LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

Volume 30, No. 1 **Spring 2020**

THE NEW "TRUMP" NLRB ASSERTS ITSELF

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Labor practitioners have long been frustrated by the ever-changing legal landscape resulting from the politically constituted National Labor Relations Board: Each administration appoints three Board members from its own party, and two from the opposite party. Not surprisingly, when an administration shifts from Democrat to Republican, that process results in a Board whose majority will likely have stark disagreements with the views of the predecessor Board.

Whether this swinging pendulum results in significant changes to substantive labor law will depend on the extent to which a very liberal Board majority is being replaced by a very conservative majority. At this writing, the conservative Trump administration has appointed three pro-business Republican Board members, who have faced off against one Democrat—but only until that member's term expired last December. The two Democrat seats are now empty. Not surprisingly, this has resulted in significant changes in Board law, often returning to the pro-business views of the George W. Bush Board.

What follows is a summary of some recent significant Trump Board decisions and policy changes, beginning with those applicable to all employers and then discussing several that pertain only to employers that have a relationship with a union.

Board issues final rule on joint employer status.

Just before we went to press, the Trump Board issued its final rule on a subject—joint employer status—that has troubled the Board and the courts for years. The Board describes the final rule as restoring the joint employer standards that the Board had applied for several decades prior to the Obama Board's decision in *Browning-Ferris Industries* (2015). The key change in the final rule is that an employer must both possess and exercise "substantial direct and immediate control" over one or more of the "essential terms and conditions" of another employer's employees. The rule also provides detailed meaning to the critical terms under the new standard. Under the Obama Board's test for joint employer status, many business relationships (*e.g.*, employee leasing, franchisor-franchisee, etc.) were in jeopardy of being labeled as joint employer relationships, potentially opening a snake pit of legal rights and obligations the parties had not anticipated. Businesses can now breathe a sigh of relief.

Union election rules are substantially loosened.

For decades unions have complained that the then-current NLRB timelines for elections seeking union representation were too lengthy, giving time for employers to mount campaigns that caused unions' win-loss ratio to be lower than they thought it should be. So, in 2014, the pro-union majority of the Obama Board put in place new rules and timelines that were pejoratively called "quickie election" rules—though that is exactly what they were. Many employers were ambushed by these new rules, resulting in an election without a realistic campaign. Ironically, though, statistics have shown that, despite the hurry-up character of the Obama Board's rules, unions did not improve their win-loss ratio. In any event, as of April 16, 2020, those quickie rules will no longer be effective.

Use of employer email systems for union organizing.

Prior to the Obama Board, the NLRB's rule concerning employer email systems was that, with certain exceptions, employers could forbid the use of their email systems for union organizational efforts even though employees routinely used that email in the course of their work. But in *Purple Communications* (2014), the Obama Board flipped the rule to state that, with certain exceptions, employees who use the employer's email system for work had a presumptive right to use the employer's system for union-related activities. Late last year, in *Caesars Entertainment* (2019), the Trump Board went back to the pre-Obama rule, i.e., that, so long as the employer was not discriminating against union-related email by allowing other similar non-work uses, employers can forbid its use for union purposes.

Confidentiality in investigations.

The Obama Board had created a rule that employers could not tell employees to maintain the confidentiality of an investigation in which they were being interviewed or otherwise involved. Under that rule, established in *Banner Estrella Medical Center* (2015), an employer had the burden of proving the necessity for confidentiality in a particular case, such as a sexual harassment investigation, which the Obama Board rarely found satisfied. Under the Trump Board's decision in *Apogee Retail* (2019), the rule is reversed—so long as a confidentiality requirement is limited to the period and subject matter of the investigation, it is presumptively valid.

New deferential analysis for employer-issued rules and policies governing employee conduct.

We all remember too well the last several years of the Obama Board members' nit-picking of employer-promulgated rules and policies to determine whether, *in the Board's view*, the rule or policy might *possibly* inhibit protected activity on the part of employees governed by the rule. In one of its first acts, the Trump Board adopted, in *Boeing Co.* (2017), a new framework for assessing whether particular rules or policies (*e.g.*, code of ethics, professionalism in the workplace, protection of the employer's non-public information, etc.) interfered with protected activity. In early 2018, the Board's General Counsel issued a comprehensive memorandum to the Regional Offices that went into greater detail. Since then, the Board has been methodically finding permissible employer rules or policies that would not have passed under the Obama Board's framework.

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

Stuart M. Israel, *Editor*
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Access of union organizers to employer property.

A frequent point of friction occurs when union organizers try to gain access to employees in the company parking lot or, for some employers, in public areas of a larger entity like a hospital or shopping mall. In two separate decisions, *Kroger Mid-Atlantic* (2019) and *UPMC* (2019), the Trump Board changed the playing field in favor of employers' right to prohibit access to union organizers even if the employer allows access for charitable, civic, and similar activities.

How much profanity and verbal abuse must an employer put up with?

What has irked so many employers over the years of the Obama Board was the seeming failure to recognize that an employer must maintain certain behavioral standards for its workplace—or it will become dysfunctional, adversarial, and abusive. Indeed, there developed a conflict between the NLRB and the EEOC over the propriety of certain sexual misconduct that the NLRB declared to be protected whereas the EEOC declared it to run afoul of the harassment laws. The Trump Board has now changed the analysis applicable to such situations. Instead of simply asking whether certain misconduct occurred in connection with protected activity, the new test looks at whether a rule of conduct, reasonably interpreted, would interfere with employees' exercise of statutorily protected rights. If so, the test then weighs the nature and extent of the potential impact on employees' rights against the employer's legitimate justification for having the rule. When the justification for the rule outweighs arguable intrusions on protected rights, it will be found lawful. Under this new approach, countless employer-promulgated workplace rules and policies will survive scrutiny—whereas the Obama Board would have found many nonsensical violations of employees' rights.

Employers may stop withholding union dues at contract expiration.

In a rather shocking deviation from decades of prior law on the subject, the Obama Board had, in *Lincoln Lutheran of Racine* (2015), over-ruled the standard followed since *Bethlehem Steel* (1962), which held that an employer could discontinue dues checkoff at the expiration of a collective bargaining agreement. The Obama Board held that dues checkoff was part of the "status quo" that must be maintained after a contract expires. In *Valley Hospital Medical Center* (2019), the Trump Board held that dues checkoff was not part of the "status quo" and that an employer is allowed, upon contract expiration, "to use dues checkoff cessation as an economic weapon in bargaining without interference from the Board."

"Contract coverage" standard for mid-contract unilateral changes.

For many years, there has been a debate among Board members and labor practitioners about the correct legal standard to be applied by the Board (and the courts) when an employer decides to make a change in mid contract, relying on a management rights provision that it believes in good faith gives it the right to make the change without bargaining with the union. The standard the Board had generally used tested whether the union had

"clearly and unmistakably waived" a right to bargain with the employer over that particular subject before the employer could make a change. As might be expected, employers were rarely able to make that "waiver" showing, which severely constricted an employer's right to rely on a management rights clause (or similar contract language). The Trump Board has now resolved that debate and held in *M.V. Transportation* (2019) that it would apply the "contract coverage" standard—which tests only whether the subject of the dispute is "covered" by applicable contract language. This will have major favorable ramifications for employers as they try to run their businesses.

Old rule for deferral to arbitrator is reinstated.

In a decision that will keep the Board out of most contract disputes that have been arbitrated, the Trump Board has now, in *United Parcel Service* (2019), restored the long-standing test for deferral, i.e., that the issues arbitrated were factually parallel to the NLRA issue, that the facts relevant to the statutory issue were presented, and that the arbitrator's decision was not "repugnant to federal labor laws." Under the Obama Board, disputes that had been arbitrated in the employer's favor were frequently the subject of renewed NLRB investigation and intervention in what should have been a final decision by the arbitrator.

We expect to see many more significant decisions for the balance of the Trump Board's tenure. ■

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HOW MUCH TIME IS A REASONABLE TIME TO HEAL? THE STATUS AND FUTURE OF A MEDICAL LEAVE OF ABSENCE AS A REASONABLE ACCOMMODATION IN MICHIGAN

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Employees taking time off work to obtain treatment for or to manage a medical condition is a recurring subject for employers. For many employers, an employee's absence is a non-issue when it is short in duration. Also, if the employee has sufficient paid time off, vacation, or sick time to cover their absence, most employers pay it no mind. The concept of time off becomes more complicated, however, when an employee's medical condition requires weeks or months of time away from work. What do employers do then?

To some employers, the answer lies with the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* If the employer is subject to the FMLA (29 U.S.C. § 2611(4)), and the employee is eligible for leave (29 U.S.C. § 2611(2)(A)), then the employer is obligated to provide the employee with up to 12-weeks of unpaid leave and reinstatement to his or her position upon returning from leave. *See* 29 U.S.C. §§ 2612(a)(1)(D), 2614(a)(1). But, the FMLA is not the answer for many employers or every situation involving a medical leave of absence.

What if the employer is not subject to the FMLA or the employee does not qualify for FMLA leave? What if the employee's medical condition persists after their FMLA leave is exhausted and they are unable to return to work? These issues present the greater complication. In those situations, when is an employer required to provide an employee with a leave of absence (or additional leave) and for how long? That question is the subject of much debate and litigation in Michigan – especially in federal courts. Enter the concept of "a reasonable time to heal".

The Reasonable Time to Heal Doctrine Under Michigan Law

The so-called "reasonable time to heal doctrine" is a catchall used by many Michigan employment lawyers to describe an employer's obligation to accommodate an employee who is unable to work because of a disability by providing the employee time off work to get better. This doctrine originated under Michigan state law in the early 1990s. *See, e.g., Rymar v. Michigan Bell Telephone Co.*, 190 Mich. App. 504 (1991). That doctrine's existence, however, was short lived.

In 1999, a special panel of the Michigan Court of Appeals ruled that the Handicappers' Civil Rights Act ("HCRA"), now the Persons With Disabilities Civil Rights Act ("PWDCRA"), M.C.L. § 37.1101 et seq., "does not require that an employer allow a disabled employee a reasonable time to heal." *Lamoria v. Health Care & Ret. Corp.*, 233 Mich. App. 560, 562 (1999). As a result, an "employer's duty to make 'reasonable accommodation' under the [PWDCRA] does not extend to granting the plaintiff a medical leave until such time as he would be able to perform the requirements of his job." *Kerns v. Dura Mech. Components, Inc.*,

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242 Mich. App. 1, 16 (2000) (alteration added).

So the question at hand is settled under Michigan state law. But what about federal law and, specifically, the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*? That answer, on the other hand, is anything but settled or clear—especially in the Sixth Circuit.

Leaves of Absence as a Reasonable Accommodation under the ADA

The ADA is a comprehensive statute that touches nearly every employer in the United States. *See* 42 U.S.C. § 12111(5)(A) (an "employer" for purposes of the ADA means a person or entity "engaged in an industry affecting commerce who has 15 or more employees"). In relevant part, the ADA prohibits employers from discriminating against a "qualified individual" on the basis of a disability by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual" where such an accommodation does not cause the employer an "undue hardship". 42 U.S.C. § 12112(b)(5)(A). To be "qualified", an employee must be able to "perform the essential functions" of their position "with or without a reasonable accommodation". 42 U.S.C. § 12111(8). A "reasonable accommodation" may include

> job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9)(B).

It is undisputed that a medical leave of absence is not a "reasonable accommodation" identified in either the text of the ADA or is corresponding regulations. *See* 42 U.S.C. § 12111(9)(B), 29 U.S.C. § 1630.2(o). Instead, the only textual authority providing as much comes from "interpretive guidance" issued by the Equal Employment Opportunity Commission ("EEOC"). *See* 29 C.F.R. § Pt. 1630, App. There, the EEOC asserts that "other accommodations" under the ADA "*could* include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment." *Id.* (emphasis added).

The EEOC's opinion is not binding. That opinion may be "'entitled to respect'" if it has "the 'power to persuade.'" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 n. 6 (2002) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)). But, when the statutory "text is clear, that is the end of the matter. Ancillary persuasive authority is irrelevant." *Keen v. Helson*, 930 F.3d 799, 805 (6th Cir. 2019) (citing *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 (2018)). Regardless of whether the EEOC's opinion is entitled to respect or not (a debate for another day), most federal circuits – in one way or another – still recognize that a medical leave of absence may be a reasonable accommodation under certain circumstances.[1]

Unsurprisingly, this principle is not without some criticism seeing as the "ADA is an antidiscrimination statute, not a medical-leave entitlement." *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 479 (7th Cir. 2017). The Second Circuit, while not taking an official position on the issue, noted that

> the idea of unpaid leave of absence as a reasonable accommodation presents 'a troublesome problem, partly because of the oxymoronic anomaly it harbors—the idea that allowing a disabled employee to leave a job allows him to perform that job's functions – 'but also because of the daunting challenge of line-drawing it presents.'

Graves v. Finch Pruyn & Co., Inc., 457 F.3d 181, 185 n. 5 (2d Cir. 2006) (quoting *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 651 (1st Cir. 2000) (O'Toole, J., dissenting)). Likewise, then Judge Neil Gorsuch while writing for the Tenth Circuit pointed out that it "perhaps goes without saying that an employee who isn't capable of working for so long isn't an employee capable of performing a job's essential functions … After all, reasonable accommodations – typically things like adding ramps or allowing more flexible working hours –are all about enabling employees to work, not to not work." *Hwang v. Kansas State Univ.*, 753 F.3d 1159, 1161-62 (10th Cir. 2014) (Gorsuch, J.).

Be that as it may, the law in most federal circuits (including the Sixth Circuit) holds to the contrary. But, as alluded to above, the Sixth Circuit's take on when a medical leave of absence qualifies as a reasonable accommodation – and how much time is reasonable – is a bit murky.

The Sixth Circuit's Murkiness

The Sixth Circuit's jurisprudence on a medical leave being a reasonable accommodation is scarce. As a starting point, the Sixth Circuit holds that a "[r]easonable accommodation does not require the employer to wait indefinitely for an employee's medical condition to be corrected." *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998). But, "a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances." *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 783 (6th Cir. 1998).

What circumstances are appropriate? The Sixth Circuit did not say and has been virtually mum on the subject ever since. The apparent lone exception came in 2003 when the court held that the plaintiff's request for a six-month leave of absence for medical issues secondary to her pregnancy was reasonable. *See Cleveland v. Fed. Express Corp.*, 83 Fed. Appx. 74, 79 (6th Cir. 2003). The *Cleveland* Court also noted that "this Court has declined to adopt a bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation." *Id.*, at 78. That observation appears to hold true to this day.

But for these examples, the Sixth Circuit has been silent on how much medical leave employers must provide an employee to satisfy the reasonable accommodation requirement under the ADA. Instead, subsequent opinions have focused primarily on how much *extended* leave is reasonable after a leave of absence has already been provided.

In *Walsh v. United Parcel Serv.*, 201 F.3d 718 (6th Cir. 2000), the plaintiff was given a year of paid leave followed by roughly "six additional months of unpaid leave" before being terminated. *Id.*, at 726-727. The plaintiff attempted to rely on *Cehrs* "for the proposition that an indefinite leave of absence, no matter how potentially lengthy," was not an objectively unreasonable accommodation. *Id.*, at 726. The *Walsh* Court disagreed. Initially, *Cehrs* was factually distinguishable as that case concerned "a

situation where a request for a definite and relatively short leave was made, accompanied by a reasonable prospect of recovery." *Id.* The *Walsh* plaintiff was on leave for nearly 18 months and his doctors could only provide "a vague estimate" of when he could return to work. *Id.* As a result, the *Walsh* Court found the plaintiff's request for additional leave to be an "unreasonable accommodation". *Id.*, at 728. In coming to its decision, the *Walsh* Court also held:

> The ADA was designed to eliminate discrimination against individuals with disabilities so that they could become productive members of the workforce. See 42 U.S.C. § 12101; 29 C.F.R. pt.1630 (1996). However, when the requested accommodation has no reasonable prospect of allowing the individual to work in the identifiable future, it is objectively not an accommodation that the employer should be required to provide. We therefore hold that when, as here, an employer has already provided a substantial leave, an additional leave period of a significant duration, with no clear prospects for recovery, is an objectively unreasonable accommodation

Id., at 727. Moreover, *Walsh* noted that its review of case law from other federal circuits "disclosed no cases where an employer was required to allow an employee to take a leave of absence for well in excess of a year—let alone indefinitely—as a reasonable accommodation to the employee's disability." *Id.*, at 727. Again, this also appears to still be the case. "This suggests" the *Walsh* Court continued "that it would be very unlikely for a request for medical leave exceeding a year and a half in length to be reasonable." *Id.*

Although *Walsh* offered more than its predecessors on the subject, that opinion raised more questions than it answered. Principally, what length of time satisfies the "identifiable future", "substantial leave", and "significant duration" temporal queries? That remains unclear as only a few unpublished opinions from the Sixth Circuit have followed regarding the extended-leave aspect of *Walsh*. Those opinions, however, turned not so much on the amount of leave being taken, but on the definitiveness to the end of the leave in question. *See, e.g., Aston v. Tapco International Corp.*, 631 Fed. Appx. 292, 294, 298 (6th Cir. 2015) (holding that an additional six-weeks of leave following six-months of leave was "beyond what constitutes a reasonable accommodation" because the requested leave had "no certain or credibly proven end in sight".); *Maat v. Cty. of Ottawa, Michigan*, 657 Fed. Appx. 404, 407-408, 413 (6th Cir. 2016) (finding that an additional request for "open ended" leave following six-months of part-time leave "was not definite in duration" and was not a "reasonable accommodation under the law of this circuit.").

Federal district courts in Michigan have also varied on how much leave is objectively reasonable under the ADA. For example: one district court found a medical leave that "came close to a full year" where the employee arguably could return to full-time at the end of the leave presented a "question of fact for a jury" on whether the amount of leave was "objectively reasonable". *E.E.O.C. v. J. Disposition Corp.*, 2011 WL 5118735, at *4 (W.D. Mich. Oct. 27, 2011) (Bell, J.). While another district court held that a total leave of "17-18 months" was unreasonable – not because of the shear amount of leave – but because the plaintiff "provided no assurance that he would be medically cleared to return to work." *Cotuna v. Walmart Stores, Inc.*, 2016 WL 5661572, at *3 (E.D. Mich. Sept. 30, 2016) (Hood, C.J.).

And that's about it. Taken together, the foregoing opinions provide the following guidance (some binding, some not) on when a medical leave of absence is a reasonable accommodation under the ADA:

- An employer is not required to provide an indefinite medical leave of absence to an employee;
- There is no limit to the maximum duration of leave an employee can take to accommodate his or her disability. Although it is "very unlikely" that 18 months of leave is reasonable, it is not out of the question; and
- Regardless of duration, an employee's request for leave must allow the employee to work in the "identifiable future". This appears to mean that the employee must demonstrate a "reasonable prospect for recovery" and "a certain or credibly proven end to the leave." A "vague estimate" or "open ended" end date will not suffice.

In other words, no matter how much leave is requested – could be six months, one year, or three years – if the employee establishes an "identifiable", or "certain", or "credibly proven" end date for his or her leave, and the leave shows a "reasonable prospect of recovery", the leave requested is arguably a reasonable accommodation the employer must provide.

It goes without saying that the Sixth Circuit's direction (or lack thereof) on when a medical leave is a reasonable accommodation is not exactly clear-cut. To be fair, the Sixth Circuit is not alone in its lack of clarity on this issue. Virtually every other federal circuit that recognizes that a medical leave of absence as a reasonable accommodation has fallen prey to this "'daunting challenge of line-drawing'". *Graves v. Finch Pruyn & Co., Inc.*, 457 F.3d 181, 185 n. 5 (2d Cir. 2006). *See, infra*, n.1. That is with one notable exception.

The Seventh Circuit Provides Some Clarity

The Seventh Circuit has drawn the clearest lines of any federal circuit on when a medical leave of absence qualifies as a reasonable accommodation, and how much time is reasonable. Beginning with *Byrne v. Avon Prod., Inc.*, 328 F.3d 379 (7th Cir. 2003), the Seventh Circuit was presented with an employee who was terminated after being off for two months seeking treatment for mental health issues. *Id.*, at 380. After he was terminated, the plaintiff filed suit under the ADA and the FMLA. *Id.* The district court granted summary judgment in favor of the employer and the plaintiff appealed. *Id.*

The plaintiff's primary argument on appeal was "that he should have been accommodated by being allowed *not* to work." *Id.* (emphasis in original). Judge Frank Easterbrook (along with Judges Richard Posner and Richard Cudahy) disagreed. That position, the *Byrne* Court wrote,

> is not what the ADA says. The sort of accommodation contemplated by the Act is one that will allow the person to 'perform the essential functions of the employment position'. Not working is not a means to perform the job's essential functions. An inability to do the job's essential tasks means that one is not 'qualified'; it does not mean that the employer must excuse the inability.

Id., at 380-381. Instead, the "'rather common-sense idea is that if one is not able to be at work, one cannot be a qualified individual.'" *Id.*, at 381 (quoting *Waggoner v. Olin Corp.*, 169 F.3d 481, 482 (7th Cir.1999)).

The *Byrne* Court did not foreclose the prospect that time off of work could potentially fall under the ADA's reasonable-accommodation requirement. "Time off may be an apt accommodation

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for intermittent conditions" by, for example, providing an employee with "a few days off or a part-time position". *Id.*, at 381. However, the "[i]nability to work for a multi-month period removes a person from the class protected by the ADA." *Id.*

In 2017, the Seventh Circuit was asked (with support from the EEOC) "to retreat from or curtail our decision in *Byrne." Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 479 (7th Cir. 2017). In *Severson*, the plaintiff took a 12-week medical leave under the FMLA to treat back pain. *Id.*, at 478. He had surgery on his last day of FMLA leave and needed another two to three months of additional leave to recover. *Id.* His employer "denied his request and terminated is employment, but invited him to reapply when he was medically cleared to work." *Id.*

The plaintiff filed suit alleging his employer violated the ADA by failing to provide him a reasonable accommodation (three months of medical leave). *Id.* The district court granted summary judgment and the plaintiff appealed. *Id.*, at 478-479. The Seventh Circuit affirmed and declined to walk back from *Byrne: "Byrne* is sound and we reaffirm it." *Id.*, at 479. The *Severson* Court then fleshed out *Byrne's* position in the most novel of ways: it applied the ADA as written.

As noted above, the *Severson* Court began its opinion by stating the obvious: "The ADA is an antidiscrimination statute, not a medical-leave entitlement." *Id.* The court then turned to the ADA's text; specifically, who is defined as a "qualified individual" and what is a "reasonable accommodation" under the statute. *Id.*, at 479, 481. The court acknowledged that the ADA's list of reasonable accommodations "is flexible and the listed examples are illustrative." *Id.*, at 481. But,

> the baseline requirement found in the definition of 'qualified individual' is concrete: A 'reasonable accommodation' is one that allows the disabled employee to 'perform the essential functions of the employment position.' § 12111(8). If the proposed accommodation does not make it possible for the employee to perform his job, then the employee is not a 'qualified individual' as that term is defined in the ADA. *Id.* The illustrative examples listed in § 12111(9) are all measures that facilitate work.

Id. Thus, by reading "these interlocking definitions together, a long-term leave of absence cannot be a reasonable accommodation." *Id.* "Simply put, an extended leave of absence does not give a disabled individual the means to work; it excuses his not working." *Id.*

Severson also reaffirmed that "a brief period of leave to deal with a medical condition could be a reasonable accommodation in some circumstances." *Id.*, at 481 (citing *Byrne*, 328 F.3d at 381). "Intermittent time off or a short leave of absence – say, a couple of days or even a couple of weeks – may, in appropriate circumstances, be analogous to a part-time or modified work schedule, two of the examples listed" as reasonable accommodations under the ADA. *Id.* (citing 42 U.S.C. § 12111(9)). However, a "multi-month" medical leave of absence is simply not covered by the ADA. *Id.* Instead:

> Long-term medical leave is the domain of the FMLA, which entitles covered employees 'to a total of 12 work-weeks of leave during any 12-month period ... [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.' 29 U.S.C. § 2612(a)(1)(D). The FMLA protects up to 12 weeks of medical leave, recognizing that employees will sometimes be *unable* to perform their job duties due to a serious health condition. In contrast, 'the ADA applies only to those who can do the job.' *Byrne*, 328 F.3d at 381.

Id., at 481 (alterations and emphasis in original).

The EEOC disagreed. In its view, "a long-term medical leave of absence should qualify as a reasonable accommodation" and "the duration of the leave is irrelevant as long as it is likely to enable the employee to do his job when he returns." *Id.*, at 482. The *Severson* Court rejected that position because, if so, "the ADA is transformed into a medical-leave statute – in effect, an open-ended extension of the FMLA." *Id.* Such a position is inconsistent with the ADA and represents "an untenable interpretation of the term 'reasonable accommodation.'" *Id.*

The Sixth Circuit's Future in Light of Byrne and Severson

The Seventh Circuit has delineated the clearest lines of any federal circuit court to date on when a medical leave is and is not a reasonable accommodation under the ADA. Although no other federal circuit has expressly adopted the Seventh Circuit's approach, none have rejected it either. A few circuits, however, have cited favorably to the approach, *see Fogleman v. Greater Hazleton Health All.*, 122 Fed. Appx. 581, 585 n. 7 (3d Cir. 2004), including the Sixth Circuit. *See Boileau v. Capital Bank Fin. Corp.*, 646 Fed. Appx. 436, 441 (6th Cir. 2016) (citing *Byrne*). Admittedly, citing favorably is a far cry from expressly adopting. So what are the chances of the Sixth Circuit actually adopting the Seventh Circuit's approach in the future? It's possible for several reasons.

Initially, the Sixth Circuit's leading precedent on the subject – *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998) – is not founded on the most solid of ground. *Cehrs* did not rely on any relevant aspect of the ADA to support its holding that a medical leave of absence could constitute a reasonable accommodation. *See, id.*, at 782-783. Which, as the foregoing shows, is not the case. Also, *Cehrs* seems to suggest that a medical leave is reasonable *per se* unless the employer shows an undue hardship. *See, id.*, at 782 ("If an employer cannot show that an accommodation unduly burdens it, then there is no reason to deny the employee the accommodation."). That is also incorrect as the employee always bears the burden of "'showing that the accommodation is reasonable in the sense both of efficacious and of proportional to costs.'" *Keith v. County of Oakland*, 703 F.3d 918, 927 (6th Cir. 2013) (quoting *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir 1996)).

Second, the Sixth Circuit has recently seen fit to break ranks with *Cehrs* on another front. In addition to a medical leave being a reasonable accommodation, *Cehrs* also held that "no presumption should exist that uninterrupted attendance is an essential job requirement". *Id.*, at 783. In *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 761 (6th Cir. 2015), the court sitting *en banc* held that "[r]egular, in-person attendance is an essential function – and a prerequisite to essential functions – of most jobs". *Id.*, at 762-763.

Third, roughly the entire foundation that supports the holdings

in *Byrne and Severson* – a fair amount of which was recently espoused by the *Ford* Court – is already recognized by the Sixth Circuit. To begin with, the Sixth Circuit recognizes that the ADA "was designed to eliminate discrimination against individuals with disabilities so that they could become productive members of the workforce." *Walsh v. United Parcel Serv.*, 201 F.3d 718, 727 (6th Cir. 2000). "To be 'qualified' under the ADA," an employee "must be able to 'perform the essential functions of [his or her job]' 'with or without reasonable accommodation.'" *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 761 (6th Cir. 2015) (en banc) (alteration added). A reasonable accommodation "does *not* include removing an 'essential function' for the position", let alone all of them, "for that is *per se* unreasonable." *Id.*, at 761 (citing *Brickers v. Cleveland Bd. Of Educ.*, 145 F.3d 846, 850 (6th Cir. 1998)) (emphasis in original). And, most importantly, "'an employee who does not come to work cannot perform any of his job functions, essential or otherwise.'" *Id.*, at 761 (quoting *EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 948 (7th Cir.2001) (en banc)).

All of these principles lead to the ultimate conclusion reached by the Seventh Circuit: "'An employee who needs long-term medical leave cannot work and thus is not a 'qualified individual' under the ADA." *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 479 (7th Cir. 2017) (citing *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381 (7th Cir. 2003)) (emphasis added). Also, the *Ford* Court reminded us that the "sometimes-forgotten guide" of "common sense" should be considered. *Ford*, 782 F.3d at 762. The Seventh Circuit agrees: the "common-sense idea is that if one is not able to be at work, one cannot be a qualified individual.'" *Byrne*, at 381 (7th Cir. 2003) (quotation omitted).

Further, if the Sixth Circuit is asked (or decides *sua sponte*) to revisit its approach, the court does not need to overrule *Cehrs* to join the Seventh Circuit. *Cehrs* left open the question of what the "appropriate circumstances" are for a medical leave of absence to constitute a reasonable accommodation. 155 F.3d at 783. The Seventh Circuit merely holds that such circumstances only exist by providing "a brief period of leave" to deal with "intermittent conditions." *Severson*, 872 F.3d at 481 (citing *Byrne*, 328 F.3d at 381). A "long-term" or "multimonth leave of absence" is not an appropriate circumstance. *Id.*, at 479.

If, however, *Cehrs* is asked to be or needs to be overruled, the *en banc* majority in *Ford* still occupies the Sixth Circuit's bench. Moreover, whatever precedential value *Cehrs* may still hold is not dispositive. *Stare decisis* "is not an 'inexorable command, … and courts on occasion 'bow to the lesson of experience and the force of better reasoning'" *Theile v. Michigan*, 891 F.3d 240, 243 (6th Cir. 2018) (citations omitted). Although overruling precedent "'demands special justification,'" *id.*, at 243-244, such a justification exists when the case in question is "'shown to be unworkable or … badly reasoned.'" *Id.*, at 244 (citations omitted). The latter, as shown herein, arguably exists on this issue.

Whether the foregoing will ultimately come to fruition only time will tell. But until then, employment attorneys and courts alike will be left to continue guessing on how much time is a reasonable time to heal.

—END NOTE—

[1]*Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119, 128 (1st Cir. 2017); *Gardner v. Sch. Dist. of Philadelphia*, 636 Fed. Appx. 79, 84 (3d Cir. 2015); *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995); *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413, 417 (5th Cir. 2017); *Byrne v. Avon Prod., Inc.*, 328 F.3d 379, 381 (7th Cir. 2003); *Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537, 545-546 (8th Cir. 2018); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1135 (9th Cir. 2001); *Robert v. Bd. of Cty. Comm'rs of Brown Cty., Kans.*, 691 F.3d 1211, 1217-1218 (10th Cir. 2012); *Billups v. Emerald Coast Utilities Auth.*, 714 Fed. Appx. 929, 935 (11th Cir. 2017). ■

WHY WORKPLACE HARASSMENT POLICIES ARE GOOD BUSINESS

Ryan J. L. Fantuzzi
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Many small employers know that they ought to have a workplace harassment policy. What they don't know is *why* they need one. Of course, no one should be subjected to harassment in the workplace. That's a given. And if a policy prevents workplace harassment, it has served an important purpose. But in addition to protecting employees, workplace harassment policies make financial sense: An anti-harassment policy that is publicized and used can shield employers from legal liability created when employees harass other employees. Anti-harassment policies are good business.

The automaker Nissan recently used its harassment policy to defeat a lawsuit. See, *Wyatt v. Nissan of North America, Inc.*, No. 3:17-cv-1545, M.D. Tenn. (December 6, 2019). In *Wyatt*, an African American female project manager alleged that Nissan subjected her to a hostile work environment because of her sex and race. The plaintiff alleged that her supervisor sexually assaulted her by "continuously touching her, rubbing her shoulders and back down to her buttocks, and making her uncomfortable." The supervisor also allegedly got the plaintiff to his hotel room on a false pretense, and then sexually assaulted her. The plaintiff additionally asserted that the supervisor made offensive remarks in the workplace. The plaintiff waited three months to report her supervisor's conduct to Nissan's Human Resources Department. Seven days after receiving plaintiff's complaint, Nissan completed an internal harassment investigation under its policy and decided to terminate the supervisor. The supervisor resigned before Nissan terminated his employment.

Wyatt held that Nissan had exercised reasonable care by promptly investigating the plaintiff's complaint and recommending the supervisor's termination. Moreover, *Wyatt* held that by waiting three months to file her complaint under Nissan's harassment policy, the plaintiff had unreasonably failed to take advantage of available preventive opportunities. In short, Nissan's enforcement of its anti-harassment policy shielded it from legal liability for the harassment by one of its employees. *Wyatt* is an example of what employers ought to do when confronted with a harassment complaint. (This case is on appeal in the Sixth Circuit, so stay tuned.)

Having and enforcing workplace anti-harassment policies can protect an employer from legal liability whether the harasser is a co-worker or a supervisor. If the harasser is the victim's co-worker, then the employer is liable only if "it was negligent in controlling the working conditions." *Vance v. Ball State University*, 570 U.S. 421, 424 (2013). An employer is negligent in controlling the working conditions if the plaintiff shows that the "employer's response to the plaintiff's complaints manifested indifference or unreasonableness in light of the facts the employer knew or should have known." *Smith v. Rock-Tenn Services, Inc.*, 813 F.3d 298, 311 (6th Cir. 2016). A plaintiff most often shows manifested indifference by showing his or her employer failed to take prompt

(Continued on page 8)

WHY WORKPLACE HARASSMENT POLICIES ARE GOOD BUSINESS

(Continued from page 7)

and appropriate corrective action where it knew or should have known about the harassment. *Id.* The simplest way an employer can show appropriate corrective action in a given case is with prompt enforcement of its anti-harassment policy.

As illustrated in *Wyatt*, Employers can also shield themselves from liability in cases where the harasser is a supervisor. If the harasser is a supervisor—someone who is "empowered by the employer to take tangible employment actions against the victim"—then the employer is strictly liable if the supervisor's harassment culminates in a tangible employment action. *Vance*, 570 U.S. at 424. Actions that effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits can constitute tangible employment action. *Vance*, 570 U.S. at 431. "But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided." *Id.* As these factors were met in *Wyatt*, the employer was not found to have liability.

Generally, the employer's adoption, publication, and use of an anti-harassment policy can establish the first element of an employer's affirmative defense. See *Thorton v. Federal Express Corp.*, 530 F.3d 451, 456 (6th Cir. 2008). "An effective harassment policy should at least: (1) require supervisors to report incidents of sexual [or other protected class] harassment; (2) permit both informal and formal complaints of harassment to be made; (3) provide a mechanism for bypassing a harassing supervisor when making a complaint; and (4) provide for training regarding the policy." *Thorton,* 530 F.3d at 456 (internal quotations omitted).

The EEOC recommends that employers should require that supervisors and managers understand their responsibilities under anti-harassment policies and complaint procedures and put on periodic training to help achieve that result. The EEOC recommends that training explain the types of conduct that violates the policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation. *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, available at www.eeoc.gov/policy/docs/harassment.html. Periodic training will help the employer establish the first element of the defense.

Once the employer establishes the first element to the defense, it may then show that the plaintiff unreasonably failed to take advantage of the anti-harassment policy. *Thorton* held that the plaintiff unreasonably failed to take advantage of FedEx's preventive and corrective measures found in the employer's "promulgated and disseminated" anti-harassment policy, by not timely reporting the harassment. See also *Equal Emp't Opportunity Comm'n v. Autozone, Inc.*, 692 Fed. Appx. 280, 286 (6th Cir. 2017) (the employer was not liable where the plaintiff delayed over two months in reporting the allegations.)

According to the Supreme Court and the EEOC guidance, employers with small workforces may not be required to maintain formal anti-harassment policies. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998); *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, June 18, 1999, available at www.eeoc.gov/policy/docs/harassment.html. But even for small employers, concise policies can still shield employers from legal liability. The risk of not maintaining a formal policy, and instead relying on the "small employer" defense, is an expense that prudent employers should avoid. For example, in *Starnes v. JLQ Automotive Services, Co.*, 442 F. Supp. 2d 416 (E.D. Mich. 2006), the employer did not maintain a formal written anti-harassment policy. Nevertheless, it still conducted a full investigation into the plaintiff's harassment allegations. The employer argued that it was a small employer and thus not legally required to maintain a policy. The Court disagreed and denied the employer's motion for summary judgment even though the employer may have "acted swiftly to remedy the situation." Judge Duggan explained, "An employer is not relieved of its obligation to exercise reasonable care to *prevent* harassment simply because it can prove that it promptly corrected any sexual harassing behavior." The outcome might have been different had the employer had a concise, formal anti-harassment policy in place, and trained its staff to enforce the policy.

Employers hoping to shield themselves from legal liability must remember that the defense does not apply if they merely maintain an anti-harassment policy—the employer must actually *publicize it* and *use it*. Having an anti-harassment policy is much like having Arnold Schwarzenegger's 1,523-page tome "The Encyclopedia of Modern Bodybuilding"—merely owning it will not benefit you; instead, you must do the exercises. "The best anti-discrimination policy in the world will not help the employer who, rather than fulfill its duty to act on complaints about a serial harasser, lets the known harasser continue to injure new victims." *Hawkins v. Anheuser-Bush, Inc.*, 517 F.3d 321, 341 (6th Cir. 2008).

Hubbell v. FedEx SmartPost, Inc., 933 F.3d 588 (6th Cir. 2019) reminded management lawyers and the plaintiff's bar that merely maintaining an anti-harassment policy may not be enough. There, FedEx had an anti-harassment policy and managers had annual online diversity inclusion training. But after the plaintiff reported discrimination, the employer never opened an investigation, which was required by the policy. FedEx's corporate human resources manager testified that FedEx did not follow its own policy. The consequence of FedEx not following its own policy cost it $300,000 in punitive damages. See also *Smith v. Rock-Tenn Services, Inc.*, 813 F.3d 298 (6th Cir. 2016) (affirming jury's verdict in favor of plaintiff where employer ignored its own anti-harassment policy.) In *Smith*, the employer waited ten days after it learned that the harasser had sexually touched the plaintiff, which was not the harasser's first offense. Then rather than terminating the harasser, it suspended the harasser for one to two days *with pay.* The court found in favor of the plaintiff.

Employers who do not create anti-harassment policies risk losing a vital legal defense in employment discrimination cases. ■

BE ORGANIZED—STRATEGIES FOR WRITING CLEARLY, PURPOSEFULLY, AND THOUGHTFULLY

Kristin Wittenbach

In my experience teaching writing composition, I've found that there are two indispensable techniques that help make the construction of most types of writing simple and practical: (1) the purpose statement and (2) the outline.

When you begin the writing process, you probably have an idea as to what you want to say. If your paper isn't organized well, your thoughts can become lost to the reader, and your purpose is defeated from the start. This is why you will want to begin your writing process with a statement of purpose.

The purpose statement is really the main idea of your paper. It should be unmistakably clear. As I tell my students, I should be able to take a highlighter and underline the sentence that explains your purpose. This is what the reader will focus on throughout your paper.

The purpose statement doesn't necessarily have to be the first sentence or in the first paragraph. Depending on the type of paper you are writing, your introduction may be lengthy, and you may need more than one sentence to describe your purpose. What matters is that you have so clearly defined your purpose that it is unmistakable.

After you have written your introduction, underline your purpose statement. If you can't find it, you will need to re-consider how you have structured your introduction. Do not go on until you are able to underline your purpose statement.

Now that you are clear about what you want to say, you can develop your outline. The outline is simply that: It uses Roman numerals, letters of the alphabet, and numbers. This is critical to your paper because it allows you to keep to the task of supporting your purpose. Everything in your outline should relate back to your purpose statement.

Your outline can be as detailed as you want. But first, here is an easy way to remember how to outline: The Roman numerals are the *topic sentences* of the paragraphs, the letters of the alphabet are the *supporting sentences*, and the numbers are the *details*. Depending on your purpose, you may have an extended outline, and that's fine, as long as every detail supports and relates back to your purpose. The outline forces you to narrow your topic while allowing you to be as in-depth as you need to be.

While constructing your outline you must consider your audience. Ask yourself these questions: "Who am I writing to?" "What do they already know?" and "What do I need to let them know?" Another priority is clear language. Go through your sentences. Ask yourself "Could this be said more simply?" These practices will save both you and your audience critical time.

When you have checked the body of your paper and have made sure that it sticks to the "script" of your outline, you are ready to compose your conclusion. Generally, the reader will look to the conclusion of the paper for a "re-cap." Here, he or she expects a reminder of your main point. This can be done in several ways depending on the type of paper you are writing (persuasive, argumentative, etc.). You may want to add a few well-crafted sentences that would appeal to the emotional side of your audience, if this applies. You want your reader to remain focused here, and you want to leave a good impression.

I've found that the development of a clearly recognizable purpose statement along with an actual outline, prepared before writing, takes the "stress" out of crafting an effective paper. This method is simple, easy to remember, and will allow you to narrowly focus on what you wish to say, creating stronger writing skills and satisfied readers. ■

SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long

In *Jander v. Retirement Plans Committee of IBM*, 272 F. Supp. 3d 444 (S.D.N.Y 2017), a group of IBM employees filed an Employee Retirement Income Security Act (ERISA) action against IBM and its corporate officers alleging that they failed to prudently manage the assets in the IBM employee stock option plan (ESOP). The basis of the claim was that the plan fiduciaries knew and failed to disclose that one of IBM's divisions was overvalued, thereby artificially inflating the value of IBM's stock and harming the ESOP members. IBM moved to dismiss the complaint on the grounds that the plaintiffs did not plead facts sufficient to state a breach of the duty of prudence; specifically, they did not meet "the significant burden of proposing an alternative course of action so clearly beneficial that a prudent beneficiary could not conclude that it would be more likely to harm the fund than to help it." *Id.*, p. 448-49, *emphasis in original.* The trial court granted IBM's motion, and the plaintiff's appealed.

The Second Circuit Court of Appeals reversed the trial court's decision and remanded the case for further proceedings, finding that the plaintiffs did, in fact, sufficiently plead "that no prudent fiduciary in the Plan defendants' position could have concluded that the earlier disclosure would do more harm than good." *Jander v. Retirement Plans Committee of IBM*, 910 F.3d 620, 631 (2nd Cir. 2018). The defendants successfully sought certiorari on the question, "Whether . . . the 'more harm than good' pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time." *Jander v. Retirement Plans Committee of IBM*, 1389 S.Ct 2667 (2019). The Supreme Court heard oral argument on November 6, 2019, and on January 14, 2020 issued its Opinion. The Supreme Court did not address the merits of the action, however. Instead, it noted that neither the plaintiffs nor the defendants had briefed the issue presented in the Petition for Writ of Certiorari. Instead, the parties briefed issues that they had not presented to the Court of Appeals. In a *per curium* opinion, in which Justices Kagan and Ginsburg concurred, the Supreme Court held that the Court of Appeals must be given the opportunity to rule on the merits of the issues briefed to the Supreme Court and vacated the judgement below and remanded the case. ■

DIARY OF A FREE-LUNCH MONITOR

Professor Otto Stockmeyer
WMU-Cooley Law School (Emeritus)

According to the American Association of Retired Persons, so-called "free lunch" seminars are often used to lure people into investing in unsuitable or even fraudulent products. To help older Americans avoid being scammed out of their investments, AARP and the North American Securities Administrators Association developed the Free Lunch Monitor Program

Volunteer monitors attend free lunch or dinner investment seminars and, using a checklist developed by AARP, report what takes place. The first-hand observations help AARP and regulators determine if investment professionals are truly working in the best interest of investors. Information on the program is available at https://createthegood.aarp.org/volunteer-guides/spot-free-lunch-investment-scam.html.

Soon after I retired, sure enough, I began receiving colorful postcards inviting me to free seminars on "retirement planning," "new tax laws," "Social Security maximization," "wealth management," and like topics. All involved dinners, not lunches, and most featured a picture of a steak or the logo of a local steakhouse. Like many retirees, three of my favorite words are Food, Finances, and Free. So I enlisted as an AARP monitor. This is my experience.

November 14:

My first investment seminar took place at the Henry Center, attached to the University Club in Lansing. The invitation promised a "complimentary gourmet meal" where "our guests can expect to have a little fun, a good meal and obtain some meaningful information." A luscious steak was pictured.

Our host, a SEC Registered Investment Advisor, ran a one-man firm in Grand Ledge, associated with a multistate securities brokerage. He was down-to-earth, promising to "help you guys out big time." He promised a "fiduciary level of service" which means "doing the right thing for you."

The program—which I learned always comes first—lasted about an hour. It was very general. He offered "full-service retirement planning" to those who accepted his invitation to make an office appointment. No products were pitched, other than his services. Steak was indeed among the limited menu choices following the seminar. There was precious little fun, or actionable information, but the meal was good.

I declined an office appointment. There was no pressure and no follow-up. I sent my checklist to AARP but felt like a failure for not identifying anything untoward.

February 27:

My second invitation was to a "complimentary financial dining event" at Spag's restaurant in Williamston. The postcard promised information on "new tax laws" and "new changes to IRAs." But nothing in the hour-and-a-half presentation dealt with any new laws or regulations.

Our host was from Fowlerville. I later learned from brokercheck.finra.org that an individual by the same name, from the same town, was barred by the SEC for attempted cheating on a licensing exam. Coincidence?

I think his main purpose was to sell annuities. One product he mentioned paid 3¼% for 10 years. That didn't sound impressive to me. Nor was the meal anything special, a limited menu of pasta and such. But then, no steak was promised or pictured.

March 6:

Things improved markedly with the next invitation, for a "complimentary gourmet meal" at Lansing's Capital Prime steakhouse. "Expect to have a little fun, a good meal and obtain some meaningful information," it promised. Where have I read that before?

The hosts were two Registered Investment Advisors, one from Portland and one from Sunfield. Recalling that previous hosts were from Grand Ledge and Fowlerville, I could understand why they were prospecting in Lansing. But why would they think Lansingites would travel to the boonies for investment advice?

Again, the presentation didn't match up with the invitation, which promised that we would learn about: "How to avoid taxes on IRA distributions," "Where you should never put your IRA," and "Good versus Bad IRAs." Instead, the pitch was for equity-indexed annuities. Do seminar hosts even read their invitations?

But steak was on the limited menu we were offered, and it was excellent. Later I learned that the chart on display, which showed how an annuity outpaced the S&P 500 index over the past twenty years, did not include stock dividends. With dividends reinvested, the S&P would have outpaced the annuity by 33%.

May 8:

This time it was back to Capital Prime in response to an invitation that promised, "Come listen to an attorney, CPA, and licensed Wealth Managers deliver a UNIQUE presentation on life, taxes, Michigan laws, finances and how they relate to each other!" That's a tall order.

Although the weather was clear, only one speaker showed up. He was neither a lawyer nor a CPA (nor a Registered Investment Advisor), but he did have one year of law school. He was from Tawas City--another out-of-towner.

He talked a lot about trusts, including advice that if your assets were more than $2 million, use a revocable trust; otherwise use an irrevocable trust to avoid Medicare spend-down requirements. It was probably the most specific advice I received from any speaker. He offered trusts at the special price of $250 (through an affiliated law firm).

The dinner was the best yet. Steak was again on the menu, plus free mixed drinks for the asking. How can he afford it on $250 trusts?

January 8

Finally, a local guy who lives and works in nearby Okemos. And a Registered Investment Advisor. His postcard, picturing a steak, promised to tell us "10 things about IRA Required Minimum Distributions" at my new favorite restaurant, Capital Prime. And he came accompanied by two assistants and at least four satisfied

clients. Come to think of it, some of my tablemates at prior seminars were clients as well.

Unfortunately, only about fifteen minutes of his one-hour presentation touched on RMDs. Most of his time was devoted minimizing fees, taxes, and risk. Particularly risk: "I don't believe in risk," he said. And "We need to make adjustments to your portfolio to reduce your risk." Annuities, maybe?

This time we were invited to order off the main menu, but mixed drinks were on us. Tiring of steak, I went for the $19 lamb chops. As with other seminars, someone came around to our table to schedule an office appointment. And, again, a simple "No, thank you" sufficed.

February 11

Different invitation, different location, but it turned out to be the same guy from Okemos. This time the postcard offered "An inside look into leaving a legacy: What the wealthy know and you should, too" with "a deep dive into some of the current strategies available that redesign the way people do retirement." A steak was pictured, but the location was the Coral Gables restaurant in East Lansing.

The host was a polished speaker, but his anecdotes (which I had already heard once) went on too long. This might be because, according to information on the SEC's website (adviserinfo.sec.gov), he is a former church pastor. In addition to his Okemos investment firm, he runs an insurance agency with a very similar name to which he devotes more than 50% of his time. His only associate spends 80% of his time selling insurance.

I received a third invitation from the Okemos advisor, this one on "Trump's New Tax Plan: Help or Hindrance?" Although his program was back at Capital Prime, I declined. Been there, heard that.

* * *

Then all of sudden the investment-seminar postcards stopped. Have I been found out? I still encounter free-meal invitations to learn about timeshares, reverse mortgages, retirement facilities, pre-planned funerals, and even replacement windows. I decline them all; I'm a monitor, not a mooch.

During my year as a Free Lunch Monitor1 I did not observe any fraudulent representations or high-pressure tactics. But then I also never accepted invitations for a one-on-one meeting with a sponsor to learn what really is being pitched, and how.

My Do's and Dont's for seniors receiving investment-seminar invitations are these: Don't expect the topics discussed to necessarily match the invitation. Don't expect the information to be specific enough to act on. Do expect to be encouraged to meet with the host for a follow-up consultation. And do enjoy the steak . . . with more than a few grains of salt.

—END NOTE—

1. I suspect that AARP continues to use the title Free Lunch Monitor, despite the investment-seminar trade's shift to dinners, to reflect economist Milton Friedman's caution, "There's no such thing as a free lunch." The expression refers to the once-common practice of saloons providing a "free" lunch to patrons who purchased at least one drink. In 1872 the *New York Times* decried "loafers and free-lunch men" who "devours whatever he can and, while the bartender is occupied, tries to escape unnoticed." Earl Bronsteen, *The Adventures Of A Free Lunch Junkie* 65 (2011). ■

MERC NEWS

Ashley Rahrig
Departmental Analyst
Bureau of Employment Relations

• **MERC Act 312 Arbitrator/Fact Finder Training Program** - On September 25, 2019, MERC staff organized a one-day training conference for Act 312 Arbitrators, Fact Finders and constituents which was held at the VisTa Tech Center at Schoolcraft College in Livonia. MERC attorneys D. Lynn Morison and Carl Wexel presented on "Legislative Changes & Significant Case Law Affecting Act 312 Arbitration & Fact Finding." Nick Brousseau and Michael Wrobel from the Michigan Department of Treasury were joined by Sue Feinberg from MERS and presented a segment entitled "Retirement Issues, Ability to Pay & School Funding."

Two 'break-out' sessions were held in the afternoon, one for the Act 312 Arbitrators and Fact Finders (panelists were 312 Arbitrators/Fact Finders Richard Black, Elaine Frost and William Long) and the other for constituents (panelists were attorneys or HR professionals, John Clark, Suzanne Clark, Pamela Gordon and Michael O'Hearon). The sessions featured candid discussion on key topics including MERC Rules and polices re: Act 312 Arbitration and Fact Finding.

• **2019 Annual Report** – The 2019 Annual Report is available on the agency's website. The Report highlights statistics and numerous accomplishments of the agency during the 2019 fiscal year that covers October 1, 2018 - September 30, 2019. The MERC Annual Report was instituted during fiscal year 2013 at the request of then MERC Chair Edward Callaghan and has since continued.

• **Retirements and Departures** - After more than 38 years, longtime MOAHR **ALJ Julia Stern** retired from State service on October 18, 2019. Julia's tenure with the State began as a law clerk with her career advancing to an Administrative Law Judge assigned to conduct hearings, exclusively, on MERC cases. Effective December 15, 2019, **Fred Vocino** retired from State service. Fred was a MERC Labor Mediator since October 2009 serving the areas of Grand Rapids and southwest Michigan from Whitehall to Sturgis. **Ruthanne Okun** retired on February 7, 2020 having been the Bureau Director since 1998, the longest-serving Bureau Director in the agency's history. She served as legal advisor to the Commission, and supervised MERC staff located in Detroit, Lansing, and out-state areas, as well as staff of the Wage and Hour Division. Finally, effective September 30, 2019, **D. Lynn Morison** was appointed by Governor Whitmer as Commissioner to the Unemployment Insurance Appeals Commission. Lynn served as Staff Attorney for MERC during the past 18 years. The Bureau staff and Commission wish Julia, Fred, Ruthanne and Lynn many years of prosperity, happiness and success in their future endeavors. Their combined wealth of knowledge and commitment to the agency will be greatly missed.

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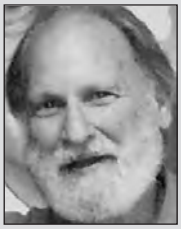

The State Bar of Michigan Labor and Employment Law Section Distinguished Service Award is presented to persons who, for a period of 20 years or more

- have made major contributions to the practice of labor and employment law;
- reflect the highest ethical principles, including principles of civility and professionalism;
- have advanced the development of labor and employment law;
- have a long-established commitment to excellence; and
- are recognized and respected by all constituents in the labor and employment community.

Past Recipients

1997	Theodore Sachs	2010	Leonard D. Givens
1998	William M. Saxton	2011	Thomas J. Barnes
1999	George T. Roumell, Jr.	2012	George N. Wirth
2000	Theodore J. St. Antoine	2013	Joseph A. Golden
2001	Erwin B. Ellman	2014	Janet C. Cooper
2002	James E. Tobin	2015	Richard Mittenthal
2003	John E. Brady	2016	Kathleen L. Bogas
	Joseph C. Marshall III		John R. Runyan, Jr.
2004	Gordon A. Gregory	2017	Michael Pitt
2005	Carl E. Ver Beek		David Calzone
2006	Robert J. Battista	2018	Stuart M. Israel
2007	H. Rhett Pinsky		Timothy H. Howlett
2008	Leonard R. Page	2019	Megan P. Norris
2009	Sheldon J. Stark		

AWARD PRESENTATION TO BARRY GOLDMAN

Stuart M. Israel

I am happy and honored to be a part of presenting this well-deserved award to Barry Goldman.

As most of you know, Barry is a long-time and highly-regarded labor arbitrator and mediator, writer, teacher, and more.

I have known Barry for many years—the precise number being lost in the mist of time.

I first met Barry some decades ago. I was a consumer of his arbitral services. Barry presided over efficient and substantive hearings. His decisions were prompt, clear, succinct, and wise. The fact that *wise* comes to mind suggests that my clients prevailed, but those details also are lost in the mist of time.

Barry and I became friends and ultimately collaborators. I enlisted Barry as a columnist for *Labor and Employment Lawnotes*, the State Bar of Michigan Labor and Employment Law Section's quarterly journal.

Barry has written his *Lawnotes* "For What It's Worth" column since 2002. The title of his column, of course, reflects the standard arbitral ruling on evidentiary objections.

That ruling really means: "I will admit the evidence for what it's worth and *maybe* I'll tell you what it's worth in my decision after I have sufficient time to research and figure out what it's worth." That is just too long for a column title.

Anyway, since 2002 Barry has delivered four excellent "For What It's Worth" *Lawnotes* columns per calendar year, through snow, rain, heat, and gloom of night.

Barry and I wrote a 2009 article for the *Michigan Bar Journal* called "The Arbitration Dialogues—An Advocate Talks to Arbitrators and An Arbitrator Talks Back." I was the advocate, instructing arbitrators on the right path. Barry was the back-talking arbitrator.

It is Barry's actual decisions, however, many of which I read as a litigant and later as an interested observer, that cause me—not prone to idle compliments—to conclude that Barry is wise.

More non-idle observation-based praise: Barry is an excellent writer.

He and I collaborated on *Opinions—Essays on Lawyering, Litigation and Arbitration, the Placebo Effect,* Chutzpah, *and Related Matters* (2016). The 124 or so essays in our book, except for one, are individually written, roughly half by me, half by Barry. Our collaboration was in the selection and organization of the essays, and convincing Professor Ted St. Antoine to write a kind foreword.

One of my essays in *Opinions*—which originally appeared in *Labor and Employment Lawnotes*—is a review of Barry's 2008

book published by American Law Institute-American Bar Association. His book is called *The Science of Settlement: Ideas for Negotiators.*

My review was called "What Negotiators Ought to Know About Why People Do What They Do." I commended Barry's book as clear, succinct, simultaneously humorous and serious, exceedingly well-written, fun and funny, and wise. Let me add useful, insightful, science-based, and thought-provoking. You can look it up.

As the world's foremost scholar of the Goldman Canon, as an avid student of Barry's arbitration decisions, and as a consumer of Barry's periodic *Los Angeles Times* columns, I feel well-qualified to repeat my praise that Barry's work is clear, succinct, simultaneously humorous and serious, exceedingly well-written, fun and funny, and—again, wise—just what one would hope for in the work of a LELS Distinguished Service Award honoree.

Barry also has had a long career at the professorial podium—at Wayne State University and Wayne Law School. In addition, he is a well-regarded instructor at LELS and ICLE programs, and other forums where lawyers, judges, arbitrators and mediators, and regular people go to hone their understanding and skills.

Barry is, of course, a long-time LEL Section member. Barry served on the LELS council, doing the heroic work of keeping the Section productive, effective, within budget, and a light unto other State Bar sections.

To allude to the New Testament, Barry is a prophet *with* honor in his own country *and* beyond. Barry is a Fellow of the College of Labor and Employment Lawyers, a member of the National Academy of Arbitrators, and a mainstay on arbitrator panels around the country, serving employers and employees in university, public safety, and other public service settings, and in industries, trades, and other private sector employment areas.

In addition, in a bid for Renaissance personhood, Barry communicates with a variety of dogs, cats, chickens, and horses and other non-humans, and is an accomplished musician, known throughout Oakland County and as far south as Ecorse.

In sum, Barry fully satisfies the requisite award criteria. He has made major contributions to labor and employment law, reflects the highest ethical principles and civility and professionalism standards, is an excellent arbitrator, mediator, and teacher, is well-regarded by all LEL constituencies, and—last but certainly not least—is a premier *Lawnotes* columnist.

Again, I am happy and honored to introduce Barry and to congratulate Barry and his wife and scientific muse, clinical psychologist Susan Silk.

So, I give you Barry Goldman—accomplished lawyer, arbitrator, mediator, law professor, college teacher, writer, fun and funny observer of the human condition, and more—and now the well-deserving recipient of the State Bar of Michigan Labor and Employment Law Section Distinguished Service Award.

Barry Goldman… ■

REMARKS OF BARRY GOLDMAN

Many years ago I went to a Muddy Waters concert at a park near Waikiki. It was a perfect Hawaiian evening. 78 degrees. The sun was setting into the Pacific. The ocean was glistening. The palm trees were gently swaying in the breeze. And Muddy Waters said to Pinetop Perkins, "We're cookin' in a big pot now!"

That's how I feel standing in this room looking out over this audience knowing that my name is going on the list with the GIANTS who have received this award in the past. We're cookin' in a BIG pot now!

So I want to thank my wife Susan who reads everything I write and keeps me from embarrassing myself. There is no way I'd be here without her vigilance. I want to thank my great friend Stuart Israel for nominating me and the Committee and the Section and all my friends and colleagues in the labor bar. I am deeply honored and profoundly grateful. Thank you all very much.

But I'm not ready to sit down because this does raise a question. The question is: How did THIS happen?

Show of hands. How many people in this room are familiar with this dream? You have an important final exam. You never went to class. You didn't read the book. You don't know where the exam is being held. You're late. And you're not wearing any pants?

I have that dream a lot. My wife the shrink says it's an anxiety reaction secondary to my imposter syndrome. I have that dream because I'm afraid one of these days you are going to figure out I don't know what I'm doing. I don't know how to be a labor arbitrator, and I'm faking it.

Unlike Ted St. Antoine, Dick Mittenthal, Erwin Ellman, and George Roumell who received this award because they are masters of the field, I don't know much about labor law.

That's why I spend so much time trying to get the parties to settle. It's because I'm convinced they are going to do a better job of resolving their disputes than I am.

It's also why, when I am compelled to write decisions, that I write short ones. It's because I believe the less I say the better.

And it's why I adhere as closely as I can to the language of the CBA. It's because I know the more I rely on the parties themselves and stick to the language of the agreement they negotiated, the better it will be for everyone.

There is another reason too, also diagnosed by my wife. That is pathological laziness. An ideal case for me is when I listen to opening statements, I take the lawyers into the hall, roll my eyes and shake my head, and say, "You really ought to settle this one." And they do.

The Latin motto I have adopted for myself is: "Domum ad prandium." It means Home for Lunch.

So, here I need to quote the great American philosopher, Hunter Thompson, who said, "I hate to advocate drugs, alcohol, violence, or insanity to anyone, but they've always worked for me."

In the same way, I hesitate to recommend ignorance, self-doubt and laziness to anyone, but they seem to have worked for me.

I am profoundly grateful. Thank you. ■

MERC UPDATE

John A. Maise
White Schneider PC

A summary of a recent landmark decision issued by the Michigan Employment Relations Commission (the "Commission") follows. Decisions of the Commission may be reviewed on the Michigan Department of Licensing and Regulatory Affairs website (www.michigan.gov/LARA).

Technical Professional and Office Workers Association of Michigan (TPOAM) -and- Daniel Lee Renner

Case No. CU18 J-034

On December 10, 2019, the Commission released a landmark decision analyzing the recent US Supreme Court decision *Janus v. American Federation of State, County and Municipal Employees,* 138 S. Ct. 2448 (2018) assessing whether the United States Supreme Court created a right for unions to charge non-members for the cost of union representation, such as filing and processing a grievance.

Janus was a landmark Supreme Court case which determined that Unions were not able to charge non-members within the bargaining unit a base fee limited to the costs associated with representation- such as grievance procedures or bargaining a new contract. The Supreme Court essentially found that such fees violated individuals freedom of association as protected by the First Amendment. The Union was unable to force an individual to pay union dues if they did not want to associate with the union. This decision put unions in a difficult position overall, the costs associated with the responsibilities to its members are very real- bargaining, processing grievances, and arbitrations all cost significant time and money. In theory, a union could "choke out" if too much of its bargaining unit were non-member, this is typically referred to as a "free rider" problem. The Supreme Court appeared to address this concern in several places, notably:

> In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. Individual non-members could be required to pay for that service or could be denied union representation altogether.

Janus, at 2468-2469

> There is precedent for such arrangements. Some states have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure"... This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment Rights.

Id. at Footnote 6

Many have read this language included in the Supreme Court's decision as indicating that this was giving permission to Unions to charge non-members for the costs of representation.

In the facts of this case, Mr. Renner, a non-member of the Technical Professional and Office Workers Association of Michigan ("TPOAM") was sent a bill to prepay for a grievance he wished to be filed on his behalf. Mr. Renner refused to pay the bill sent to him and TPOAM as a result did not file his grievance. In response, Mr. Renner filed an unfair labor practice against TPOAM alleging a breach of the duty of fair representation. The matter came before the Commission who ultimately ruled that the *Janus* decision did not create a right for public sector labor unions to charge for services related to filing a grievance and sustained the unfair labor practice against TPOAM.

In reaching its determination, the Commission analyzed the duty of fair representation, which is focused around the concept that the union is the "exclusive bargaining representative" which carries with it an "obligation and duty to fairly represent *all* employees in the bargaining unit". It is important to emphasize that this duty is to all employees in the bargaining unit which must extend to both members and non-members. The Commission has consistently held the position that a union has a duty to properly represent non-members, see *Government Employees Labor Council,* 27 MPER 18 (2013). In addition to these responsibilities inherent to the position of exclusive representative, the Commission also looked to the amendments to PERA enacted in 2012 which forbid labor unions from requiring non-members to pay any "dues, fees assessment or other charges or expenses of any kind" and prohibits any person from compelling someone to "financially support a labor organization" 2012 PA 349.

The real issue before the Commission is whether the United States Supreme Court changed this standard in a meaningful way through the language quoted above in the *Janus* decision? The approach taken by the Commission was

that the *Janus* decision itself did not change a union's responsibilities, but rather left open the door to state legislatures to add statutes that would allow unions to recoup some of these fees. Moreover, in a footnote to its own decision, the Commission noted that Rhode Island has recently enacted such bills authorizing public sector unions to charge fees on nonmembers who request union representation in grievance or arbitration proceedings. Essentially, the Commission noted that until Michigan changes PERA to specifically allow for public sector unions to charge for representation service. The Commission notes that the Supreme Court emphasized that the default position must be that these types of fees cannot be "justified on the ground that it would be otherwise unfair to require a union to bear the duty of fair representation. That duty is a necessary concomitant of the authority that a union seeks when it chooses to serve as the exclusive representative of all employees in a unit." *Janus* at 2485.

The Commission also rejected arguments made by the Union that their own First Amendment rights to freedom of association were not violated by being forced to represent a non-member. In making this determination, the Commission looked to recent federal case law on these issues in the time following Janus, such as the Ninth Circuit. Essentially, the Commission found that representation was part of the responsibilities of being the *exclusive* bargaining representative and being an exclusive bargaining representative did not itself violate the First Amendment. The Commission also dismissed arguments that the decision to charge a non-member was internal union business outside the scope of the Commission. In rejecting this argument, the Commission emphasized that charging non-members for representation services would interfere with their section 9 right to refrain from union activities.

This decision by the Commission for the time being settles the question as to whether public sector unions have a right to charge non-members for representation services post-*Janus*. However, it should be emphasized that this matter is currently pending before the Michigan Court of Appeals (Case No. 351991). In the meantime however, it does not appear that unions will be permitted to charge non-members fees for services provided by the union unless an amendment to PERA is enacted. ■

President Trump and Governor Whitmer declare *Lawnotes* to be "essential" (or probably would have, if asked).

TRANSCRIPT ERRORS: "CONFIDENT" AND "FEROCIOUS" ATTORNEY

John G. Adam
Legghio & Israel, P.C.

I was a witness in an NLRB case more than 20 years ago. I was questioned by NLRB counsel Linda Rabin Hammell. When she finished, the late Karl Bennett, the company attorney, stepped to the podium to conduct my cross-examination. Bennett began by saying to "all present" that I was a competent labor practitioner with a reputation for truth and veracity.

I appreciated his kind words. The court reporter, however, heard different words (bold added):

Hammell: I have nothing further [of witness Adam].

Bennett: I have just a few questions for you, Mr. Adam.

Let me state to the court and all present that I have known Mr. Adam for many years. **He is a highly experienced and confident labor practitioner and I do not doubt for one second his truth and ferocity and his reputation to truth and ferocity precedes him and is larger than he is in some respects.**

Judge Amchan: Well, that makes life easy for me.

Hammell: I'll stipulate to that.

Oy. By a series of transcription errors I became large, overconfident, and ferocious! And the ALJ agreed!

Transcription, to quote *The Devil's Dictionary,* is the "act of repeating erroneously the words of another."

It reminds me of an early spell check when my *ex parte* motion to quash a subpoena came out as "sex party motion to squash some penis." ■

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.

SUDDEN HEART DEATH: EVERY LAWYER SHOULD "DEFEND" AGAINST THE "WIDOWMAKER"

Dr. Joel K. Kahn[1]

I start by paraphrasing the title of my first book, *Dead Lawyers Don't Win Lawsuits.* Ahead, I "appeal" to lawyers to be proactive. I offer you this short "brief" on how to avoid sudden heart death.[2]

The Widowmaker artery. The sound of this deadly cardiac blockage causes fear. And it should.

The Widowmaker artery is the first portion of the largest heart artery to the heart, called the left anterior descending or LAD. Unfortunately, the Widowmaker artery is the most frequent location of narrowing of all of the heart arteries. This lifeline blood vessel is prone to sudden closure, massive heart attacks, and sudden death. It poses a risk, like a cobra waiting to strike, until it may be too late.

Ask: was your physical examination at age 45, 50, or 60, designed to identify heart artery blockages *before* the Widowmaker strikes? For most, the exam is not adequate. Indeed, more than 2,000 people die every day in the United States from cardiovascular disease, many from the Widowmaker.

The idea that heart attacks are preventable is not new. More than 60 years ago, Harvard Medical School professor Paul Dudley White challenged the medical system, saying that "a heart attack after age 80 is an act of God, before age 80 a failure of medicine." Dr. White said this while caring for President Eisenhower after the President suffered a massive heart attack in 1955.

In reality, little has changed since White's words. The routine executive examination that you might have had does not afford the peace of mind that a Widowmaker blockage is not present and posing a mortal risk. After practicing cardiology for more than 30 years, and countless nights in the "cath" lab opening totally blocked Widowmaker arteries of patients in the middle of a massive heart attack, a better plan is proposed to keep you from joining the list of statistics.

> The tragedies of life are largely arterial.—
> Dr. William Osler, *Diseases of the Circulatory System*

1. Get a coronary artery calcium scan (CACS)

A CACS is a CT scan of the heart that takes under 1 minute, uses no dye or needles, has a very low radiation exposure equivalent to a mammogram, and costs between $75-125 at most hospitals. It is the only way to actually see heart arteries, including the Widowmaker, in a painless and simple manner. The ideal result identified in about 50% of those tested is a CACS score of zero. A zero indicates the absence of calcium in the Widowmaker area and is associated with a long-term freedom from worry about a future heart attack that can last for 5-10 years.

Even a slight elevation in the CACS beyond zero raises the risk for a future heart attack. Without question, scores of lawyers and judges who have suffered heart attacks of the Widowmaker, fatal or not, would have had ample time to be fully evaluated had they had a CACS within a few years of the tragic day. If you have a stent, heart bypass surgery, heart blockage, or heart attack, the CACS generally is not necessary as the details of your heart disease are known.

2. Arrange for advanced labs

In general, the same lab studies done during a physical exam in the 1980s are ordered today. There have been major advances in laboratory testing. Here are some labs I request and analyze for patients as a routine to gauge their risk of the Widowmaker.

Advanced cholesterol panel: Rather than the "calculated" LDL cholesterol level found in routine panels since the 1970s, an advanced cholesterol panel measures the LDL particle number and size. These numbers have been shown to be more accurate in predicting future heart and stroke events. These tests are widely available (known as a NMR lipoprofile) and quite inexpensive.

hs-CRP: The high sensitivity C-reactive protein is a blood test patented by Harvard Medical School to measure inflammation or the "fire" that results from an overactive immune system. The higher the hs-CRP, the greater the risk of the Widowmaker and a future heart attack, stroke and even other conditions like cancer and dementia.

Lipoprotein (a): This is a genetic form of cholesterol that's elevated in about 25% of the public. It's rarely drawn even though hundreds of research studies indicate that if it's high, the risk of heart attack and stroke skyrocket. It runs high in many families that have been decimated by heart disease of the arteries and the aortic valve.

Homocysteine: This amino acid is produced by a process called methylation. It can injure arteries when elevated. It may be due to a genetic defect in the MTHFR gene, which is easily measured. It can be treated with methylated B-complex vitamins. If elevated, it also responds to a diet absent of red meat.

3. Never leave an ER without a complete evaluation

If by some misfortune in you end up in an ER with chest discomfort from a stressful day of legal practice, a black out spell, shortness of breath, or racing heart beats, please take my advice: DO NOT GO HOME without a thorough evaluation for the Widowmaker.

Ask for "serial" cardiac enzymes that are repeated two or three times, every four to six hours, even if you might stay longer. Ask for repeat electrocardiograms (ECGs) to compare to the one that was done on within the first few minutes of arrival. Finally, ask for a definitive test before discharge.

Many ERs offer an even more advanced test than the CACS, called a coronary CT angiogram (CCTA). The CCTA is by far the most accurate way to be sure your arteries are clean and free of the risk of the Widowmaker before discharge.

Many decades have passed since Dr. White announced that heart attacks are a failure of the medical system. The emphasis on learning CPR or placing defibrillators in courthouses misses the main point for a successful and healthy career and life.

There is no reason not to be tested for the presence of a silent Widowmaker artery in your heart and the factors that might have caused it.

A responsible health plan for the high stress of a legal and judicial career is to include these state of the art tests.

Silence, when it comes to this artery, can be deadly.

—END NOTE—

[1]Joel Kahn, MD, FACC, is a practicing cardiologist and a Clinical Professor of Medicine at Wayne State University School of Medicine. He graduated Summa Cum Laude from the University of Michigan Medical School. Dr. Kahn is board certified in Internal Medicine, Cardiovascular Medicine, and Interventional Cardiology. He founded the Kahn Center for Cardiac Longevity in Bingham Farms. He has written six books, including *Your Whole Heart Solution*, *Dead Execs Don't Get Bonuses*, and *The Plant Based Solution.* His sixth book, *Lipoprotein(a): The Heart's Silent Killer,* was published in 2020. See www.drjoelkahn.com.

[2]Disclaimer: The information in this article should not be substituted for, or used to alter, medical therapy without your doctor's advice. For a specific health condition, see your physician for a consultation. ■

SIXTH CIRCUIT UPDATE

Kamil Robakiewicz
Ashley Higginson
Miller, Canfield, Paddock and Stone, P.L.C.

EVIDENCE OF A BLANKET POLICY TO DENY ACCOMMODATIONS FOR ANY NON-WORK-RELATED INJURY REVIVES ADA CASE

In *Morrissey v. Laurel Health Care Co.*, 946 F.3d 292 (6th Cir. December 23, 2019), a licensed practical nurse convinced the Sixth Circuit to reverse a district court's summary judgment of her Americans with Disabilities Act claims. A disabling condition involving Plaintiff's back prevented her from working more than twelve hours per shift. Yet, the employer repeatedly scheduled Plaintiff to work shifts in excess of twelve hours. Plaintiff submitted evidence that the employer had a policy of honoring only those work restrictions that were based on work-related injuries.

The Sixth Circuit reversed the district court's decisions that Plaintiff had not established that she was disabled, that she had not suffered an adverse employment action, that her employer had not failed to accommodate her, and that she had not experienced retaliation. The appellate court stressed evidence that the employer had failed to accommodate Plaintiff, which is *itself* an adverse employment action under the direct evidence of discrimination test. See *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868-69 (6th Cir. 2007). The court also relied heavily on evidence of the employer's blanket policy against honoring work restrictions for non-work-related injuries to reverse summary judgment on the failure-to-accommodate claim. The case was remanded for trial.

EMPLOYER NEED ONLY PROVIDE A LEGITIMATE NON-DISCRIMINATORY REASON FOR TERMINATION TO SHIFT BURDEN TO EMPLOYEE, EVEN IF THE EMPLOYER HAS NO EVIDENCE OF THE PROFFERED REASON

In *Miles v. South Central Human Resource Agency, Inc.*, 946 F.3d 883 (6th Cir. January 7, 2020), Plaintiff alleged that her employer discharged her in violation of the Age Discrimination in Employment Act ("ADEA"). Investigations of Defendant by the Tennessee Bureau of Investigation and the U.S. Department of Energy revealed various deficiencies, including in programs directly supervised by Plaintiff. Defendant further found that Plaintiff's behavior was toxic to subordinates. Therefore, Defendant terminated Plaintiff.

The only issue before the Sixth Circuit was whether Plaintiff could demonstrate that Defendant's legitimate reasons for termination were pretextual. The Court found that while Plaintiff's name was not in the government's investigation report, "this hardly means that the report did not implicate her." *Id.* at 889. Further, while Defendant could not provide any actual evidence that subordinates had complained to management about Plaintiff's toxicity, Plaintiff similarly could not provide any evidence that her subordinates never complained. The Sixth Circuit acknowledged that Plaintiff did not have any written complaints against her or discipline in her file, but found "[t]erminating an employee only because of complaints from her subordinates – without investigating the merits of those complaints – may be unwise, but that's not the question here." *Id.* at 890. Finally, the Defendant's failure to provide Plaintiff with a reason for her termination was not evidence of pretext, because "nothing in the ADEA requires an employer to justify a termination to the fired employee, even if she is among the protected class." *Id.* at 891. Accordingly, the Sixth Circuit affirmed the trial court's grant of summary judgment for Defendant. ■

Write Now!

You are staying home. You are administering alcohol externally and internally, keeping social distance, and wondering what to do with those extra hours you are saving by not commuting, avoiding interminable meetings, and postponing court appearances.

Write for *Lawnotes!* Share your knowledge, insights, and opinions! See your name in print! The contact info is in the boxes on pages 3 and 15. *Carpe diem!*

MERC SPECIAL RETIREMENT NEWS

Sidney McBride,
Interim Bureau Director
Bureau of Employment Relations

Ruthanne Okun Retires

Under the MERC NEWS section of this edition of *Lawnotes*, we note the recent retirement of long-term Bureau Director, Ruthanne Okun whose last workday was on February 7, 2020. In recognition of Ruth's outstanding service to the Bureau since 1998, we continue to hallmark her legendary career at MERC by reflecting on two receptions held in her honor. The Lansing event occurred on January 21, 2020 at the Stephens T. Mason Building, while the Detroit event was held on January 31, 2020 at Cadillac Place (former GM Headquarters Building in the New Center Area). Nearly 200 well-wishers, collectively, attended the events to wish Ruth a grand "bon voyage" and to help jumpstart her 'post' MERC life.

Special greetings and resolutions on behalf of Governor Whitmer and the Department of Labor & Economic Opportunity (LEO) were presented by LEO Director Jeff Donofrio along with Susan Corbin (LEO Chief Deputy Director) and Sean Egan (LEO Deputy Director of Labor). Ruth also received special acknowledgments from several others including the Michigan Public Employer Relations Association (MPELRA); longtime MERC Panel member/ Arbitrator, Attorney George T. Roumell, Jr; as well as MERC Commissioners Samuel R. Bagenstos (chair), Edward D. Callaghan and Robert S. LaBrant.

Ruth's daily presence at the Bureau is missed; however, the impact of her steadfast commitment and the successes during her tenure remains. The Bureau staff (MERC & WHD), Commissioners and LEO officials continue to wish her the best. ■

Detroit Event: LEO Executive Staff—
J. Donofrio, R. Okun, S. Corbin & S. Egan

Detroit Event: Ruth's Family & Friends

Lansing Event: J. Spalding, Ruth & M. Cameron

Detroit Event

Detroit Event: G. Roumell and Ruth

Lansing Event: Friends & Well-Wishers

Lansing Event: Friends & Well-Wishers

Lansing Event: Friends & Well-Wishers

Lansing Event: Friends & Well-Wishers

Detroit Event: S. McBride (MERC) & J. Fields (WHD)

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

"Everything is the way it is because it got that way."
- D'Arcy Wentworth Thompson

I am writing this column from the road. I blocked off three weeks of Michigan winter and drove down south to visit friends in warm places. After 3,000-odd miles, I have some observations.

The first is that small towns have been decimated. The one-two punch of Walmart and Amazon murdered Main Street. There is still a Walmart, and there is a Dollar General every few miles, but there is no independent anything. All food is fast food. All hotels are franchise hotels. All stores are chain stores.

This means everybody who has a job is working for $10 an hour.

Try to imagine what that must be like. You used to have a drugstore or a hardware store or a shoe store or you used to work at a plant or a mine and belong to a union. Now you work for a franchise. Or, more likely, you work for a staffing agency with a contract to provide workers to a franchise.

What does that do to your world view? What does it do to your politics?

The stock market is doing fine [this was written before the coronavirus pandemic.] People with 401Ks are happy. And this is a big country; there are lots of such people. The readers of this publication are likely to be among them. But the people who work at Wendy's or La Quinta don't have brokerage accounts. They work long hours at boring jobs with no benefits, and they don't make a living wage. They are among the 40% of American adults who say they couldn't come up with $400 for an emergency expense.

I'm not saying anything here I didn't know before I took this trip. I've seen the graphs of the income distribution. What I'm saying is there is a difference between seeing a graph of the income distribution or reading an article about wealth inequality and seeing the kids in the parking lot so stoned they can't remember how to smoke a cigarette.

There is a difference between reading about "deaths of despair" in the New York Times and seeing one about to transpire in front of you. I walked past those kids on the way from my crummy franchise restaurant dinner to my crummy franchise hotel. They were committing suicide as sure as if they had shotguns in their mouths.

This didn't happen by itself. There is no law of nature, or law of economics, that says employment must evolve into independent contracting, and jobs that once came with pensions and benefits must evolve into on-call gig work with neither. It is this way because it got this way. And it got this way because somebody wanted it to.

The shareholders of the hotel chain or burger chain want to see the stock price go up. They can get it to go up if they cut labor costs. They can cut labor costs if they can pretend their employees are independent contractors. And they can do that if they contract hiring out to staffing agencies. Then they can avoid worker protection laws and make it more difficult for workers to organize and bargain collectively. And with the money they save they can donate to politicians who will perpetuate the process.

Case in point: the NLRB just published its new final rule on joint employers. Quoting from the Clark Hill Labor and Employment Update that just arrived in my mailbox:

In its new Final Joint Employer Rule, the National Labor Relations Board ("NLRB") states that one entity will be considered the joint employer of another company's employees only if the alleged joint employer possesses and exercises substantial direct and immediate control over the "essential terms" of employment of the other company's employees.

The NLRB's new Final Rule defines "essential terms" of employment as only wages, benefits, hours of work, hiring, discipline, supervision, and direction.

As a result of the new Final Rule, franchisors (for example) are now less likely to be deemed joint-employers with franchisees in federal labor law disputes involving the franchisees' employees. The impact of the Final Rule is significant because joint employers:

- must collectively bargain about the terms and conditions of employment;
- may be picketed during labor disputes; and
- may be jointly and severally liable for an employer's unfair labor practices.

The law says all those people working at all those franchises are not legally the employees of the franchisor. It's an astonishing feat of legal legerdemain.

It's true we get cheap hamburgers out of this arrangement. But the social costs, the human costs, are incalculable. ■

MICHIGAN ARBITRATION CASE LAW UPDATE

Lee Hornberger
Arbitrator and Mediator

This update reviews significant Michigan cases issued since 2018 concerning arbitration. For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions.

MICHIGAN SUPREME COURT DECISIONS

Supreme Court grants leave to appeal of COA reversal of Circuit Court order granting arbitration

Lichon v Morse, 327 Mich App 375, 339972 (March 14, 2019), lv gtd, ___ Mich ___) (September 18, 2019). In split decision, the COA held that sexual harassment claim was not covered by an arbitration provision in employee handbook. Because arbitration provision limits scope of arbitration to only claims that are "related to" plaintiffs' employment, and because sexual assault by an employer or supervisor cannot be related to their employment, the arbitration provision is inapplicable to their claims against Morse and Morse firm. The COA majority decision said "[C]entral to our conclusion in this matter is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault."

Judge O'Brien's dissent said parties agreed to arbitrate "any claim against another employee" for "discriminatory conduct" and plaintiffs' claims arguably fall within scope of arbitration agreement.

The Supreme Court granted leave to appeal, stating, "The parties shall include among the issues to be briefed whether the claims set forth in the plaintiffs' complaints are subject to arbitration."

MICHIGAN COURT OF APPEALS PUBLISHED DECISIONS

Confirmation of award partially reversed in construction lien case.

TSP Services, Inc v National-Standard, LLC, ___ Mich App ___, 342530 (2019). Michigan law limits a construction lien to the amount of the contract less any payment already made. Although a party suing for breach of contract might recover consequential damages beyond the monetary value of the contract, those consequential damages cannot be subject to a construction lien. The arbitrator concluded otherwise. This clear legal error had substantial impact on the award. The COA reversed with respect to confirmation of that portion of the award.

COA affirms order to arbitrate labor case.

Registered Nurses Union v Hurley Medical Center, 328 Mich App 528, 343473 (2019). Grievants terminated for allegedly striking in violation of the CBA. Although the defendant may present to the arbitrator undisputed evidence that plaintiffs were engaged in a strike, question of fact is for the arbitrator to decide. Any doubt regarding whether question is arbitrable must be resolved in favor of arbitration. The Circuit Court did not err in ruling that that CBA required arbitration.

Denial of motion to vacate affirmed.

Radwan v Ameriprise Ins Co, 327 Mich App 159, 341500 (2018), lv den ___ Mich ___ (2019), was a first-party no-fault case. The COA held the Uniform Arbitration Act, MCL 691.1681 *et seq.*, not MCR, applied; and the Circuit Court did not err when it denied motion to vacate the arbitration award on the basis of collateral estoppel.

COA reverses Circuit Court order that denied motion to require arbitration.

Lebenbom v UBS, 326 Mich App 200, 340973 (2018). The COA held that the parties' arbitration clause providing for FINRA arbitration encompassed plaintiff's claims alleging conversion against the defendant.

Arbitration agreement does not have to be in warranty document.

Galea v FCA US LLC, 323 Mich App 360, 334576 (2018). Plaintiff alleged a new vehicle was a lemon. She sued the seller and the bank, asserting warranty claims. Defendants countered with a signed arbitration agreement. Plaintiff argued that the Magnuson-Moss Warranty Act (MMWA), 15 USC 2301 *et seq.*, prohibits binding arbitration of warranty disputes. This argument collided with *Abela v Gen Motors Corp*, 469 Mich 603; 677 NW2d 325 (2004), which held to the contrary. Plaintiff also argued by failing to mention arbitration, the warranty violated the single document rule in 16 CFR 701.3, a Federal Trade Commission (FTC) regulation implementing the MMWA. According to Plaintiff, this omission foreclosed arbitration. Majority (Gadola and O'Brien) interpreted *Abela* to mean the binding arbitration provision need not be included in the warranty. Gleicher's dissent stated arbitration agreements outside the warranty are not enforceable.

DRAA award partially vacated.

Eppel v Eppel, 322 Mich App 562, 335653, 335775 (2018). The COA held the arbitrator deviated from the plain language of the Uniform Spousal Support Attachment by including profit from ASV shares. This deviation was substantial error that resulted in substantially different outcome. *Cipriano v Cipriano*, 289 Mich App 361; 808 NW2d 230 (2010), lv den ___ Mich ___ (2012). The deviation was readily apparent on the face of the award.

Offer of judgment and subsequent award confirmation.

Simcor Constr, Inc v Trupp, 322 Mich App 508, 333383 (2018). MCR 2.405, offer of entry of judgment, applied to the District Court's confirmation of an arbitration award, and offer of judgment costs were merited. *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338; 852 NW2d 22 (2014) (case evaluation sanctions).

MICHIGAN COURT OF APPEALS UNPUBLISHED DECISIONS

COA affirms granting of motion to compel arbitration.

Century Plastics, LLC v Frimo, Inc, 347535 (January 30, 2020). The COA affirmed Circuit Court holding that the parties validly incorporated General Terms and its arbitration agreement by reference. General Terms applied to parties' agreement even though defendant was not specifically listed entity.

COA affirms confirmation of DRAA award.

Daoud v Daoud, 347176 (December 19, 2019). The COA affirmed Circuit Court confirmation of DRAA award. **Past domestic violence and PPO.** Where arbitrator provided parties equal opportunity to present evidence and testimony on all marital issues, recognized and applied current and controlling Michigan law, and explained his uneven distribution of property, there was no basis for concluding that arbitrator exceeded authority in issuing award.

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MICHIGAN ARBITRATION CASE LAW UPDATE

(Continued from page 21)

COA reverses Circuit Court's denial of motion to compel arbitration.

Lesniak v Archon Builders, Inc, 345228 (December 19, 2019). The COA reversed Circuit Court's order denying defendants' motion for arbitration because arbitration terms of construction agreements sufficiently related to plaintiffs' claims to require arbitration, and defendants had not waived their right to arbitration. Any doubts about arbitrability should be resolved in favor of arbitration. Purpose of arbitration is to preserve time and resources of courts in interests of judicial economy.

Refusal to adjourn arbitration hearing approved.

Domestic Uniform Rental v Riversbend Rehabilitation, 344669 (November 19, 2019). After overruling R's motion to adjourn arbitration hearing, arbitrator entered award against R. The COA affirmed CC's confirmation of award. MCL 691.1703(1)(c).

Incorporation of AAA rules.

MBK Constructors, Inc v Lipcaman, 344079 (October 29, 2019). The incorporation of AAA's rules in arbitration agreement was clear and unmistakable evidence of the parties' intent to have the arbitrator decide arbitrability.

COA affirms Circuit court confirmation of award.

2727 Russell Street, LLC v Dearing, 344175 (September 26, 2019). The COA affirmed confirmation of award. The arbitrator's factual findings are not reviewable. The COA referenced "facilitation" and "statutory arbitration." Med-arb.

COA affirms Circuit Court denial of sanctions.

Clark v Garratt & Bachand, PC, 344676 (August 20, 2019). The COA affirmed Circuit Court order denying G's motion for sanctions. The language of the arbitration award foreclosed G's ability to request sanctions because the issue of sanctions was either not raised during the arbitration or, having been raised, resulted in the arbitrator declining to award sanctions. The language of the judgment confirming the award also foreclosed G's ability to subsequently request sanctions. G had failed to prove that the plaintiff's complaint was frivolous.

Circuit Court order to arbitrate confirmed.

Roseman v Weiger, 344677 (June 27, 2019), lv den ___ Mich ___ (2019). To the extent the plaintiff argues the arbitration agreement is unenforceable on the ground that the purchase agreement was invalid, these are matters for the arbitrator. MCL 691.1686(3). The Circuit Court did not err by concluding the plaintiff's claims against the sellers were required to be resolved in arbitration.

DRAA award confirmation confirmed.

Zelasko v Zelasko, 342854 (June 13, 2019), app lv pdg, concerned whether husband's winning of $80 million Mega Millions jackpot was part of marital estate. The arbitrator ruled the jackpot was marital property. The Circuit Court confirmed the award. The COA affirmed the confirmation. The COA stated "we may not review the arbitrator's findings of fact and are extremely limited in reviewing alleged errors of law." Delay, death, and alleged bias of arbitrator issues. See generally *Zelasko v Zelasko*, 324514 (2015), lv den ___ Mich ___ (2016).

DRAA custody dispute award confirmed.

Shannon v Ralston, 339944 (May 23, 2019), lv den ___ Mich 2019). Agreement to arbitrate "all issues in the pending matter." The COA affirmed confirmation of DRAA award that decided change in domicile issue. The arbitrator acted as both mediator and arbitrator. Ex parte contact occurred while the parties were still mediating. At time of ex parte communication, the arbitrator was acting as a mediator, not as an arbitrator and prohibition against ex parte communications did not apply. Belated raising of alleged disparaging remarks by neutral. Arbitrator's alleged financial interest in arbitration process. Plaintiff ordered to pay fees associated with investigative guardian ad litem. Issue of the arbitrator's alleged financial bias was one of the plaintiff's own making by stopping payment in violation of the parties' agreement to split cost of the arbitration and in violation of the arbitrator's instructions.

DRAA award confirmed.

Hyman v Hyman, 346222 (April 18, 2019). The COA held that the Circuit Court's modification of DRAA award to include Monday overnights constituted error because the Circuit Court lacked authority to review the arbitrator's factual findings and alter parenting-time schedule without finding that the award adverse to children's best interests.

COA affirms order to arbitrate labor case.

Senior Accountants, Analysts and Appraisers Association v City of Detroit Water and Sewerage Department, 343498 (April 18, 2019). Issue of whether union complied with procedural requirements to arbitration in CBA arbitration clause is procedural question for arbitrator.

Selection of replacement arbitrator foreclosed in DRAA case.

Sicher v Sicher, 341411 (March 21, 2019). Arbitration clause in JOD named only A as arbitrator and did not provide for alternate, substitute, or successor arbitrators. A became disqualified due to conflict of interest. MCL 600.5075(1). Because Circuit Court was presented with no evidence that parties had agreed upon new arbitrator to be appointed, Circuit Court was permitted to "void the arbitration agreement and proceed as if arbitration had not been ordered." MCL 600.5075(2). Because parties had agreed only for A to arbitrate property division disputes, Circuit Court's refusal to appoint different arbitrator was permitted by DRAA.

COA reverses confirmation of employment arbitration award.

Checkpoint Consulting, LLC v Hamm, 342441 (February 26, 2019). The COA held there was no valid arbitration agreement between the parties because the independent contractor agreement voided all prior agreements, including the arbitration clause within the employment agreement.

COA affirms confirmation of employment arbitration award.

Wolf Creek Productions, Inc v Gruber, 342146 (January 24, 2019). The COA affirmed confirmation of employment arbitration award. The COA stated nothing on face of the award demonstrated that the arbitrators were precluded from deciding on issue of whether just cause existed to terminate the defendant's employment. Courts are precluded from engaging in contract interpretation, which is a question for the arbitrator.

COA affirms confirmation of exemplary damages award.

Grewal v Grewal, 341079 (January 22, 2019). The COA affirmed judgment confirming the arbitrator's award of exemplary damages in favor of the plaintiffs in amount of $4,969,463.94 and correcting the arbitrator's award by striking portion that ordered the plaintiffs to provide accounting of assets in India.

COA affirms confirmation of award.

Hunter v DTE Services, LLC, 339138 (January 3, 2019). In employment discrimination case, the COA affirmed confirmation of award. The arbitrator did not exceed authority by failing to provide citations to case law.

COA affirms confirmation of award.

Walton & Adams, LLC v Service Station Installation Bldg & Car Wash Equip, Inc, 340758 (December 18, 2018), lv den ___ Mich ___ (2019). The COA affirmed confirmation of award. The arbitrator not required to make findings of fact or conclusions of law. Once the court recognizes that the arbitrator utilized controlling law, it cannot review legal soundness of arbitrator's application of law. Courts may not engage in fact-intensive review of how the arbitrator calculated values, and whether evidence relied on was most reliable or credible evidence presented. Even if the award is against the great weight of evidence or not supported by substantial evidence, court precluded from vacating award.

Case evaluation sanctions after arbitration.

Len & Jerry's Modular Components 1, LLC v Scott, 341037 (December 13, 2018). In light of referral to arbitration order, the Circuit Court was empowered to award case evaluation sanctions.

Scope of submission to the arbitrator.

Pietila v Pietila, 339939 (December 13, 2018). The COA affirmed the Circuit Court confirmation of an award concerning insurance agency. Circuit Court may not disturb an arbitrator's discretionary finding of fact that neither party prevailed in full and his decision not to award attorney fees. The issue of commissions was submitted as claim under grant of power to the arbitrator to determine legal enforceability of the Agreement.

COA affirms Probate Court confirmation of award.

Gordon v Gordon-Beatty, 339296 (November 8, 2018), lv den ___ Mich ___ (2019). The COA affirmed the Probate Court's confirmation of an award. Because the parties agreed to arbitrate their disputes and because the arbitrator acted within the scope of his authority the challenges to administration of the trusts lacked merit.

DRAA award confirmed.

Thomas-Perry v Perry, 340662 (October 16, 2018). The parties were given opportunity to present evidence and testimony on all issues during arbitration. Because the reviewing court is limited to examining face of the arbitration ruling, there is no basis for concluding that the arbitrator exceeded his authority in issuing award.

Length of FOF in award.

Schultz v DTE, 337964 (September 30, 2018). The COA affirmed confirmation of nine page employment arbitration award. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118 (1999). FOF and COL.

COA affirms Circuit Court confirmation of award.

Oliver v Kresch, 338296 (July 19, 2018). The COA confirmed Circuit Court's confirmation of award. Attorney referral fee case. The COA stated:

> Judicial review of arbitration awards is limited." *Konal v Forlini*, 235 Mich App 69, 74; 596 NW2d 630 (1999). "A court may not review an arbitrator's factual findings or decision on the merits[,]" may not second guess the arbitrator's interpretation of the parties' contract, and may not "substitute its judgment for that of the arbitrator." *City of Ann Arbor v [AFSCME]*, 284 Mich App 126, 144; 771 NW2d 843 (2009). Instead, "[t]he inquiry for the reviewing court is merely whether the award was beyond the contractual authority of the arbitrator." *Id.* "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court may not overturn the decision even if convinced that the arbitrator committed serious error." *Id.*

COA affirms Circuit Court confirmation of award.

Mumith v Mumith, 337845 (June 14, 2018). The COA affirmed the Circuit Court's confirmation of award. Two to one arbitration panel award. Ownership of car wash and burden of proof issues. The COA stated:

> … judicial review of an arbitration award … is extremely limited." *Fette v Peters Const Co*, 310 Mich App 535, 541; 871 NW2d 877 (2015). "… '[a] court's review of an arbitration award "is one of the narrowest standards of judicial review in all of American jurisprudence." ' " *Washington*, 283 Mich App at 671 n 4, quoting Way *Bakery v Truck Drivers Local No 164*, 363 F3d 590, 593 (CA 6, 2004), quoting *Tennessee Valley Auth v Tennessee Valley Trades & Labor Council*, 184 F3d 510, 514 (CA 6, 1999). … An arbitrator may exceed his or her powers by making a material error of law that substantially affects the outcome of the arbitration. In order for a court to vacate an arbitration award.

Demand for labor arbitration concerning prohibited subject of bargaining.

Ionia Co Intermediate Ed Assn v Ionia Co Intermediate Sch Dist, 334573 (February 22, 2018), lv den ___ Mich ___ (2018). The COA affirmed Michigan Employment Relations Commission (MERC) order granting summary disposition, where Association engaged in ULP by demanding to arbitrate grievance concerning prohibited subject of bargaining under the Public Employment Relations Act, MCL 423.201 *et seq.* MERC ordered the Association to withdraw its demand for arbitration and to cease and desist from demanding to arbitrate grievances concerning prohibited subjects of bargaining. See ***Mich Ed Ass'n v Vassar Public Schs,*** 337899 (May 22, 2018).

COA affirms Circuit Court confirmation of award.

Galasso, PC v. Gruda, 335659 (February 8, 2018). The COA affirmed the confirmation of an award because there was no clear error of law on the face of the award. Uniform Arbitration Act, MCL 691.1681 et seq. MCL 691.1703(1)(d). **Arbitrator's reasons for declaring promissory note, mortgage, and service agreement void and unenforceable were not apparent on face of award.**

If parties agree, arbitrator can decide arbitrability.

Elluru v. Great Lakes Plastic, Reconstructive & Hand Surgery, PC, 333661 and 334050 (February 6, 2018). Parties may agree to delegate to the arbitrator the question of arbitrability, provided the arbitration agreement clearly so provides. Uniform Arbitration Act, MCL 691.1681 *et seq.* MCL 691.1684(1) provides "parties may vary the effect of the requirements of this act to the extent permitted by law." ■

From the Editors

The content of this issue of *Lawnotes* was mostly completed before coronavirus events put pretty much everything into new perspective. As the inscription on King Solomon's ring observes: "This too shall pass." In the meantime, stay safe and wash your hands.

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- Advice for lawyers from teacher Kristin Wittenbach, and doctor Joel Kahn and Otto Stockmeyer presents post-professorial "free-lunch" perspectives.
- Barry Goldman is presented the LELS 2020 Distinguished Service Award and Ruthanne Okun retires from MERC.
- Labor and employment decisions and developments from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, MDCR and EEOC news, websites to visit, and more.

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