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LABOR AND EMPLOYMENT LAWNOTES

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The Civil Rights Act of 1991

by Kurt N. Sherwood
Miller, Canfield, Paddock and Stone

The Civil Rights Act of 1991 (hereafter the "Act"), was signed into law by President Bush on November 21, 1991. The Act, which is arguably one of the most significant pieces of legislation affecting employer-employee relations enacted in the last ten years, was accepted by President Bush only after a bitter two-year struggle which pitted the White House against the Democratically controlled Congress. During that two-year period the White House had consistently opposed civil rights reform claiming that the Congressional proposals would force employers to resort to quotas. Critics contend that the version ultimately accepted by the White House is only marginally different than earlier versions, and that President Bush's concession was politically motivated.

The Act dramatically changes federal civil rights law. Specifically, the Act fundamentally changes Title VII of the 1964 Civil Rights Act by providing for expanded remedies to plaintiffs, including limited recovery of compensatory and punitive damages in cases of intentional discrimination, and the right to jury trial when such damages are requested. The Act also overturns seven United States Supreme Court decisions which were unfavorable to plaintiffs claiming employment discrimination. Thus, although originally proposed as a means of restoring Title VII, and traditional interpretations of Title VII, to Title VII's pre-1989 status, the Act in reality has progressed far beyond this objective.

Compensatory Damages

A plaintiff who alleges intentional discrimination may recover compensatory damages (not available in "disparate impact" cases), provided the plaintiff cannot recover under 42 U.S.C. §1981. Thus, for the first time, the Act makes compensatory damages available to plaintiffs alleging sex discrimination, religious discrimination and discrimination under the Americans with Disabilities Act ("ADA"). Examples of the types of compensatory damages expressed in the Act include "damages . . . for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses . . ." As defined in the Act, compensatory damages do not, however, include "backpay, interest on backpay, or any other type of relief authorized under § 706(g)" of Title VII. Consequently, the Act does not disturb or limit pre-existing Title VII damages remedies.

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Public Policy Exception to the Enforcement of Labor Arbitration Awards — An Update

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In 1987 the United State Supreme Court issued an unanimous decision in **United Paperworkers v Misco**, 484 US 29 (1987), resoundingly affirming the Steelworker Trilogy cases'[1] extremely narrow standards for judicial review of labor arbitration awards. Certiorari was granted in **Misco** to consider the application of public policy exception to the enforcement of labor arbitration awards, an issue on which the federal Courts of Appeal had split.

This article updates an earlier analysis of **Misco** and the federal cases which follow it[2] to see whether **Misco** resolved the split among the Circuits and to analyze the treatment of the public policy exception in the more recent cases.[3]

Overview

Before **Misco**, the federal Courts of Appeal split essentially along two lines on the application of a public policy exception to the enforcement of labor arbitration awards. The First, Seventh and Fifth Circuits espoused the view that arbitration awards could be overturned where necessary to safeguard societal mores, values, or safety. The Ninth Circuit and the Circuit Court of the District of Columbia construed the exception narrowly to permit an arbitration award to be overturned only if the remedy or relief granted by the arbitrator violated some express mandate of law. Although the Supreme Court granted certiorari in **Misco** expressly to address the "narrow" approach, the Court ultimately declined to reach that question. **Misco,** *supra* at 45, n 12. Instead, the unanimous Court overturned a Fifth Circuit decision vacating an arbitration award reinstating an employee for alleged drug possession on company property, because the lower courts impermissibly substituted their judgment for that of the arbitrator, made findings of fact, drew improper inferences and failed to identify any well defined and dominant law violated by the arbitrator's award of reinstatement.

Post-Misco split of authority

What happened since **Misco** was decided? The Circuits are still split, but along different lines. In a majority of the

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STATEMENT OF EDITORIAL POLICY

Labor and Employment Lawnotes is a quarterly newsletter published under the auspices of the Council of the Labor Relations Law Section of the State Bar of Michigan as a service to section members. Views expressed in the articles and case commentaries appearing herein are those of the authors, not the Council, the Section or the State Bar at large. We encourage Section members and others interested in labor and employment law to submit articles and letters to the editor for possible publication. Please send them to the editor at 320 N. Main St., Suite 400, Ann Arbor 48104.

Paul E. Glendon, Editor

COUNCIL DIRECTORY

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Of profound significance to the Act, as well as possibly to future tort reform, are caps on compensatory damages. The amount of compensatory damages, including punitive damages, which may be awarded to each complaining party against an employer with 15-100 employees in each of 20 or more calendar weeks in the current or preceding calendar year is capped at $50,000. The cap is set at $100,000 for an employer with 101-200 employees, $200,000 for an employer with 201-500 employees, and $300,000 for an employer with more than 500 employees. It has, however, been noted that despite the caps "nothing in this section shall be construed to limit the scope of, or the relief available under" § 1981, nor does that Act appear to cap damages which may be sought under pendent state law claims.

Although the Act is perceived as unfavorable to employer interests in most respects, it clearly provides some protection to employers confronted with suits under the ADA. Specifically, damages may not be awarded under the Act "where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business."

Punitive Damages

The Act provides that "[a] complaining party may recover punitive damages . . . against a respondent (other than a government, governmental agency or political subdivision) if the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Nevertheless, although punitive damages may be recovered under the Act, they cannot, in conjunction with compensatory damages, exceed the caps on damages noted above.

Jury Trials

Dramatically departing from Title VII, the Act provides for jury trials in certain types of actions. If a plaintiff seeks either compensatory or punitive damages in an intentional discrimination suit, either party to the suit may demand a trial by jury. The court is also prohibited from informing the jury about the caps set on compensatory and punitive damges.

There has been substantial speculation and apprehension, primarily among employers, about the impact of the Act's jury trial provision. Many employer advocates contend that the jury trial provision will cause judges to defer decisions to juries, thereby making it more difficult for defendants to obtain summary judgment. It is also generally believed that plaintiffs reaching a jury will be successful in greater proportions than under the traditional bench trial system. Both of these factors have lead to speculation that employer fears

of juries, and jury awards, will result in more efforts by defendants to utilize alternative dispute resolution mechanisms and to more vigorously pursue settlement.

The Act Reverses or Impacts Upon Seven Supreme Court Holdings Decided Betwen 1989 and 1991

The Act reverses **Wards Cove Packing Co. v Atonio**, and eases the plaintiff's burden of proof in disparate impact cases. In **Wards Cove**, the Court had held that after a plaintiff identifies a specific employment practice as causing a disparate impact, the burden of production shifts to the employer to produce evidence showing the practice has a legitimate business justification. The ultimate burden of proof and persuasion, however, remained with the plaintiff.

In reversing **Wards Cover**, the Act restores the understanding of disparate impact enunciated by the Court in both **Griggs v Duke Power Co.**, and in its other pre-**Wards Cove** decisions. In doing so, the Act shifts the burden of persuasion back to employers as had been the case prior to **Wards Cove**. Consequently, a claim may now be established when the plaintiff demonstrates that a particular employment practice causes a disparate impact on the basis of race, color, religion, sex, or national origin, and the defendant thereafter fails to demonstrate that the challenged practice is "job related for the position in question and consistent with business necessity," or, when the plaintiff, after demonstrating disparate impact, proves that there is an alternative employment practice which the employer refuses to adopt.

Recognizing that it may often be difficult for complaining parties to specifically identify each alleged unlawful employment practice, the Act provides that the "decision-making process may be analyzed as one employment practice" provided the plaintiff can prove that" the elements of a respondent's decision-making process are not capable of separation for analysis."

A few observations regarding the Act's treatment of disparate impact seem appropriate. First, substantial litigation is expected to result from the Act's failure to define "business necessity." It is generally agreed, however, that by shifting the burden of persuasion back to employers and by strongly implying that the burden on employers will be heavy, the Act may make disparate impact claims increasingly difficult to defend. There is also lingering interest regarding the quota issue. President Bush's initial opposition to civil rights reform was allegedly based on the belief that imposing a heavy burden on employers to justify employment practices having a disproportionate adverse impact on members of a protected group would result in quotas by forcing employers to hire and promote on racial and sexual numerical bases in order to avoid statistical deficiencies. Because replacement of the business justification standard with the business necessity standard would not appear to address the Administration's professed concern, it will be interesting to see whether the Administration's concerns will be realized, or whether time instead will vindicate the President's critics who argued that his concern with quotas was entirely politically motivated.

As a miscellaneous observation, the Act also makes clear in this section that a rule barring employment of an individual who currently and knowingly uses or possesses a controlled substance can be an unlawful practice "only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin."

Reversing the Court's ruling in **Patterson v McLean Credit Union**, the Act expands 42 U.S.C. § 1981 to include all forms of race discrimination, including racial harrassment, as well as post-contract formation conduct. In **Patterson**, the Court limited § 1981's application to the initial formation of contracts and conduct which impairs the right to enforce contract obligations. The Court ruled that § 1981 did not apply to post-contract formation conduct, namely racial harassment, etc.

In reversing **Patterson**, the Act extends § 1981 to post-contract formation conduct by adding this sentence: "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." The Act also makes clear that § 1981 rights "are protected against impairment by non-governmental discrimination and impairment under color of State law."

Modifying the Court's holding in **Price Waterhouse v Hopkins**, the Act eases the burden of proof in mixed motive cases. In **Price Waterhouse**, the Court held that where an employment decision is motivated by both lawful and unlawful factors, i.e. mixed motives, the employer can rebut the discrimination claim by demonstrating that it would have taken the same action even absent the unlawful motivating factor.

The Act impacts the Court's holding by permitting a plaintiff to establish an unlawful employment practice by demonstrating that "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." However, as somewhat of a compromise, the Act notes that if the respondent shows that it would have taken the same action even absent the unlawful motivating factor, the court may grant only declaratory or injunctive relief, costs, and attorneys' fees, and may not award damages or "issue an order requiring any admission, reinstatement, hiring, promotion, or payment."

The Act also substantially impacts the Court's treatment of challenges to consent decrees. In **Martin v Wilks**, the Court allowed white fire fighters, who had not been party to proceedings culminating in a consent decree, to bring reverse discrimination charges based on the decree's allowance of race conscious promotion decisions. In reversing **Wilks**, the Act precludes consent decree challenges by persons who had actual knowledge and opportunity to object to a proposed judgment or order and yet failed to object prior to entry of the judgment or order, as well as by persons whose

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interests were adequately represented by another party who challenged the judgment or order on the same legal grounds and with a similar factual situation. The Act does provide an exception to the second part of this rule where there has been an intervening change in law or fact.

With regard to limitations periods and seniority systems, the Court had held in **Lorance v AT&T Technologies**, that the triggering event for Title VII limitations period purposes is the execution of a collective bargaining agreement which detrimentally impacts female employees' seniority rights. In so holding, the Court rejected arguments that the triggering event should properly be the agreement's application to a particular plaintiff. In reversing **Lorance**, the Act states that "an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision) when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system."

Consistent with a 1987 ruling involving Title VII, the Court in **West Virginia University Hospitals v Casey**, held that § 1981's attorney fees provisions could not be extended to allow the recovery of expert witness fees. In reversing these decisions, the Act specificies that courts have the discretion to award expert witness fees as part of attorneys' fees.

The act also extends the reach of federal civil rights legislation. It does so by reversing the Court's **EEOC v Arabian American Oil Co.** decision, which had rejected Title VII's application to United States citizens working overseas for United States companies, and specifying that both Title VII and the ADA have extraterritorial effect.

Retroactivity of the Act

To date, the Act's most troublesome aspect probably involves the question of retroactivity. During the compromise process leading up to enactment, language compelling retroactive application of the Act was deleted. The result is legislation, and legislative history, which fails to state or provide clear guidance regarding whether the Act should apply to cases pending on November 21, 1991.

There is universal agreement that the Act's language regarding retroactivity is extremely ambiguous. Statements concerning retroactivity arise in five different places within the Act, including § 402(a) which states that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Section 402(b), which exempts the **Wards Cove** case, adds that "notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983." Section 109, dealing with the extraterritorial effect of Title VII and the ADA, states that the Act "shall not apply with respect to conduct occuring before the date of the enactment of this Act." Section 110, which authorizes establishment of a Technical Assistance Training Institute, states that the Act "shall take effect on the date of the enactment of this Act." Finally section 116 states that "nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements that are in accordance with the law."

Considering such ambiguity, it is not surprising that President Bush called for the Act to be applied only prospectively. The rationale underlying this interpretation of the Act's ambiguous language is that legislation has generally not been found to be retroactive unless Congress specifically states otherwise. President Bush even issued a directive calling for the Equal Employment Opportunity Commission ("EEOC") and other federal agencies to not apply the Act to cases pending in court or within the EEOC. In compliance with this directive, both the Justice Department and the EEOC subsequently announced that the Act would be applied only to discrimination claims arising after November 21, 1991. The significance of the retroactivity issue and the President's directive is evidenced by the fact that the EEOC has appoximately 850 pending court cases and more than 60,000 charges currently on file. Furthermore, of the cases that EEOC is currently litigating, approximately 400 to 500 raise allegations of intentional discrimination in which compensatory and possibly punitive damages would be available if the Act is applied retroactively.

Equally as predictable as the Administration's interpretation of the Act, is the opposite interpretation of retroactivity advanced by civil rights advocates and plaintiff's attorneys. The rationale underlying this interpretation is that Congress has in the past demonstrated that it knows how to incorporate language which prevents retroactive application of legislation, and because only a few of the Act's provisions contain prohibitions on retroactive application, Congress obviously intended all other provisions to apply to pending matters.

Because neither the Justice Department's nor the EEOC's interpretations of the Act are binding, the judiciary has charted its own course regarding the retroactivity issue. Unfortunately, the judiciary has also proven unable to resolve the retroactivity dilemma. Of the approximately two dozen district court rulings on retroactivity to date, thirteen have been in favor of retroactivity, nine have opposed retroactive application of the Act, and the few remaining have failed to take a clear stand on the issue. One recurring theme among those who have addressed this issue is frustration with Congress' failure to clearly articulate its intent regarding retroactivity. Judge Finesilver, of the federal district court in Colorado, although ruling in favor of the Act's prospective application, noted that "Congressional indecision on the retroactivity issue has forced both the federal courts and litigants to expend valuable time and resources resolving an issue that is wholly unrelated to the merits of civil rights

cases." Judge Finesilver also noted that forcing the courts to resolve issues which could have been avoided through more specific Congressional language "frustrates efforts to reform and streamline the American legal system."

The Supreme Court recently declined an opportunity to address the retroactivity issue. In addressing an action which arose prior to November 21, 1991, the D.C. Circuit in **Gersman v Group Health Association**, dismissed charges filed under § 1981 on grounds that there was no cause of action pursuant to **Patterson v McLean Credit Union**. In vacating and sending the case back to the D.C. Circuit, the Supreme Court may prompt the first court of appeals decision on the retroactivity issue. Nevertheless, there is little reason to believe that the courts of appeals will prove any more able than the district courts to devise an unanimously accepted interpretation of the Act. Consequently, it appears unlikely that the retroactivity issue will be resolved until addressed by the Supreme Court.

Additional Provisions

The Act makes it an unlawful employment practice for employers, "in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of employment related tests on the basis of race, color, religion, sex, or national origin."

The Act specifically encourages the use of alternative dispute resolution, "where appropriate and authorized by law," including settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials, and arbitration.

The Act provides for the EEOC to establish a Technical Assistance Training Institute, and to carry out education and outreach activities, including the dissemination of information in languages other than English.

The Act brings the Age Discrimination in Employment Act into line with Title VII by providing that if a charge filed with the EEOC is dismissed or the proceedings are otherwise terminated, the EEOC shall notify the person aggrieved, and that person may bring a civil action within 90 days after the date such notice is received.

Title II of the Act is designated the "Glass Ceiling Act of 1991." It calls for establishing a Glass Ceiling Commission to prepare recommendations concerning the advancement of women and minorities to management and decision-making positions in business, a comprehensive research program, and a National Award recognizing those employers who exhibit diversity and excellence in American executive management by creating opportunities for, and eliminating artificial barriers to, the advancement of women and minorities.

Finally, the Act extends civil rights protections to United States Senate employees and Executive Branch appointees, and incorporates by reference previously established protections for House employees.

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cases since **Misco**, the arbitration awards have been enforced over public policy objections, generally following the Ninth Circuit's *en banc* decision in **Stead Motors of Walnut Creek v Machinists, Lodge 1173**, 886 F2d 1200 (CA 9 1989) **cert den**, 110 S CT 2205 (1990) *rv'g* 843 F2d 353 (CA 9 1988), where the *en banc* Court essentially adopted the "narrow" view that arbitration awards reinstating employees may be overturned on public policy grounds only if the reinstatement is expressly prohibited by law. The minority view, exemplified by **Iowa Elc Light & Power v Local 204, IBEW**, 834 F2d 1424 (CA 8 1987) and **Delta Air Lines v Air Line Pilots Ass'n**, 861 F2d 665 (CA 11 1988), sanctions vacatur on public policy grounds if (1) public safety or health issues are clearly implicated by the award; (2) the employee's misconduct related to an integral part of the job; and (3) a "clear link" exists between enforcement of the award and public policy. **See Iowa Power,** *supra* at 1428-1429; **Delta Air Lines,** *supra* at 671, 674-675.

Most of the challenges to finality of arbitration awards on public policy grounds continue to involve employee misconduct cases where the arbitrator reduces the discharge to a lesser penalty, usually at least reinstatement. "Public safety" cases, that is, cases in which the employee's misconduct adversely affects or could adversely affect public safety, remain the most difficult for the courts to resolve, particularly when the arbitrator finds the grievant guilty of the misconduct alleged but overturns the discharge on due process or other procedural grounds or finds the penalty too severe and the employee amenable to rehabilitation.

The "narrow view" — Stead Motors and its progeny

The most thorough and well reasoned case following **Misco** is the Ninth Circuit's *en banc* decision in **Stead Motors**, reversing a previous decision of a three judge panel of that Circuit who vacated an arbitration award which reinstated a "reckless" auto mechanic with an unfortunate propensity for failing to secure lug bolts on the wheels of Mercedes automobiles. In an excellent summary of the law on the unique role of labor arbitrators and the federal courts' basic "hands off" policy exemplified by the Steelworker Trilogy cases, the Ninth Circuit showed clearly how **Misco** is but the latest expression of the federal courts' consistent policy of non-interference with labor arbitration awards. Cutting to the heart of the matter, the Ninth Circuit held that the critical issue is not whether the underlying act for which the employee was disciplined violates public policy, but whether the law bars reinstatement of an individual who committed the misconduct. 886 F2d at 1215. Nothing in the laws of California expressly forbade reinstatement of an auto mechanic who had previously committed a reckless act; therefore it was wrong for the lower courts and the original panel to overturn the arbitration award because they believed

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the employee was likely to commit the same reckless act again, such a determination being an exercise in judicial fact-finding expressly prohibited by **Misco**. *Id* at 1217. The Ninth Circuit also distinguished **Iowa Electric** and **Delta Air Lines** and declined to follow them after concluding they were wrongly decided.

The Sixth Circuit, essentially adopting the **Stead Motors** *en banc* test, enforced an arbitration award reinstating a truck driver arrested for off-the-job possession of drugs. **Interstate Brands Corp v Teamsters Local 135**, 909 F2d 885, 893 (CA 6 1990) *cert den*, 111 S Ct 1104 (1991). The reinstatement of the driver did not violate any explicit law which prohibited return to work by an employee discharged for off-duty possession of controlled substances. *Id*. The district court erred in looking to the grievant's conduct, not the remedy ordered by the arbitrator, substituting its judgment for that of the arbitrator as to admissibility of evidence and engaging in judicial fact-finding.

While not expressly adopting the **Stead Motors** test, the Tenth Circuit expressly rejected the key elements of the **Iowa Power** and **Delta Air Lines** test, namely that where an employee's conduct violates well defined laws and precedent and the conduct involves an integral part of the employee's job, the arbitration award should be vacated. In **CWA v Southeastern Electric Cooperative**, 882 F2d 467 (CA 10 1989) the Court enforced an award reinstating a 19-year employee who sexually accosted a customer of the utility company. Following **Misco**, the Court refused to substitute its judgment for that of the arbitrator on issues such as the nature of the offense and the influence of the employee's long work record and declined to disturb the arbitrator's finding that corrective discipline would be appropriate in these circumstances. *Id* at 469.

Two other recent employee misconduct cases are also worthy of note. In both cases, the arbitrators found the employee guilty of misconduct which involved either sexual harrassment or alcohol consumption. Applying the **Stead Motors'** test, both courts enforced the arbitration awards finding no legal bar to reinstatement of the employees. **Chrysler Motors v Allied Industrial Workers**, 748 F Supp 1352 (ED Wis 1990), *app pending* 909 F2d 248 (CA 7 1990) (sexual harrassment); **Laidlaw Waste Systems v Local 379 Teamsters**, 134 LRRM 2471 (D Mass 1990) (alcohol). **See also Rack Engineering v Steelworkers**, 137 LRRM 2825 (WD Pa 1990) *aff'd* 915 F2d 419 (CA 3 1991) (although lying to an arbitrator under oath may violate the state's criminal law, reinstatement of the employee is not barred by law.)

The minority view — Iowa Electric and Delta Air Lines revisited

Both **Iowa Electric** and **Delta Air Lines** were decided soon after **Misco**. Indeed, **Misco** was only a few weeks old when the Eighth Circuit handed down its decision in **Iowa Electric**. In **Stead Motors**, the Ninth Circuit **en banc** concluded that **Iowa Electric** and **Delta Air Lines** were wrongly decided; they could not be reconciled with the view that an award violates public policy only if the remedy awarded is contrary to a positive mandate of the law. In the more recent cases, the courts also declined to follow **Iowa Electric** or **Delta Air Lines**, factually distinguishing the cases and limiting their application to situations in which the misconduct occurred while the employee was performing duties integral to his/her employment and where public safety concerns "overwhelmingly compelled" the use of the public policy exception to vacate the arbitration award. *E.g.*, **Chrysler Motors v Allied Industrial Workers,** *supra* at 1362, n 30; **Laidlaw Waste Systems v Local 279 Teamsters,** *supra* at 2473.

Examples of cases in which the courts vacated arbitration awards on public policy grounds show the influence of **Iowa Electric** and **Delta Air Lines** remains, although diminished after **Stead Motors**. A district court in Georgia, following the **Delta Air Lines** precedent in the Eleventh Circuit and employing the **Iowa Power/Delta Air Lines** test, vacated an arbitration award which reinstated a chronic marijuana user to a safety-sensitive job for a utility company. **Georgia Power Co v IBEW, Local 84**, 707 F Supp 531, (ND Ga 1989) *aff'd* 896 F2d 507 (CA 11 1990) (mem.) In a case which could be described as **Misco** revisited, marijuana was found in the employee's car in the company parking lot. Unlike **Misco**, this employee was given three separate drug screens which he failed and he admitted to being a chronic marijuana user, smoking a grand total of three marijuana cigarettes per week. Even though there seemed to be no evidence of actual impairment on the job and the arbitrator ordered the employee reinstated only on the condition that he pass future drug screens, the district court was so incensed by the safety danger it believed the employee posed that it refused to enforce the award. The Eleventh Circuit affirmed without opinion.

In a relatively early post-**Misco** case in the Eastern District of Michigan, Judge James Churchill vacated an arbitration award which reinstated a nurse the arbitrator had found "guilty of substantive misconduct" in the area of patient care and who had a history of poor performance and attitude. **Russell Memorial Hospital v Steelworkers**, 720 F Supp 583 (ED Mich 1989). Relying on the **Iowa Power** and **Delta Air Lines** cases as well as the original panel decision subsequently vacated in **Stead Motors**, Judge Churchill concluded that reinstatement of the nurse violated public policy. He found a well defined and dominant public policy assuring safe and competent patient care, by reference to various Michigan statutes and regulations, and a "clear link" between that public policy and the arbitration award reinstating the nurse.

Contrary to the Supreme Court's explicit direction in **Misco**, in the cases discussed above the courts substituted their judgment for that of the arbitrator on various issues, primarily the likelihood of repeated misconduct by the employee. The Second Circuit strayed down the same path

in **Newsday v Long Island Typographic Union**, 915 F2d 840 (CA 2 1990), *cert den*, 111 S Ct 1314 (1991) involving a "repeat offender" in the sexual harassment area whom the arbitrator ordered reinstated because the offense was subject to progressive discipline not summary discharge. Overturning the award, the Second Circuit concluded that the arbitrator in effect condoned the misconduct which was contrary to well established federal and state law and the award would have perpetrated a hostile working environment contrary to law and prevented the employer from eliminating sexual harassment in the work place as it was required to do so by law. Under the **Stead Motors** test these justifications would be totally insufficient since nothing in federal or state law prohibits reinstatement of even a chronic sexual harasser.

The pitfalls of the **Iowa Power/Delta Air Lines** analysis are also evident in a recent Pennsylvania district court decision. **Stroehmann Bakeries v Local 776, Teamsters**, 136 LRRM 2874 (MD Pa 1991). Consider the test announced by this court — "whether the arbitrator's reasoning process, language, tone, considerations, and award violate public policy." *Id* at 2875. Not surprisingly the court, offended by the arbitrator's rather cavalier treatment of testimony regarding sexual harassment, overturned the award reinstating the grievant on the grounds of an inadequate investigation by the employer. This decision, which obviously cannot be squared with **Misco**, is the most egregious of the recent cases.

A final decision in this area illustrates a rather creative argument by the employer and receptivity to such argument by courts who are dissatisfied with or offended by the arbitrator's decision reinstating an employee whose misconduct is uncontroverted. In **Shelby County Health Care Corp v AFSCME Local 1733**, 137 LRRM 2565 (WD Tenn 1991), the court vacated an award reinstating a leader of a strike conducted in violation of the notice provisions of NLRA § 158(d). Although the parties agreed to arbitrate the striker's dismissal, the employer argued successfully that her reinstatement was prohibited by § 158(d) which provides that employees striking in violation of the notice provisions lose their status as employees *for purposes of the Act*. The employer argued and the court agreed that this language mandated dismissal of the striker and prohibited her reinstatement. The opinion contains no discussion of limiting language in the statute which withdrew the Act's protections from such workers but clearly did not make their dismissal mandatory.

Conclusion

With the Ninth Circuit's *en banc* decision of **Stead Motors** providing the "bright line" test missing from **Misco**, the number of cases vacating arbitration awards on public policy grounds continue to decline, particularly where arbitrators are careful to craft their decisions with the **Misco** caveats clearly in mind.

FOOTNOTES

1. **United Steelworkers of America v Enterprise Wheel & Car Corp**, 363 US 593 (1960); **United Steelworkers of America v Warrior & Golf Navigation Company**, 363 US574 (1960); **United Steelworkers of America v American Manufacturing Company**, 363 US 504 (1960).
2. Nowikowski, "Public Policy Exception to the Enforcement of Labor Arbitration Awards," 68 Mich Bar J 626 (1989).
3. The cases discussed were culled from BNA's LRRM reporter and are not intended to be an exhaustive list of all recent public policy/arbitration enforcement cases.

U.S. Supreme Court Review

by Lauren A. Rousseau-Rohl
Dykema Gossett

Union's Right to Organize on Employer's Property

This January, the Supreme Court dealt union organizing campaigns a blow with its decision in **Lechmere v NLRB**, No. 90-970 (US SupCt 1/27/92). The Court held that nonemployee union organizers may trespass on employer property only "in the rare case" where employees are so inaccessible that the union's reasonable attempts to communicate with them are ineffective. The decision rejects the three-part balancing test traditionally applied by the NLRB, under which the NLRB considered the strength of employees' organizational rights, the strength of the employer's property rights, and the availability and feasibility of alternative means of communication.

The Court noted that employers cannot be compelled to allow nonemployee organizers on their property simply because access to employees is difficult or not optimally effective. Rather, employers can be so compelled only where the location of the business and living quarters of employees place them beyond the reach of nonemployee organizers, such as in logging camps and mountain resorts. As long as the organizers have reasonable access to employees outside an employer's property, the employer's right to keep the organizers off its property remains intact.

District Court's Power to Impose Sanctions on Attorneys

In Willy v Coastal Corporation, No. 90-1150 (US SupCt 3/3/92), the Supreme Court upheld the power of a federal district court to impose sanctions to penalize attorney misconduct even where it is later found that the court lacked jurisdiction to address the merits of the case. The issue arose in the context of a retaliatory discharge action, which was removed to federal court by the employer on the grounds that federal law was an essential element of the state law cause of action.

The plaintiff filed several requests to remand the case to state court, but was denied. The district court then granted the employer's motion for Rule 11 sanctions, based upon the plaintiff's misleading, ill-founded, and incomprehensible

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pleadings, ponderous briefs and filings, use of the discovery process for harassment, frivolous allegations, and repeated misquoting of state disciplinary and evidentiary rules. On appeal, the plaintiff convinced the appellate court that the case had been improperly removed three years earlier. The district court remanded the case to state court, but retained the Rule 11 issue and granted the employer $19,307 in sanctions against the plaintiff.

The Supreme Court upheld the district court's award of sanctions, stating that the issue of sanctions was collateral to the merits, and therefore, resulted in no unconstitutional invasion of the province of state courts. The Court noted that the interest in having rules of procedure obeyed does not disappear upon a determination that the court was without subject matter jurisdiction.

Other Decisions

In **King v St. Vincent's Hospital**, 1991 US LEXIS 7175, the Court held that the Veteran's Reemployment Rights Act does not limit the length of military reservists' leaves of absence from civilian jobs. Resolving a conflict in the circuits, the Court held that the Act does not impose a reasonableness requirement on the reservists' leaves of absence.

Finally, in **Collins v Harker Heights**, No. 90-1279 (US SupCt 2/26/92), the Supreme Court held that municipalities are not required by the federal due process clause to provide their employees with certain minimal levels of safety in the workplace. The lawsuit was filed under Section 1983 of the Civil Rights Act of 1871, premised upon the on-the-job death of a city sanitation worker. The Court analogized the action to a "fairly typical state law tort claim," and noted that the due process clause does not supplant traditional tort law.

Recent Cases in the Sixth Court of Appeals and Michigan Federal District Courts

by Robert A. Boonin, Butzel Long

MISCONDUCT DISCOVERED AFTER TERMINATION CAN LEGALLY BAR WRONGFUL TERMINATION CLAIM.

Johnson v Honeywell Information Systems, Inc., ____F.2d____, 1992 U.S. App. Lexis 1100, 47 FEP Cases 1362 (6th Cir. January 30, 1992).

The Plaintiff was terminated in 1984 by her employer, Honeywell, for a performance problem. She sued Honeywell for wrongful termination and discrimination under Michigan law. In the course of discovery, it was learned that plaintiff made a number of representations on her employment application form which were false. Specifically, the plaintiff had lied about being a college graduate, and she had also exaggerated about her prior experience. The form included the following statement:

> I understand . . . that the submission of any false information in connection with my application for employment, whether on this document or not, may be cause for immediate discharge at any time hereafter should I be employed. . . .

Relying on this provision, the defendant moved for summary judgment arguing that these misrepresentations constituted just cause. The lower court denied the motion by ruling that such evidence discovered *after* one's termination could not serve as the basis of a just cause defense, and that the materiality of the misrepresentation was also a question of fact.

Reversing the lower court in an opinion written by Judge Ryan, the Sixth Circuit concluded:

> We believe the Michigan Supreme Court would hold that just cause for termination of employment may include facts unkown to an employer at the time of dismissal, though obviously such facts would be neither the actual or inducing cause for discharge.

Furthermore, based on a review of the evidence, the Court ruled that as a matter of law the misrepresentations were "material, directly related to measuring the candidate for employment, and . . . relied upon by the employer in making the hiring decision." Since company management testified (by affidavit) that it would not have hired the plaintiff had it known that she was not a college graduate, the misrepresentation was material. For these reasons, both plaintiff's contract and discrimination claims were effectively barred.

DISCRIMINATORY MOTIVES BY MANAGERS WHO ARE NOT DECISION-MAKERS ARE IRRELEVANT.

Wilson v Stroh Companies, Inc., 952 F. 2d 942 (6th Cir. 1992).

The plaintiff brought a discrimination claim against his former employer contending that his race was a determining factor in his termination. The plaintiff was terminated for insubordination based upon the facts determined through an investigation by the plant's industrial relations manager, and the plant manager's decision as based on the results of that investigation. The plaintiff claimed that his immediate supervisor exhibited racial animus toward him, and that animus was a factor in the immediate supervisor's decision to question the plaintiff's conduct — which triggered the investigation. No racial animus was directly attributed to the industrial relations manager or the plant manager. Nonetheless, the plaintiff claimed that the supervisor's racial animus should have been imputed to the other managers, and thereby preclude summary judgment.

Rejecting plaintiff's contentions, and affirming the district court's granting of summary judgment under federal and Michigan law, the Court focused on the independence of the industrial relations manager's investigation. Since the discharge was based on the independent investigation, the supervisor's alleged animus did not infect the termination decision.

A similar holding was reached by the Court in **Cesaro v Lakeville Community Schools**, 953 F.2d 252 (6th Cir. 1992). In this case, a teacher claimed that the superintendent's decision to recommend against her promotion to become Director of Special Education was sex discrimination. The superintendent allegedly preferred not to have a female in that position. Instead of limiting candidates to internal applicants, the superintendent sought outside candidates, as well. Plaintiff was among the finalists considered, but the Board of Education ultimately chose a male candidate. Since the ultimate decision-maker was not shown to have any discriminatory motive, the Court affirmed the granting of the defendent's summary judgment motion.

HANDICAPPER CANNOT BE REASONABLY ACCOMMODATED.

Pesterfield v Tennesee Valley Authority, 941 F.2d 437 (6th Cir. 1991).

Plaintiff brought suit under the Federal Rehabilitation Act Claiming that he was a handicapped individual, and that his former employer failed to provide him with reasonable accommodations. Plaintiff had been injured and transferred to work in another department. He developed a psychological condition which severely reduced his tolerance for accepting criticism. Criticism, according to his doctor, would trigger extreme anxiety and depression. Due to his intolerance, his exhibiting of uncontrolled conduct and his medical record, the employer concluded that the plaintiff's continued employment would be unsafe. Therefore, the plaintiff was terminated.

Upholding the lower court's dismissal of this case, the Court concluded that by not being able to accept criticism the plaintiff could not perform an essential function of the job. The Court stated: "It would be unreasonable to require that TVA place plaintiff in a virtually stress-free environment and immunize him from any criticism in order to accommodate his disability." Plaintiff was already working in the least stressful job in the plant (tool room attendant), and there were virtually no jobs in which all contact with supervision and regular job demands could be avoided.

Moreover, the Court found that TVA's reasonable reliance on the doctor's report — even if wrong — precluded a finding of handicapper discrimination. TVA, in good faith, believed that he was unable to work due to his medically supported history. TVA did not base its decision on stereotype of individuals with psychological problems.

NON-COMPETE AGREEMENT ENFORCED.

Robert Half International, Inc. v Van Steenis, 1991 U.S. Dist. LEXIS 14,362 (E.D. Mich. June 11, 1991) (Rosen, J.).

In this case, the defendant had worked for plaintiff as a recruiter. When he began that job, he signed a no-competition agreement and also promised to not dislcose or misuse confidential information. The no-competition agreement extended for the twelve months after termination, and applied to the area within fifty miles of the employer's three offices.

After leaving the company due to a number of perceived misrepresentations, the plaintiff joined a competitor's recruiting staff — across the street from his former employer's main office. While there, he used his former employer's confidential information (names of client contacts, etc.). Both of these acts were admittedly in direct conflict with the no-compete agreement.

The Court enforced the restrictive covenants under Michigan law, and held them to be "reasonably necessary to protect [plaintiff's] reasonable competitive business interests." An injunction was appropriate due to the difficulty which would result in determining the source of the competitor's business. Thus, a permanent injunction was granted, all confidential information was ordered to be returned, and plaintiff was required to comply with the no-compete requirements for the period covered by the agreement.

ABILITY TO FIRE "WITHOUT NOTICE" IS NOT EVIDENCE OF AN AT-WILL RELATIONSHIP.

Parker v Aetna Life & Casualty Co., 1991 U.S. Dist. LEXIS 19,256 (W.D. Mich. October 15, 1991) (Gibson, J.).

The plaintiff brought suit against his former employer who allegedly fired him for being "mentally or emotionally unstable and/or likely to do physicial violence to . . . co-employees." The suit was brought under the **Toussaint** doctrine, with plaintiff challenging the just cause basis for the termination.

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RECENT CASES IN THE SIXTH COURT OF APPEALS AND MICHIGAN FEDERAL DISTRICT COURTS —

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The employer sought summary judgment largely in reliance on reservations in the employee handbook and job application form which provided that employees could be terminated "at any time, with or without notice." The Court held that such reservations are not sufficient to overcome other facts establishing a just cause relationship because they "[do] not reserve the right to dismiss him 'without cause.'" The Court stressed that the employer was in a position of essentially precluding a reasonable expectation of just cause employment from being created, but that it stopped short of confirming the at-will relationship. Noting that the ability to terminate employment "at any time, without notice" is not necessarily inconsistent with a "just cause" relationship, it found the reservations were not sufficiently "clear and unequivocal" to avoid a fact question.

Michigan Court of Appeals Update*

by Michael D. McFerren
Sachs, Waldman, O'Hare,
Helveston, Hodges & Barnes, P.C.

WHISTLEBLOWERS PROTECTION ACT - PUBLIC POLICY EXCEPTION

Dudewicz v Norris Schmid, Inc., No. 126212 (Michigan Court of Appeals, December 16, 1991)

Plaintiff-employee was discharged by defendant-employer after he refused to dismiss a criminal charge of assault which he filed against a supervisor. The plaintiff argued that it was a violation of public policy, and of the Michigan Whistleblowers Protection Act, MCLA 15.361 *et seq*; MSA 17.428(1) *et seq*, to discharge an employee for filing a criminal complaint against a supervisor. The Court of Appeals agreed.

Defendant argued that the plaintiff could not state a claim that his discharge violated public policy unless there was a direct nexus between the employment relationship and the right which the employee was discharged for vindicating (like the "right to file a worker's compensation claim" at issue in **Sventko v The Kroger Co**, 69 Mich App 644; 245 NW2d 151 (1976)). The Court held, however, that a violation of public policy could be based upon an expressed legislative enactment which gives an employee an individual right (like the right to file a criminal complaint), regardless whether that individual right was employment-related.

Defendant also argued that a Whistleblowers Protection Act claim is made out only where an employee is terminated for reporting a violation of law *by the employer.* The requirement that the alleged violation of law be committed by the employer was mandated by **Dixon v Oakland University**, 171 Mich App 68; 429 NW2d 640 (1988), based upon that court's reading of the legislative history of the Act. In this case, the court concluded that **Dixon** was wrongly decided, and found that plaintiff stated a claim under the Act by alleging that he was discharged for reporting a violation of law regardless of whether it was committed by the employer. The Court held: "The language of the statute is inclusive of all violations, not just those of employers."

The Court declined to address the issue whether, on the facts of this case, the Whistleblower's Protection Act claim was plaintiff's exclusive remedy, precluding plaintiff's public policy claim. **See, Kovell v Spengler**, 141 Mich App 76; 366 NW2d 76 (1985), *lv den* 422 Mich 977 (1985).

** There are no significant labor or employment cases from the Michigan Supreme Court to report this quarter.*

MERC UPDATE

by Kathryn A. VanDagens
White, Beekman, Przybylowicz,
Schneider & Baird, P.C.

Kalamazoo County Sheriff, Case No. C90 A-6 (January 24, 1992).

MERC reversed its decision in **Ecorse Board of Education**, 1984 MERC Lab Op 615, to the extent that it held an employer must bargain over the impact of a layoff decision prior to its implementation. Member Tansman dissented from the majority's decision. Chairman Bixler and Member Bishop also found that, in the case at bar, the employer had satisfied its obligation to bargain by discussing the matter in meetings which took place between the parties prior to implementation.

In his dissenting opinion, Member Tansman wrote:

> . . . an employer should have the same obligation to offer the union an opportunity for meaningful bargaining prior to the implementation of a decision to lay off one employee as when it closes down an entire operation. I disagree with my colleagues' assumption that the parties could engage in meaningful bargaining over impact issues such as which employee was to be laid off and the who [sic] would do the work of the eliminated position after the employer had in effect already made decisions on these issues.

Grand Traverse County Sheriff Department, C89 G-169 and C89 G-170 (January 23, 1992).

Even where the employer proposed during negotiations language permitting it to take the complained of action and

the union rejected that proposal, MERC will not consider a dispute over the meaning of the provisions of a collective bargaining agreement when it contains a conclusive means of resolving disputes by way of binding arbitration. Member Tansman dissented from the majority opinion, as he would hold that the interpretation of the contract by the employer was "clearly unreasonable and manifested a patent disregard for the agreement" in light of the bargaining history. He would have found that the employer's actions constituted a repudiation of the collective bargaining agreement in these circumstances.

Lansing Community College, R90 K-256 and R90 K-257 (January 22, 1992).

In deciding a motion for reconsideration, the Commission ruled that participation by Commission Chairman Bixler in the decision was not improper, despite the fact that he was the administrative law judge in the underlying representation proceeding.

Olivieri/Cencare Foster Care Homes -and- Michigan Department of Mental Health, C90 C-49 (January 22, 1992).

On exceptions, MERC affirmed ALJ Bixler's decision finding the employer guilty of unlawfully discharging an employee because of her union activities. Although the employee had received prior reprimands, the administrative law judge found that the initial allegations contained no detail and the employee was "not given an opportunity to rebut or explain these vague charges based on secondhand information." The Commission also upheld his finding that the employer knew of her specific union activities and that there was animus toward the general union activities which were taking place on the premises. The administrative law judge found that the employer failed to prove the employee would not have been discharged in the absence of protected activity, and the Commission agreed this was the proper analysis of the case.

Saginaw Intermediate School District, UC90 C-18 (January 22, 1992).

MERC refused to separate data processing personnel from a unit of clericals, dismissing the employer's petition. Based on a ten-year history of bargaining, there was insufficient evidence to justify removing them from the unit. Further, the fact that the data processors had access to confidential information did not justify their exclusion as confidential employees.

NLRB: Winter Update

by George M. Mesrey
Field Attorney - National Labor Relations Board

The Board and the courts have issued a number of decisions during the last three months of which practitioners should be aware. This article will serve to highlight some of the most important substantive and procedural developments during this period. It should be noted, however, that the views expressed in this article are those of the author and not necessarily those of the National Labor Relations Board.

UNION ACCESS TO COMPANY PROPERTY FOR ORGANIZATIONAL ACTIVITY

On January 27, 1992, the United States Supreme Court issued a landmark decision in the area of union access to employer premises for organizational activity. **Lechmere, Inc. v NLRB**, 139 LRRM 2225 (January 27, 1992).

The dispute in this case arose from a Union's attempt to organize employees at a retail store owned and operated by Lechmere, Inc. The store was located in a shopping plaza. After unsuccessfully advertising in a local newspaper, non-employee union organizers distributed organizational literature on the windshields of cars located in a corner of the parking lot where Lechmere employees usually parked. The Employer immediately ordered the organizers off the property. The organizers left, and Lechmere personnel removed the literature. This sequence of events occurred several more times before the union organizers relocated to a strip of public land adjoining the outer edge of the Employer's parking lot. The Union picketed from this vantage point but was unsuccessful in attracting much attention to its cause. The Union then filed an unfair labor practice charge alleging that the Employer violated the Act by barring the non-employee organizers from its property. The Board and the Court of Appeals applied the balancing test in **Jean County**, 291 NLRB 11; 129 LRRM 1201 (1988), and concluded that the Employer violated the Act.

The Supreme Court reviewed **NLRB v Babcock and Wilcox Co.**, 351 U.S. 105 (1956), and its progeny and determined that the Board misapprehended the nature of an employer's duty to accommodate employees' Section 7 right to organize. In particular, the Court found that the Board in **Jean Country** improperly applied the basic holding and narrowness of the exception to the general rule in **Babcock**.

The **Lechmere** court reject the **Jean Country** approach of automatically balancing employees' and employers' rights when faced with the issue of access to an employer's premises by non-employee union organizers. According to the Court, the proper approach is to first determine whether the non-employee union organizers have reasonable access to employees outside the employer's premises. The Court stated that "inaccessibility" does not mean cumbersome or less than ideal but instead, only where the location of the plant and the living quarters of the employees place them beyond the reach of reasonable union efforts to communicate their

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NLRB: WINTER UPDATE —

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cited were logging camps, mining camps and mountain resort hotels. The Court further explained that access to employees, not success in winning them over, is the critical issue. Under the restrictive approach adopted by the **Lechmere** Court, the only time employees' Section 7 rights will be balanced against an employer's property rights is upon a showing that a union does not have "reasonable access."

The Court concluded that the Union had reasonable access and reversed the Board and the Court of Appeals. Critical factors in this decision were the availability of advertising, the ability to picket on adjoining public property and the success in contacting employees outside of work.

DUTY TO BARGAIN/DRUG TESTING

In **Michigan Bell Telephone Company**, 306 NLRB No. 54 (February 11, 1992), the Employer implemented a drug testing program during the term of a collective bargaining agreement without securing the Union's consent. The Board was asked to decide whether the Employer's unilateral implementation of the program violated Section 8 (a)(5) and (1) of the Act.

The Board reviewed the parties' collective bargaining agreement and concluded that the zipper clause provision did not clearly and unmistakably waive the parties' rights to bargain over mandatory subjects not mentioned in the contract or in negotiations immediately preceding the contract. In addition, the Board found that the contract did not contain a provision concerning or referring to drug testing. Thus, the requirement in Section 8(d) of the Act that the Union must consent to a mid-term modification of the contract did not apply. With these findings as the predicate, the Board analyzed the course of bargaining between the parties and concluded that the parties were at impasse. Therefore, the Board found that the Respondent's unilateral implementation of the drug testing program did not violate the Act.

BARGAINING UNITS IN THE HEALTH CARE INDUSTRY

In **Park Manor Care Center**, 305 NLRB No. 135; 139 LRRM 1049 (December 18, 1991), the Board clarified exactly what standard it would apply to determine appropriate bargaining units in non-acute health care facilities. After exhaustively reviewing applicable precedent and the Rule for acute-care facilities, the Board opted for a broad standard which encompasses traditional "community of interest" factors as well as background information gathered in prior cases *and the health care rule making process. The Board expressed* hope, however, that certain recurring factual patterns will emerge and illustrate which units are typically appropriate.

SECTION 10(b) LIMIT ON RECOVERY OF UNPAID FRINGE BENEFITS

The Board recently decided an important case concerning the extent to which Section 10(b) of the Act limits remedial relief for an Employer's failure to make contractually required wage and fringe benefit payments. **Moeller Bros. Body Shop, Inc.**, 306 NLRB No. 29 (January 28, 1992). The unfair labor practice charge in this case was filed with the Board on January 30, 1990. Subsequently, the Board issued a Complaint alleging that the Employer had failed to make wage and fringe benefit contributions since January 1, 1987. The Administrative Law Judge found that the Employer committed an unfair labor practice but limited the remedy to six months prior to filing of the charge. The General Counsel and the Union subsequently filed Exceptions with the Board challenging the limited remedy.

The Board focused on the Union's failure to discover obvious contractual noncompliance by the Employer for an extended period of time prior to filing the unfair labor practice charge. The Board concluded that the Union was chargeable with the constructive knowledge by its failure to exercise reasonable diligence by which it would have learned much earlier of the Employer's actions. As a result, the Board affirmed the Administrative Law Judge's remedy limiting recovery to six months prior to filing of the charge.

Michigan Legislative Update

by Christine Kuzara
Legislative Service Bureau

In January the Michigan legislature entered into its second year of the two-year 86th Legislative Session. The following are highlights of legislative developments in the area of labor and employment since the last detailed update.

Smoker's Rights Legislation

One of the most hotly debated employment issues nowadays in Michigan and throughout the country is whether employers have the right to require that their employees refrain from smoking not only on the job, but also in the privacy of their own homes. Since 1989 the tobacco industry has launched a nationwide campaign which has convinced legislators in twenty states to bar employers from refusing to hire smokers. Interest on the issue in this state has increased with the movement of Senate Bill No. 484.

Sponsored by Senator Frederick Dillingham (R-Fowlerville), Senate Bill No. 484 would create a new act which would prohibit an employer from requiring as a condition of employment that an employee or prospective employee refrain from smoking or using tobacco products outside his *or her workplace, or from discriminating against an employee* with respect to his or her compensation or other terms or conditions of employment for smoking or using tobacco products outside his or her workplace. The bill does not prohibit an employer from offering, imposing, or having in effect a health, disability, or life insurance policy or certificate, health maintenance organization contract, or heath care corporation certificate that charges tobacco users more or otherwise

makes distinctions among employees regarding the type of coverage or the cost of coverage based upon the employees' use of tobacco products.

After considerable debate the Senate by a vote of 26 to 6, passed and transmitted the bill in November to the House. In late January the House Labor Committee listened to nearly three hours of testimony on the bill and, with a vote of 6 to 4, failed by one vote to report the bill from committee. Although a second committee meeting on the bill was scheduled and cancelled, support for the bill or a more encompassing version of it appears strong. Some representatives voted against the bill not because they support an employer's right to employ only nonsmokers, but because they believe the bill does not go far enough. They prefer to broaden the scope of the bill and protect not only smoker's rights, but other legal lifestyle choices as well.

Proponents of the bill maintain:

– A policy of not hiring smokers is discrimination.

– To prohibit smoking outside the workplace is an invasion of privacy. What employees do on their own time is none of the employer's business.

– If an employer can ban one habit that is not healthy, a precedent may be set for banning others. The employer may then decide to hire or retain employees who have the least tan on their faces because of the risk of skin cancer or require employees to eat a high-fiber diet; abstain from red meat and alcohol; and refrain from speeding, parachuting, hang gliding, and mountain climbing.

– Smoking has nothing to do with how many widgets a person turns out. Employers should not have the right to deny employment to qualified persons who would comply with workplace smoking rules.

– Since the bill allows employers to require smokers to contribute more for insurance coverage than nonsmokers, smokers would not be primarily responsible for their employers' skyrocketing health care costs.

– The bill would not generate more litigation. The burden of proof would likely fall on the employee and discourage frivolous lawsuits. Moreover, we are not creating a new cause of action because, under the Americans with Disabilities Act, employers cannot refuse to hire workers predisposed to work-related or nonwork related injuries or illnesses. It can be argued that smoking is a disability because of the addiction to nicotine.

– Broader worker protection is desirable but should be provided in statute later. The most compelling need now is to protect smokers against discrimination since this is the group that is being targeted by employers in their employment practices.

Opponents of the bill respond:

– Smoking is a health issue, not a discrimination issue. The bill is an attempt by the tobacco industry to divert health advocates from their health-related agenda.

– Likening a policy of not hiring smokers to discrimination on the basis of race or gender is inappropriate. Smoking is a behavior people choose to adopt.

– The bill does not exempt employers with a bona fide occupation qualification. The bill is so extreme it would prevent the American Cancer Society and similar organizations from giving hiring preference to nonsmokers, even if the person were hired to conduct smoking cessation classes.

– A policy that only nonsmokers will be hired could give the unemployed an important reason to stop smoking and live a healthier lifestyle.

– Smokers increase the cost of doing business because of increased use of sick leave, health insurance, and life insurance.

– The bill would generate more litigation. Discharged employees could sue their former employers alleging the discharge resulted from their off-duty conduct.

– If the bill is truly a civil rights bill, it woud protect people on the basis of their lifestyle choices.

– Employers should be able to negotiate work rules.

Whistleblower Protection

The Whistleblowers' Protection Act, 1980 PA 469, MCLA 15.361 - 15.369; MSA 17.428(1) - 17.428(9), prohibits employers from retaliating against employees who report violations of federal, state, or local laws and rules. While the act defines "employee" to include a person employed by the state, an exception is made for state classified civil service employees. These employees are not protected by the act because Const 1963, art 11, § 5 gives the Civil Service Commission the power to "regulate all conditions of employment in the classified service." OAG, 1980, No 5736, p 862 (July 10, 1980) affirmed that the act, as well as companion amendments that were made to the law governing the conduct of public officials and employees, 1973 PA 196, MCLA 15.341 - 15.348; MSA 4.1700(71) - 4.1700(7B), cannot be construed to apply to state classified civil service employees.

With that history and prompted by an incident within the Child Protective Services Division in the Department of Social Services, Representative Joe Young, Jr. (D-Detroit) sponsored House Joint Resolution V in order to ensure whistleblower protection for employees in the state classified civil service. Drafted as an amendment to Const 1963, art 11, § 5, HJR V provides, in pertinent part, that:

> The commission shall provide that an employee in the state classified civil service is not discharged, threatened, or otherwise discriminated against regarding his or her compensation, terms, conditions, location, or privileges of employment because the employee or a person acting on behalf of the employee reported or is about to report a violation or a suspected violation of a state or federal law or a rule promulgated under a state or federal law

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MICHIGAN LEGISLATIVE UPDATE —

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unless the employee knows that the report is false; because the employee participated or is about to participate in an investigation, hearing, or inquiry held by a public body; or because the employee participated or is about to participate in a court proceeding.

By a vote of 92 to 0 the House in January gave overwhelming approval to HJR V. If the resolution is approved by two-thirds of the Senate, the issue will appear on the statewide ballot in November.

Although the Civil Service Commission's position has always been that classified employees were sufficiently protected from reprisals for whistleblowing by Commission rules and grievance and appeals procedures, the Commission has begun the process of reviewing whether stronger protections are needed for employees who report wrong doing and is expected to approve new guidelines for civil service workers this spring.

Negotiator Conflict of Interests

In late February the Senate, by a vote of 22 to 15, passed and transmitted to the House Senate Bill No. 498. Sponsored by Senator DiNello (D-East Detroit), this bill amends 1968 PA 317, MCLA 15.321 - 15.330; MSA 4.1700(51) - 4.1700(60), to prohibit an elected official of a local governmental unit from simultaneously serving as a bargaining representative of a labor organization with which that local governmental unit bargains.

MIOSHA

In October Governor Engler signed into law Senate Bill No. 459, the MIOSHA compromise legislation. Basically, 1991 PA 105:

- Provides for the continuation of state enforcement of job safety and health rules through the transfer of earmarked money from the SET fund to the state general fund.

- Ensures that the safety and health of public as well as private employees will continue to be protected.

- Beginning April 1, 1992, requires that state safety and health rules be substantially similar to any new federal OSHA standard.

- Beginning April 1, 1992, increases the possible amount assessed as a civil penalty under the act to seven times the current possible assessment, thereby making the possible amount assessed for civil penalties in this state consistent with the possible amount assessed under federal law.

- Increases the number of commissioner votes required to promulgate a standard.

View from the Chair

by Robert A. McCormick

Those of you who missed the Section's Mid-Winter meeting in Ann Arbor indeed missed an event that continued the great tradition the Ann Arbor affair has become. Although the usual adjectives seem hackneyed in describing such meetings, this one was all it should be — stimulating, controversial, informative and convivial. In short, it was delightful.

More than 300 members and guests convened for the cocktail party and dinner Friday night. Once our members renew friendships and acquaintances, their attention is a challenge to get and keep. Our speaker that night, however, fairly grabbed center stage to discuss his new book, **Which Side Are You On? (Trying to be for Labor When It's Flat on its Back)** as well as his observations — both caustic and hopeful — on organized labor, labor law reform and the role of unions in corporate decision making. His book, which was nominated for a National Book Critics Award and has made him an overnight media resource on such matters, draws heavily on his experiences as a lawyer for United Mine Workers dissidents in their successful campaign to unseat then-incumbent president Tony Boyle.

Drawing comparisons with other important industrialized nations, Geoghagan argued that our policies regarding collective bargaining and employee participation in corporate decision making makes us less like the thriving economies of Germany and Japan and more and more like Mexico. He also suggested that one of the purposes behind the Wagner Act — enhancement of the purchasing power of employees — be resurrected as a mechanism for lifting the nation from its current recession. Organized labor did not avoid his criticism as he argued that direct election of national officers would enhance democratization of unions.

The Saturday morning session began with updates on MERC and NLRB developments from Mary Job and Bernie Gottfried. Next, Sheldon Stark hosted a remarkable roundtable discussion on race and gender bias in the courts. The participants included Judges Bernard Friedman and Douglas Hillman the Federal District bench, and Harold Hood and Hilda Gage of the State judiciary; Attorneys Kathleen Bogas, Steven Fishman, Deborah Gordon, Sharon McPhail, Camille Stearns Miller, Michael Pitt, and Robert Vercruysse; litigants Beverly Ann Pitman and Daniel Clinton; media representatives Bill Black of WJR radio, Heath Meriwether and Jim Finkelstein of the Detroit Free Press and State Bar Executive Director Michael Franck. The forum was one that our group has not used before and the dialogue produced some illuminating and, indeed, electrifying moments. A videotape of the discussion has been created and will be made available for members and other interested persons soon. Rounding out the morning, John Hancock, Steve Mazurak and John Runyan sought to untangle and analyze the Civil Rights Act of 1991 — a statute so strange that it specifically directs the judiciary to disregard its legislative history.

As soon as details for our Spring meeting are finalized, we will get them to you. Please plan to join us!

Labor & Employment Law Section — Spring Seminar

Chicago, Illinois — May 29-30, 1992

Guest Quarters Suites Hotel, 198 E. Delaware Place

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Please make check payable to State Bar of Michigan and indicate Labor Section Spring Seminar on face of check.

If you prefer to pay by credit card, for hotel only, the following information will be supplied to the hotel. Please list:

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(American Express, VISA, etc.)

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Return this reservation and check (or credit card information) by April 30, 1992 to:

Stephanie Arbanas
STATE BAR OF MICHIGAN
306 Townsend Street
Lansing, Michigan 48933

Spring Meeting Again in Chicago May 29-30

We are returning to Chicago for the 1992 Spring Meeting — **late spring** this time. Please plan on joining us Friday, May 29, for the usual late evening social hour and Saturday morning, May 30, for breakfast and stimulating presentations by members of the Federal and State appellate benches.

The location again will be the Guest Quarters Suites Hotel, just off Michigan Avenue near Water Tower Place and the other marvels of the Miracle Mile, where the Council has reserved a block of rooms at special rates. Mary Job will be putting together a list of entertainment opportunities, of which the Windy City always has plenty to offer.

Details on speakers, prices and hotel reservations will be in your hands soon by special mailing. You may even get it before you receive this, depending on the vagaries of the U.S. Postal Service. But in the meantime you will find a reservation form on the inside back cover of this newsletter. We urge you to tear off this sheet, fill out the form, and send in your reservation immediately.

Race & Gender Bias Roundtable Tape Available

A professionally prepared and edited videotape of the roundtable discussion on **Race and Gender Bias in the Court System** at the January 25, 1992 Labor Section Winter Meeting is available for rental from the State Bar Video Library.

Individuals, firms and organizations who wish to view the tape may arrange to rent it for a nominal fee by writing to:

Karen Adams
State Bar of Michigan
306 Townsend Street
Lansing, MI 48933-2083

We regret that rentals cannot be taken by phone.

This roundtable discussion featured candid discussion of these important issues among articulate representatives of the bench, bar, litigants and media (see Chairman Robert McCormick's column for details). On tape, the discussion is somewhat streamlined (approximately 77 minutes), but none of the substance is omitted. We invite those of you who could not attend the Winter Meeting — and those who did, but may wish to hear the discussion again — to rent the tape and use it as a resource for further discussion and progress on these issues.

Labor and Employment Law Section
State Bar of Michigan
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