c), if "appropriate."

Rule 26(c)(1)(E) provides that the "court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including…designating the persons who may be present while the discovery is conducted." Presumably the possibility of "fabrication, inaccuracy, and collusion"—affecting the integrity of the litigation process—would constitute "annoyance" and "oppression" warranting a Rule 26(c)(1) protective order.

The 1993 Advisory Committee Notes to Rule 30(c) say that the rule addresses "a recurring problem as to whether other potential deponents can attend a deposition"—a "problem" about which courts "have disagreed"—but "does not attempt to resolve issues concerning attendance by others, such as members of the public or press."

If you have good reason, you can ask the judge to restrict deposition attendance—by sequestering witnesses, barring the public and the press, and excluding anyone else who ought to be excluded. Also, as the Notes advise, "consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions."

If you have good reason to restrict deposition attendance and

transcript review, ask the other side to agree to appropriate restrictions. If you don't get a suitable agreement, ask the judge to order appropriate restrictions under Rule 26(c)(1)(E) and, maybe, Rules 30(c)(2) and (d)(3).

You might, for example, want to exclude a potential witness from attending, and reading transcripts of, others' depositions if the potential witness is particularly susceptible to being influenced by others, *e.g.*, because of personal characteristics or relationships and interests, or maybe in consideration of the research on "suggestibility" and its effect on "memory."[1] Or you might want to exclude the public and the press, to avoid a proverbial three-ring circus. Or you might want to exclude the individual—party, witness, or otherwise—who threatened to visit bodily harm on the deponent. Or on your client. Or on *you*!

In some cases, you might ask deposition attendees early on whether they have weapons in their immediate possession. An affirmative answer might prompt a brief break—to allow owners to lock their weapons in their cars—or a longer break—to ask the judge for a Rule 26(c)(1)(B) or (E) order directing that the deposition resume at the courthouse, on the far side of the metal detector.

The time to object to the presence of those who ought to be excluded is as soon as you become aware of the problem. This might be before the deposition. Or it might be at the deposition, when you see your client's scowling *bête noire* sitting in your conference room, without permission from his parole officer. Or it might be during the deposition, in response to deportment problems. When it comes to restricting deposition attendance, if you see something, say something.[2]

—END NOTES—

1 See the discussion and citations in Stuart M. Israel,"Witnesses, Memory, and Truth," collected in *Opinions—Essays on Lawyering, Litigation and Arbitration, the Placebo Effect,* Chutzpah, *and Related Matters* (2016) at 108.

2 This article is adapted from Stuart M. Israel, *Taking and Defending Depositions—Second Edition* (ALI CLE), scheduled for publication in 2017. ■

LOOKING FOR *Lawnotes* Contributors!

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

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

For information and publication guidelines, contact *Lawnotes* editor Stuart M. Israel at Legghio & Israel, P.C., Suite 600, 306 South Washington, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@legghioisrael.com.

DAVID CALZONE LELS DISTINGUISHED SERVICE AWARD RECIPIENT

Gregory V. Murray
The Murray Law Group, P.C.

Dave Calzone

I have known Dave since 1980 when he came to Butzel Long as a summer associate. A highly sought after recruit, Dave was a graduate of The University of Michigan (A.B. with *high distinction* and *highest honors*, 1978, *phi beta kappa*). He attended New York University School of Law, where he was appointed to the Law Review, then transferred to the University of Michigan. I don't remember if I was his escort in 1979 on the day he interviewed at Butzel but remembering how things used to work back then, I suspect a more highly qualified associate than this DCL grad had those honors. I asked Dave today who did escort him. I was correct; his escort was a UVA grad who now sits on the 4th Circuit Court of Appeals.

Not slowing his pace any, after that summer Dave returned to U of M Law School and graduated (J.D., *magna cum laude*, 1981), where he was inducted into the Order of the Coif.

Dave became a full-time associate at Butzel in 1981 and later a shareholder, working at Butzel until 1996 when he became a director and one of the four founding shareholders of Vercruysse Murray & Calzone, P.C., leaving in 2013 to found his own mediation practice. Contrary to the stories he tells, I hope he didn't leave because after 33 years he was tired of working with me. Nonetheless, since 2013, he has been the founding Member of Calzone Mediations LLC, a firm providing alternative dispute resolution services, primarily to the labor and employment bar in Michigan.

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DAVID CALZONE LELS DISTINGUISHED SERVICE AWARD RECIPIENT

(Continued from page 15)

Dave's accomplishments and his record of service are exemplary. He served the State Bar of Michigan Labor and Employment Law Section as a Council Member from 2000-2009, as an officer from 2003-2008, and as Chair during 2007 and 2008. Even after leaving the Council, Dave continued to volunteer his services and expertise, by repeatedly serving on the Council's Nominations Committee and, most recently, serving on its Strategic Planning Committee, to help develop the current LELS Strategic Plan.

Dave has been a member of the ABA Labor and Employment Law Section's Employee Rights and Responsibilities Committee (ERR) for over 18 years, and has been an active member and frequent speaker on behalf of its Health, Disability and Leaves of Absence Subcommittee. He is currently a member of ERR's ADR subcommittee. He has been a member of the LEL Committee of the Federal Bar Association, is a Fellow of the Michigan State Bar Foundation, was a Member of the American Employment Law Council, and is a Fellow of the College of Labor and Employment Lawyers. He served on the Federal Bar Association's Civil Practice Manual Committee and the Michigan Council of School Attorneys. Dave has been on the Super Lawyers list in Michigan, since its inception, named in Chambers USA and *Best Lawyers in America* and has all the normal recognitions you would expect from such an extremely capable and accomplished practitioner.

Along with other classes, Dave has taught at ICLE's annual Labor and Employment Law Seminar/Institute since 1997. He is co-editor and co-author of *ICLE's Employment Litigation in Michigan* and its various updates. He has published articles on employment law in *The Michigan Defense Quarterly, Labor and Employment Lawnotes*, and *The ADR Quarterly*. He has also co-authored amicus briefs on behalf of the Greater Detroit Chamber of Commerce in significant employment cases before the Michigan Supreme Court.

Dave has been a frequent speaker on a variety of employment law topics for ICLE, the Labor and Employment Law Sections of the American Bar Association and the State Bar of Michigan, the Oakland County Bar Association, the University of Michigan Law School, the University of Detroit Mercy Law School, the Equal Employment Opportunity Commission, the Michigan Employment Relations Commission, the Original Equipment Supplier's Association, and HR Hero. He has also presented lectures for the Michigan Society of Employers, American Arbitration Association, Michigan Association of School Boards, Lorman Business Center, and the Society of Human Resource Management, as well as various firm and client seminars.

Throughout his career, Dave has been the highest authority on the FMLA. He has dedicated his professional life and practice to understanding the FMLA and all its nuances. He submitted comments and suggestions to the DOL in response to the anticipated amendments and is cited frequently by the DOL in its advisory comments to those Amendments because the DOL either adopted a recommendation of his or had to explain why an intelligent recommendation was declined. In practice, he counseled employers regularly on the application of FMLA leave policies and litigated FMLA cases. He also served as an expert witness in cases and on matters related to the FMLA.

Just as he reflects the highest ethical principles with everything he does, Dave also meets the highest standards of excellence. He is well-respected for his advocacy, writing, and communication skills by clients, adversaries, colleagues, and now those in the legal community seeking his mediation expertise.

Why though does Dave belong on the list of those who have received the LELS Distinguished Service Award? Because, besides all of the substantive work that Dave and all of the previous awardees have done in the area of labor and employment law; and their individual contributions to the Section, what stands out most to me about them as a group is that they are men and women who are, and were, well-respected and well-liked by their peers, competitors, and opponents; and, were the epitome of collegiality in their respective practices.

Dave is a perfect fit in that group. While actively practicing, both his competitors and adversaries respected and genuinely liked him. There may be no greater testament to those facts than the successful mediation practice he has established which continues to serve those of us who practice labor and employment law and in which people expect him to be fair, patient, and smart; and, are never disappointed.

Dave is a patient and polite individual. Many of you may not know that Dave is also a talented wood worker and musician, both of which both attest to his patience. I can attest to his unwavering politeness. Like his wife Linda, Dave is a former member of the Michigan Marching Band. Because we are both football season ticket holders, Dave and I would discuss if he was playing in the alumni band each year when homecoming rolled around. For years Dave said he would and did. I challenged him because I could never pick him out on the field. One year, I was particularly diligent, bringing a pair of binoculars to review every trumpet player who entered the field, played during halftime, and left the field. The following Monday I challenged Dave when he said that he had played in the band. After carefully listening to me describing what I had done, rather than the derision I probably deserved, Dave agreed that I likely had not seen him because, he graciously reminded me, he played the trombone. Just Dave being his polite self.

Dave is an excellent researcher and writer; an endless contributor to the practice of labor and employment law; a tireless author and lecturer; a respected leader of the Section; but, most importantly, an attorney trusted and truly liked by all of us on both sides of the practice. Let me end by saying how very pleased I am that Dave is a LELS Distinguished Service Award recipient and that, like many others, I am a better lawyer for having had Dave as a partner, and a better person for having him as a friend. ■

MICHAEL PITT LELS DISTINGUISHED SERVICE AWARD RECIPIENT

Cary McGehee
Pitt McGehee Palmer & Rivers

Mike Pitt

It is such an honor to introduce my friend, mentor, business partner, and social justice hero Michael Pitt and present him the State Bar of Michigan Labor and Employment Law Section's Distinguished Service Award.

I wanted to have a theme for my introduction and I was having a hard time. But then I was walking into the office one day and it came to me, and it was so obvious. My theme is based on one of my favorite movies: *It's a Wonderful Life*.

You don't have to like this movie. You don't even have to have seen it to appreciate its premise that each person's life touches so many others. And most people don't even realize how many lives they have impacted.

So, if you remember the movie, tonight, I am Clarence, Mike is George Bailey, and Mike's wife is Mary Bailey. There is a Henry Potter in this story, in fact there is more than one, but I won't be talking about the Henry Potters tonight.

Mike has impacted so many lives through: (1) his commitment to mentoring young attorneys; (2) his vision in establishing a law firm; (3) his organization and philanthropic work; and (4) his devotion to his clients.

Mentoring.

In 1989, I was a first year associate at the law firm of Kelman Loria and Mike was a senior partner. I had no experience practicing employment law, but that was what I was hired to do. Mike immediately took me under his wing and became my mentor. He mentored me like so many other attorneys he mentored, many of whom are in this room tonight.

As a mentor, Mike not only teaches the importance of focusing on the best interest of the client, diving into the detail of a case, and practicing law with grit, integrity, and congeniality toward your opposing counsel.

But he also instills in you his love for the law. As a mentee to Mike, his passion for the law rubs off on you. And you try, as best you can, even though it is virtually impossible, to match his work ethic.

Mike has been successful in developing new attorneys because of his willingness to kick you out of the nest and let you fly solo, to be there when you don't quite make it to flight, and to inspire you to try again.

Mike's goal in mentoring other attorneys is to show them how to lead, prosper, and shine.

Business Vision.

Mike has had an impact on so many lives based on his business vision. In 1992, while standing in the backyard of his parents' home, after his father's funeral, Mike asked me to join him as a partner to form a law firm along with his wife Peggy, and Stuart Dowty.

I was 30 years old and had been practicing law for three years. I did not know what our future would hold, but I did know that there was no way that I was going to practice law with anyone else other than Mike Pitt.

Mike founded our firm in 1992 with three partners. We have expanded and now we have seven partners and have been in business for 25 years, focusing exclusively on representing individuals in employment and civil rights matters.

Not only did Mike create a firm, but he filled it with people who have a passion for using the law to achieve social justice.

On top of that, Mike created a work environment that is all about love and respect for one another. A work environment where you collaborate and engage with each other daily and work as a team on cases. A place you love to work. A work environment that has become an extension of our families.

Organization and Philanthropic Work.

Mike has also impacted the lives of others through his service in leadership roles on numerous boards, including:

- The Michigan Association for Justice—where he serves on the Executive Committee and is past president;
- The Board of Directors of Public Justice;
- The Executive Committee of the Board of Visitors for WSU Law School; and
- The Judicial Task Force on Election of Michigan Supreme Court Justices.

He has also devoted thousands of hours performing *pro bono* work in employment and prisoner right cases, and committing time to continuing legal education as a speaker, writer, and editor.

Mike and Peggy have also been extremely generous giving money to numerous non-profit organizations, establishing a scholarship fund for students with disabilities at WSU Law School, and creating a social justice speakers series at WSU Law School.

Clients.

Mike has impacted the lives of thousands of clients during his over 40 years of practicing law. His devotion to his clients is unparalleled. His compassion and empathy for their predicaments is only matched by his willingness to zealously fight for their rights to the very end.

When Mike commits to a case, he is in for the long haul.

He demonstrated this in a case where he was one of the lead attorneys representing a class of 500 women who had been sexually assaulted and harassed by Michigan Department of

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MICHAEL PITT LELS DISTINGUISHED SERVICE AWARD RECIPIENT

(Continued from page 17)

Corrections prison guards. The evidence was compelling but the state was relentless in its unwillingness to admit fault. The case was litigated for over 13 years. The attorneys invested over a million dollars in costs.

Only after two jury trials, which ended in multimillion dollar verdicts, did the State finally come to the settlement table.

Mike was one of the trial attorneys in the first trial in that case, when, after delivering the verdict, the jury made an extraordinary request.

They asked the judge if they could apologize to the plaintiffs on behalf of the State of Michigan for the State's failure to protect them from sexual abuse.

Mike's focus is always what is in the client's best interest, not the interest of publicity or a fee.

While Mike has taken on many high profile cases in his career and his masterful litigation skills have resulted in big settlements and verdicts, he frequently takes on cases that have low economic recovery, but are high in principle, and he has instilled in our firm that this practice is critical to our mission.

While many attorneys might be winding down at this stage in their career, Mike is ramping up.

This is reflected in his tireless work on the Flint water class action case where he is teaming up with other firms and litigating the case through multiply class action lawsuits in federal court, the court of claims, and circuit court.

Fighting hard to expose the deliberate indifference of our governmental officials and finally get justice for the people of Flint.

That too will likely be a long and arduous fight, but there is no doubt in my mind that Mike will be there until the end.

Family.

Notwithstanding Mike's incredible work ethic and commitment to his clients, he has always emphasized to those he works with the importance of family and having balance in your life.

When Mike is not meeting with a client, drafting a complaint, taking a deposition, writing a brief, or creating a new legal theory, he is with his wife, Peggy, and his children Megan and Jarrod, their spouses, and his three, soon to be four, grandchildren, hanging out in Colorado or LA.

I can't talk about balance in Mike's life, without recognizing his wife Peggy. Peggy and Mike have been life partners for over 40 years and law partners for almost 25 years. You remember Mary Bailey in *It's a Wonderful Life* and the impact that she had on George Bailey's life. Well the same is true with Peggy and Mike. Peggy keeps Mike grounded and always has his back.

Conclusion

The message of *It's a Wonderful Life* is the importance of relationships; that a person's worth is not measured by material possessions or power or money a person has, but by the depth of their relationships and the positive impact they have on the lives of others.

So…you can see, Mike has had a wonderful life, and it continues. It is my honor and pleasure to present to Mike Pitt with the Labor and Employment Distinguished Service Award. ■

THE VANISHING AMERICAN TRIAL AND ITS IMPLICATIONS

Sheldon J. Stark
Mediator and Arbitrator

For many years ADR, alternative dispute resolution, meant arbitration. Arbitration was thought to be a quick and inexpensive private and confidential alternative to the traditional jury trial. Over time, however, litigators "judicialized" the arbitration process to the point that in many instances it is difficult to distinguish from a bench trial.

In recent times, ADR has come to mean mediation. Mediation has grown to be the ADR process of choice for most litigators. In August 2000, the Michigan Supreme Court adopted new court rules, MCR 2.410 and 2.411, authorizing state trial court judges to order civil disputes into some form of ADR. For most disputes, that process has been mediation and the number of civil trials has dropped dramatically. At it's heart, mediation is simply assisted negotiation utilizing the services of a trained "neutral" to help the parties better understand one another and communicate.

In the U.S. District Court for the Western District of Michigan, the federal bench has adopted a Voluntary Facilitated Mediation program to which many civil disputes are referred. http://www.miwd.uscourts.gov/sites/miwd/files/vfm_program_desc.pdf In the Eastern District, the bench recently adopted Local Rule 16.4 providing new rules governing referral of civil cases to mediation. https://www.mied.uscourts.gov/ PDFFIles/localRulesPackage.pdf

The "Michigan Judges Guide to ADR Procedures" lists many additional ADR processes from which parties may choose for resolution of their disputes. http://courts.mi.gov/Administration/SCAO/OfficesPrograms/ODR/Documents/ADR%20Guide%2004092015.pdf

Arbitration, mediation, case evaluation, negotiation – and more – have led some observers to talk of "The Vanishing American Trial." http://epstein.wustl.edu/research/courses.judpol.Galanter.pdf

ADR has become so pervasive, many ADR professionals note the irony that the civil trial has today become the alternative dispute resolution process.

Have you tried a case lately? No? How long has it been? If your trial skills are getting rusty, you're not alone.

> Over the past 200 years, litigation in federal courts has continually changed. The greatest change has taken place in the past 25 or 30 years. During this period we have seen the almost total disappearance of civil trials in federal court.
>
> "Rethinking Civil Litigation in Federal Court", by Hon. Patrick J. Walsh. *The Journal of the Section of Litigation*, Vol. 40 No. 1 Fall 2013 (ABA). http://www.americanbar.org/publications/litigation_journal/2013-14/fall/rethinking_civil_litigation_federal_district_court.html

Judge Walsh provides data for all the federal circuits:

Circuit	Total # Cases Filed	% Reaching Trial
1st	5,721	1.5
2nd	22,351	1.6
3rd	42,825	0.9
4th	17,593	1.0
5th	27,094	1.4
6th	22,135	1.0
7th	18,506	1.5
8th	16,452	1.1
9th	47,437	1.9
10th	10,825	1.5
11th	37,988	0.9

Judge Walsh's solution is to change the way discovery is conducted. If the chances of trying the case are only 1 or 2%, he questions the value of engaging in expensive, contentious and thoroughgoing discovery—of "everything." Perhaps; perhaps not. Even if the case is not going to trial, discovery has a significant influence on the outcome. Mediation works best when both sides have all the information needed to properly evaluate the case for settlement. Sometimes—as in the typical employment dispute—critical information is known only to one side. But see the 2015 amendments to Federal Rule of Civil Procedure 26 requiring staged and proportionate discovery

The lessons for ADR are similar. If the case will *not* be tried, litigator strategies in preparation for mediation might be better focused on resolution options rather than trial tactics. If counsel invests as much time and effort in preparation for mediation as once devoted to trial prep, there is little doubt the investment will lead to better results.

What are the implications of this emphasis on ADR in Michigan? In 2014, the State Bar of Michigan sponsored a forum, "The Future of Legal Services." In the December 2014 issue of the *Michigan Bar Journal*, State Bar President Thomas Rombach followed up with a list of issues discussed: "...unbundled legal services, attorney licensing and regulatory reforms, legal education reforms, alternative billing methods, electronic filing, limited license legal technicians, pro se litigation...." *Michigan Bar Journal*, December 2014, Volume 93, Number 12, pages 14-15. The "Vanishing American Trial" didn't make the list. As a mediator and former trial lawyer, I believe that's a mistake.

In Michigan, the statistical picture is little different: the percentage of cases going to trial is only 1.2%. A successful litigator with 20 years experience told me recently he has tried four cases in his entire career. "I've also arbitrated four cases," he added. "Do they count?"

When trial lawyers no longer try cases, there are consequences and implications for the bar and the public. The atrophy of trial experience, and the following topics deserve to be part of any "Future of Legal Services" discussion.

1. Declining experience evaluating cases for settlement: During my time at ICLE, the Institute of Continuing Legal Education, I met insurance executives concerned about how to value cases for settlement when the current crop of experienced trial lawyers retires. Newer lawyers are fine litigators they think, but without trial experience, how can they accurately evaluate risk and make good judgments about resolution? At least one executive explored whether trial advocacy workshops might serve as an adequate substitute. The answer: "probably not."

2. Lawyer exclusion from the valuation process. In the early days of my practice both as trial lawyer and as mediator, it was rare to run across defense counsel with only a limited role in the valuation process. Quite the contrary. Defense attorneys were crucial partners in evaluating their cases for settlement. Today, the opposite seems true, particularly with insured claims or sophisticated corporate defendants. Indeed, lawyers today often tell me their clients aren't especially interested in hearing their recommendations. In increasing numbers of cases, defense counsel arrive at the mediation table unaware of their own side's bottom line. The claim managers explain it this way: "I have way more experience in trial than my local counsel. Why would I ask for his advice?"

3. Unreasonable positions in settlement negotiations. Insurance executives are right to be concerned about a growing lack of trial experience among the attorneys they retain. Too often unreasonable settlement proposals are placed on the table because the cases were not evaluated appropriately. Unreasonable settlement proposals based on inexperienced evaluation of risk can have a toxic impact on resolution.

4. Unsound advice to clients. When I was in practice and representing clients, I tracked the number of cases I investigated versus the number of cases I accepted for litigation. The ratio hovered around 75:1. That's a lot of chaff to find the wheat. As a contingency fee lawyer, I limited my practice to cases I considered meritorious. Nonetheless, it was always clear to me which cases carried substantial risk; risk I was able to recognize after years of presenting claims to juries. Based on experience, I was able to explain to potential clients why proceeding with litigation was or was not a good investment of their time and energy. With little or no experience trying cases, plaintiff attorneys are hard pressed to distinguish solid cases from weak ones. A similar problem is occurring equally on the other side. For the defense, lack of trial experience has a powerful impact on when or whether to encourage clients to seek early resolution.

5. Weak performance in trial. Cases are won and lost mostly on their facts. Lawyering nonetheless can make a big difference. When one of the lawyers is an experienced trial lawyer and the other is not, the result can be explosive: close cases are more often won by the client with the experienced trial lawyer; and the damage award is more likely to be out of proportion to the evidence.

This is a new era, an era of "The Vanishing American Trial." The loss of trial experience is as much a challenge to the profession in the 21st Century as technology, regulation, unauthorized practice, electronic filing, and the like. There are serious consequences for a public seeking access to justice when few lawyers have broad trial experience. The challenge warrants careful consideration and vision about where the practice is going. The "Vanishing American Trial" should be part of every discussion addressing the future of our profession. ■

CAN YOU CREDIT PAID LUNCH BREAKS AGAINST FLSA PAY OBLIGATIONS?

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The answer to the question in the title is that it depends on whether the employer is using the credit against time worked, or against overtime pay the employer would otherwise owe.

In *Ruffin v. MotorCity Casino*, 775 F.3d 807 (6th Cir. 2015), a case handled by our firm, the U.S. Court of Appeals for the Sixth Circuit affirmed U.S. District Judge Murphy's ruling that MotorCity could offset its one-half hour lunch break against what would otherwise be an obligation to pay overtime. MotorCity security personnel had been required to attend an unpaid 15-minute "rollcall" each day, during which they were updated on issues they might face on their shift. The employees were also provided a half-hour paid lunch period during which they were required to monitor their radios, but not otherwise engage in job-related activities.

The plaintiffs in the MotorCity case alleged that the radio monitoring requirement meant that employees were "working" during their lunch, and that the half hour was thus "compensable" under the Fair Labor Standards Act (FLSA), meaning that it involved worktime requiring payment, as opposed to free time that was not worked and could be offset. But offset against what?

Because the rollcall took 15 minutes every day, plaintiffs claimed an hour and 15 minutes of unpaid overtime each week. But the lunch break provided 2½ hours of paid non-work time each week, meaning employees "worked" only 37.5 hours per week, not 40. Adding the rollcall as paid time meant that plaintiffs were working 38¾ hours, not 41¼ hours. MotorCity successfully argued that no overtime pay was required because employees did not work in excess of 40 hours per week.

In October 2016, the U.S. Court of Appeals for the Third Circuit decided *Bobbi-Jo Smiley v. EI DuPont de Nemours & Co.*, 839 F.3d 325 (3rd Cir. 2016), rejecting DuPont's effort to obtain credit for the one-half hour paid lunch break it provided its employees. At first glance, the Third Circuit's *DuPont* decision seems at odds with the Sixth Circuit's *MotorCity* decision. Yet the Third Circuit did not even cite, let alone distinguish, *MotorCity*. Why not?

The answer is that *DuPont* attempted to obtain credit against an acknowledged overtime pay obligation—the time spent by employees "donning and doffing" their work clothes, which was deemed working time. In other words, DuPont attempted to reduce its overtime "pay obligation" by the amounts it paid employees for their lunch breaks. This, the Third Circuit said, was not permitted given statutory language that restricted such monetary credits to premiums paid—not simply an employee's hourly rate.

It is not clear from the *DuPont* decision whether DuPont could have argued that it should be permitted to obtain credit for hours—rather than dollars—thus reducing overtime obligations correspondingly. The Third Circuit likely would have rejected this argument because DuPont calculated its employees' "regular rate of pay" by including the pay received for the lunch break.

Employers can and should take credit for paid lunch periods by counting the time to reduce the weekly hours worked, assuming the paid lunch period is not contractually required and is free of work-related obligations. Employers who can fit that model should not count the one-half hour paid lunch break as part of "hours worked." Under the FLSA, the "regular rate" is determined by dividing total remuneration for the workweek by the total number of hours actually worked. Adding the lunch break to the total of the denominator will of course reduce the "regular rate," which is used to compute what the overtime rate is. So there is a tension between reducing the regular rate and obtaining credit for the lunch break by not counting it as "hours worked." Employers should decide which approach serves them best. ■

MICHIGAN WHISTLEBLOWERS' PROTECTION ACT NUANCES

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While protecting whistleblowers is widely seen as an important public policy, who gets protected, when they are protected, and what is classified as whistleblowing is nuanced—as is clear from the high-profile and hotly-debated cases of Edward Snowden and Chelsea Manning. One woman's whistleblowing is another woman's espionage.

Interpretation of the Michigan Whistleblowers' Protection Act requires balancing the public interest in protecting legitimate whistleblowers and avoiding shielding employees from discipline or discharge for legitimate reasons. MCL 15.362 provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee . . . because the employee . . . reports or is about to report . . . a violation or suspected violation of a law or regulation or rule . . . to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

So, a knowingly false report is not protected activity. See *Truel v. City of Dearborn*, 291 Mich. App. 125, 138 (2010). But, the reported conduct does not have to turn out to *actually* be a violation—reporting a *suspected* violation is protected. *McNeill-Marks v. Midmichigan Medical Center-Gratiot*, 2016 WL 3351621 at *9 (Mich. App.). And, the reporter does not have to be motivated by a "desire to inform the public of matters of public concern." *Whitman v. City of Burton*, 493 Mich 303, 306 (2013).

Here is how the WPA works. Let's say John works at The Restaurant in Paradise, Michigan.

1. John sees coworker Jerry, who is 17, serving ginger beers at The Restaurant. Because the ginger beer cans look so much like real beer cans—and even say "beer"—John believes that Jerry is illegally serving beer. John reports this to the Michigan Liquor Control Commission. John's report is WPA-protected. His belief is reasonable and the suspected conduct—a person under 18 serving alcohol—if true, is illegal.

2. John overhears his boss, Jane, tell coworker Jill that she should go ahead and serve alcohol to the next minor that comes in the door. John reports this to the Michigan Liquor Control Commission. His report of a suspected *future* violation is not protected. See *Pace v. Edel-Harrelson*, 499 Mich. 1, 9–10 (2016).

3. John knows The Restaurant is serving liquor without a liquor license. After Jane schedules him to work on his birthday for the third year in a row, John reports The Restaurant for illegally serving alcohol. Even though John reported The Restaurant purely out of spite, he is WPA-protected.

4. John knows The Restaurant is serving liquor without a liquor license. John decides to report The Restaurant for illegally serving alcohol. John tells Jane that he will make his report the next morning. He is WPA-protected.

5. John knows The Restaurant is serving liquor without a liquor license. John is late for three shifts in a row, and Jane writes him up. After he is late again, John quickly makes a report to the Michigan Liquor Control Commission in attempt to gain protection in case Jane fires him for tardiness. John cannot use the WPA as a shield to protect himself from legitimate discipline unrelated to his report.

HIGH COURT TO CONSIDER CLASS ACTION WAIVERS FOR ARBITRATION IN EMPLOYMENT CASES

Noel D. Massie
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The U.S. Supreme Court has recently granted *certiorari* on three petitions that present the same issue: Do Sections 7 and 8 of the National Labor Relations Act (NLRA), which guarantee workers the right to bargain collectively and to engage in concerted activities without employer interference, override a waiver of the right to file or participate in class actions included in a "voluntary" arbitration agreement an employee signs as a condition of employment?

In *Lewis v. Epic Systems Corp.*, 833 F.3d 1147 (7th Cir. 2016), to keep their jobs, certain Epic employees were required to assent to arbitration agreements that allowed them to assert wage and hour claims only in individual arbitrations; these employees also waived the right to participate in "any class, collective, or represented proceeding." The U.S. Court of Appeals for the Seventh Circuit ruled these provisions unenforceable, holding that the NLRA's specific guarantees of employees' rights to act collectively meant that an arbitration agreement purporting to nullify those guarantees was illegal. The court also found that there was no conflict between the NLRA and the Federal Arbitration Act (FAA).

Although *Lewis* was the first such holding by a federal appellate court, the U.S. Court of Appeals for the Ninth Circuit soon reached the same conclusion in its 2016 decision in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016). Like Epic, Ernst & Young filed a petition for *certiorari* seeking Supreme Court review.

In a third petition that approaches the issue from the opposite direction, the National Labor Relations Board asked the Court to overturn the Eighth Circuit's decision in *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016). That case followed an earlier Eighth Circuit decision allowing an employer to enforce the class action waiver contained in its standard arbitration agreement.

The three cases have been consolidated for argument, and the Supreme Court has stated that they will be argued during the October 2017 Term. ■

Two WPA quirks:

- **The employee quirk.** The WPA applies to employees—not to prospective employees, and not to contract employees seeking renewal. *Wurtz v. Beecher Metro Dist.*, 495 Mich. 242, 256-259 (2014).
- **The attorney quirk.** A report to an attorney, as a member of the bar, counts as a report to a public body. *McNeill-Marks*, 2016 WL 3351621 at *9-10.

Few whistleblower cases are as straightforward as The Restaurant cases—or as complex as Edward Snowden's case. But, proper application of the WPA can play an important public policy role, and avoid shielding under-performing employees from legitimate discipline or discharge. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Once upon a time many years ago when I was a baby arbitrator, I got a phone call. I had been appointed to sit as the chair of a three member panel, and the attorney for the claimant was on the phone. He wanted to know if I would be available to observe the exchange of documents between the two attorneys. I wasn't being asked to make any rulings or put anything on the record. They just wanted me to be there to observe. They would pay my hourly fee.

A few days later I met the lawyers in a small conference room at the offices of the American Arbitration Association. We said hello, and claimant's counsel introduced me to a third person who took a seat along the wall. I sat at the conference table with the two lawyers.

The lawyer for the respondent took a stack of papers out of his briefcase, slid them across the table to claimant's counsel and said, "Here are all the documents you requested." Claimant's counsel took a stack out of his briefcase, held it out at arm's length, and said, "You want your documents? Pick 'em up." There was a loud BAM as the stack hit the floor.

Several seconds of silence followed. Then the respondent's attorney quietly bent over, gathered the documents up off the floor, and put them in his briefcase. Both lawyers stood up, and everybody left.

I had no idea what had just taken place. I have never seen anything like it before or since. I do know that I never heard the case. Not long after our meeting the case settled.

My suspicion is that I was a participant/witness in a cleverly designed form of alternative dispute resolution. According to this theory, the third man in the room, the man sitting quietly by the wall, was the claimant. His lawyer knew the value his case, and so did the respondent's attorney. They were prepared to settle. But the claimant was not. He needed to be convinced that the two lawyers weren't just colluding to collect their fees without doing any real work. So claimant's counsel needed to demonstrate what a tough guy he was. Respondent's counsel agreed to participate in the demonstration. My job was to sit there with my mouth hanging open. I didn't know it, but I performed precisely as scripted.

I could be wrong about all this. But suppose I'm right. The next question is whether what these lawyers did was kosher. In one sense they colluded to deceive the client about the true state of affairs. They choreographed this little piece of theater to get him to settle. And if he found out about it he would legitimately feel betrayed. But assume that both lawyers were acting in pursuit of what, in their professional judgment, they believed to be their clients' best interests. Then what they did - creatively, efficiently, and effectively - was bring about the resolution of a legal dispute. And that, after all, is what this business is about. Isn't it?

As always, I would be interested in your comments. ■

In re Darwin et al

Barry Goldman
Arbitrator and Mediator

I went to a mock arbitration at a National Academy of Arbitrators conference not long ago. Some labor arbitrators enacted a modern version of the Scopes monkey trial. In this version Ms. Scopes had been discharged for teaching creationism to her fifth grade science class. The union filed a grievance on the grounds that she was being discriminated against on the basis of her religion and that her actions were protected by the First Amendment. She argued that she was "teaching the controversy," exposing her students to alternative points of view, and helping them develop their critical thinking skills.

Perdictably, the arbitrators weren't having any of it. The panel of two American and two Canadian arbitrators found unanimously that Ms. Scopes had been repeatedly directed to follow the curriculum and that the curriculum expressly prohibited the teaching of creationism. It found further, based on her own testimony, that she had no remorse and had no intention of complying with the district's directive if she was reinstated. Accordingly, the panel found she was beyond rehabilitation, and discharge was the only appropriate remedy.

The logic was impeccable. And since I am a modern, educated, secular, humanist lawyer, I completely concurred.

But let's try a more difficult problem. Suppose the Christian fundamentalist right manages to get one of its own into the White House and enough of its members into the legislature that it can write laws friendly to its point of view. Suppose instead of it being illegal to teach creationism in the schools, it is now illegal *not* to. Suppose Mr. Sepocs teaches evolution anyway, and he's discharged for it. And suppose he raises exactly the same arguments Ms. Scopes raised in the Academy presentation. Now what?

The easy answer is that the result doesn't change. There was a clearly articulated rule, the Grievant violated the rule following repeated warnings that his job was in jeopardy if he refused to comply. He shows no remorse. In fact, he declares his intention to continue to teach evolution if he is reinstated. He says this because, in his view, he answers to an authority higher than the school board. He calls it "scientific truth."

Do I sustain this discharge? The law is the law, after all. And if I don't sustain the discharge, how do I distinguish the two cases?

Personally, I don't think the two cases are equivalent because I think creationism is nonsense. But I *would* say that, wouldn't I. And deciding the case on the basis of what I happen to think about this or that theological question sounds a lot like imposing my own brand of industrial justice. If I don't want Christian fundamentalists imposing their brand, I ought to be reluctant to impose mine. That's what we mean by rule of law. But still….

Being in favor of the rule of law is easy when the law compels the outcome I prefer. It's like sticking to your diet when you're not hungry. Anybody can do *that*. It's when the law compels a result I detest that we see how committed to the principle I really am.

Some years ago I constructed a similar hypothetical. Suppose the Jehovah's Witnesses are successful in converting enough people that they are able to command a hospital. Suppose there are no blood transfusions allowed in Jehovah's Witness hospitals on the basis of their belief that transfusions doom the recipient to eternal damnation. And suppose my baby daughter has the bad luck to find herself in a Jehovah's Witness hospital in desperate need of a blood transfusion.

If I want to be able to insist that she gets a transfusion in their hospital, don't I have to be willing to let them insist that their daughter not get one in mine? If not, why not?

As I say, I've been pondering this one for years, maybe decades. Your comments are welcome. ■

EEOC ISSUES GUIDANCE ON EMPLOYEES WITH MENTAL HEALTH CONDITIONS

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On December 12, 2016, the Equal Employment Opportunity Commission (EEOC) issued two resource documents that provide guidance on the rights of employees and applicants with mental health conditions under the Americans with Disabilities Act (ADA). The EEOC's Guidance is part of an ongoing series of publications that provide employees with practical explanations of their rights in a question-and-answer format.

An accompanying press release explained that this EEOC Guidance was prompted by the rising number of discrimination charges based on mental health conditions. In 2016, the EEOC resolved approximately 5,000 charges and obtained approximately $20 million for aggrieved employees who claimed to have been unlawfully denied employment and reasonable accommodation because of mental health conditions.

One of the resource documents, entitled *Depression, PTSD and Other Mental Health Conditions in the Workplace: Your Legal Rights*, does not purport to announce any new law, but serves as an overview of employee rights under the ADA:

Anti-Discrimination. The Guidance emphasizes that employees who have depression, post-traumatic stress disorder, or other mental health conditions are protected against discrimination or harassment at work, have workplace privacy rights, and may have a legal right to reasonable accommodation that can help them perform and keep their jobs. The Guidance states that mental health conditions such as major depression, post-traumatic stress disorder, bipolar disorder, schizophrenia, and obsessive compulsive disorder "should easily qualify, and many others will qualify as well." The Guidance also confirms the employer's right to terminate (or not hire) an individual if he or she cannot perform the essential functions of the job (with or without reasonable accommodation), or if the individual poses a "direct threat" to safety. Employers cannot, however, rely on stereotypes about a mental health condition in determining whether the individual can perform a job or if he or she poses a safety risk.

Reasonable Accommodation. The Guidance explains that employees may be entitled to reasonable accommodation if their mental health condition—if left untreated—"substantially limits" one or more "major life activities," which include activities such as communicating, concentrating, eating, sleeping, regulating thoughts or emotions, caring for oneself, and interacting with others. The EEOC explained that a condition does not have to result in a high degree of functional limitation to qualify; it may be sufficient, for example, by "making activities more difficult, *uncomfortable*, or time-consuming to perform compared to the way most people perform them." (The italicized wording appears to be new as it is not found in the statute or the Department of Labor regulations.) The EEOC gives guidance to employees on how to request an accommodation and enumerates several examples of accommodations that may be reasonable (*e.g.*, altered break and work schedules, changes in supervisory methods, quiet office space, specific shift assignments, eliminating marginal job functions, and telecommuting).

Limitations On Medical Inquiries. The Guidance describes

MICHIGAN APPEALS COURT FINDS EMPLOYMENT CLAIMS NOT ARBITRABLE

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An unpublished Michigan Court of Appeals opinion released on January 5, 2017, *Shaya v. Hamtramck*, has attracted some attention because the court could easily have reached the opposite result. Shaya was hired as Hamtramck's Director of Public Services in early 2012 and was terminated over two years later for various forms of alleged misfeasance. A section of his employment agreement headed "Binding Arbitration" stated that "[a]ny controversy or claim arising out of or relating in any way to this agreement" would be settled through arbitration, including "all claims that this agreement has been interpreted or enforced in a discriminatory manner."

After reviewing Michigan case law on pre-dispute arbitration agreements, the appellate court reversed the trial court's decision that Shaya's employment-related claims under Michigan's Civil Rights Act and Whistleblower Protection Act must be arbitrated. To the appeals court, the above-quoted language did not clearly reference Shaya's statutory discrimination claims and therefore did not provide him with clear notice that he was waiving the right to have such claims adjudicated in court.

While that outcome is not unmistakably wrong, the appellate panel seems to have overlooked the introductory language declaring that the arbitration clause extends to "[a]ny controversy or claim arising out of or relating in any way to this [employment] agreement." Employment discrimination and whistleblower claims fell into that category. ■

MICHIGAN SUPREME COURT UPDATE

Richard Hooker
Varnum

Smith v City of Flint, ___ Mich ___, No. 152844 (Slip Op 2/3/17), rev'g & rem'g, 313 Mich App 141 (2015)

Here, the plaintiff was a police officer employed by Defendant City and the president of its Police Officers Union. After he complained publicly the City was not fully putting millage revenues to the use for which they were intended, he was placed on road patrol and assigned to the night shift on the City's north end. He sued, claiming unlawful retaliation under Michigan's Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*.

The trial court granted defendant summary disposition as a matter of law, and the Court of Appeals affirmed in a 2-1 ruling, the majority holding that plaintiff's job reassignment did not constitute a materially adverse employment action. Even if it did, the majority reasoned, plaintiff had not properly pled allegations he had been engaged in activity protected by the WPA. Judge Fort Hood dissented, opining that plaintiff had created a genuine issue of material fact as to whether the job reassignment was an adverse employment action, citing all of the following factors: 1) plaintiff's allegations he could not perform his union duties while working on the night shift; 2) plaintiff's allegations his assignment to the City's north end was "exclusive" and that he was told he was not to work on the City's south end; and 3) plaintiff's allegation the north end was crime-ridden and a more dangerous assignment, particularly on the night shift.

In lieu of granting leave to appeal, the Supreme Court simply agreed with Judge Fort Hood and remanded the case to the trial court for the reasons cited in her dissent. With regard to the Court of Appeals majority's observations on proper pleading of protected activity, the Supreme Court found the Court of Appeals should not have decided that issue at all, since it had not been raised before or reached by the trial court.

Of potential significance to practitioners: First, it appears the Court may be broadening the judicial definition of "adverse employment action" consistent with U.S. Supreme Court precedents, after having narrowed it somewhat in recent years via other decisions. Second, to avoid the procedural woe that befell the City here on appeal, defense counsel should consider raising and asking the trial court to reach *all* potential summary disposition issues. Finally, plaintiffs' counsel should be wary of relying on the third factor in Judge Fort Hood's analysis, as it might be a very slippery slope from "more crime-ridden and dangerous" to "more racial," particularly if the plaintiff is the proverbial "white anglo-saxon protestant male." ■

the limitations on employer access to medical information and the obligation to treat such information confidentially. It explains that an employer is only allowed to ask medical questions (including those concerning mental health) in four situations: (1) when an employee asks for reasonable accommodation; (2) after a job offer has been made but before employment begins, as long as others entering the same job category are asked the same questions; (3) when the employer is engaging in affirmative action for people with disabilities, in which case the employee may choose whether to respond; or (4) on the job, when there is objective evidence that the employee may be unable to perform his or her job or may pose a safety risk because of his or her condition.

A corresponding EEOC Guidance document is directed to health care providers. *The Mental Health Provider's Role in a Client's Request for a Reasonable Accommodation at Work* provides instruction to health care providers who may be asked to submit certification or information regarding an employee's mental health condition. This document gives direction to the provider about how to support patients' obligations in providing documentation seeking an accommodation. It explains the interactive dialogue process and the type of documentation that may be most helpful in the accommodation process, such as (1) the provider's professional qualifications; (2) the nature and length of provider's relationship with the employee; (3) the nature of the employee's condition; (4) the employee's functional limitations in the absence of treatment; and (5) suggested accommodations.

Employers should review the EEOC's Guidance as it is a useful refresher on the ADA's provisions and applicability to mental health conditions in the workplace. ■

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