LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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LABOR AND EMPLOYMENT LITIGATION: A PERSPECTIVE FROM THE FEDERAL BENCH

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U.S. District Judge

(**Editor's Note:** Judge Cohn made these remarks at the Twenty-Second Annual Labor and Employment Law Seminar co-sponsored by the Institute of Continuing Legal Education, the State Bar of Michigan Labor and Employment Law Section, and the Federal Mediation and Conciliation Service on April 10, 1997).

After l8 years as a judge I am still learning how to go about the job. Speaking to a specialized lawyer group forces me to organize my thoughts and think precisely about a particular area of the law rather than simply anecdotally. On a given afternoon I can handle motions as far ranging from a prisoner's complaint over treatment by a correctional officer to the most arcane points of patent law. I shift from one area of the law to another, depending frequently on a law clerk's bench memo, and give little thought to the broader implication of what I decide in terms of the area of the law involved. When I am asked to speak to a group of labor and employment lawyers such as are here this noon, I can take a longer look forward and a longer look backward than customary.

Roughly l5% of the cases on the docket of the Eastern District fall within your areas of specialization. Last year, of the 5,l00 new civil cases filed in our court, about 820 could be classified as labor or employment. Unfortunately, our civil cover sheet, from which this data is derived, has only a limited number of categories. I do not, for example, divide age cases from disability cases. However primitive our statistics, the state statistics on classes of cases is substantially more so and much of your work is in state court, I know.

JUDGES AND DECISION-MAKING

As you know, these cases are spread over l8 judges, l2 in regular service, and six senior judges. Sometime over the next two years it is likely we will have three more judges. This is not a certainty. While the statistical criteria used to determine the number of judges justifies three more judges, I have a feeling these criteria are going to be challenged.

Congress is beginning to take a look at judge numbers for two reasons. First, there is a feeling, which has some legitimacy, that in some districts there is an excess in judicial capacity. The second, disguised in cliches, rhetorical flourishes, and dissembling phraseology, of which Senator Hatch is the great articulator, is a dislike for some of the decisions of Clinton appointees.

This is not a difference between judges who make law and judges who interpret law, as the Chair of the Senate Judiciary Committee would have us believe. Judges have been making law for 500 years. This is simply the differences between a liberal attitude about the business of judging and a conservative attitude about the business of judging.

This attitude has been best described by the late Chief Justice Walter Schaefer of the Illinois Supreme Court in his famous essay *Precedential Policy:*

> I have spoken of precedents and of some of the factors which move a court to adhere to a precedent or to depart from it. . . . There is nothing new in the notion that the personality of the judge plays a part in the decision of cases. . . . If I were to attempt to generalize, as indeed I should not, I should say that most depends upon the judge's unspoken notion as to the function of his court. If he views the role of the court as a passive one, he will be willing to delegate the responsibility for change, and he will not greatly care whether the delegated authority is exercised or not. If he views the court as an instrument of society designed to reflect in its decisions the morality of the community, he will be more likely to look precedent in the teeth and to measure it against the ideals and the aspirations of his time.

Parenthetically, a study of decisions of the Michigan Court of Appeals the last couple of years bears this out. It is unfortunate that no one practicing lawyer or academic, so far as I know, has undertaken to do a study to see the extent to which activist conservatives have begun to make a change in the law of Michigan — particularly in the area of labor and employment law.

PERSPECTIVES AS A TRIAL JUDGE

Now let me get directly to what I think you want — or at least were told to expect — to hear from me — my perspective as a judge sitting as the decision maker in your cases in a federal trial court.

The first thing you should know — and I am sure do know — is that judges differ. They differ about the procedures followed in moving a case from filing to disposition and they differ many times about the substance of the law. My interest here is to talk to you not so much about substance but about procedure.

First, all of us more or less follow the federal rules of civil procedure. Less frequently, we follow our local rules and each of us has our own individual practices. We currently are deeply divided over the extent we can, by local rule, require each of us to adjourn a final pretrial conference while we have a motion for summary judgment under advisement.

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STATEMENT OF EDITORIAL POLICY

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

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

COUNCIL DIRECTORY

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Labor and employment cases move along on the docket much like other classes of cases. For example, I get a brief summary of each new case filed and selectively decide in which ones I will hold a status conference immediately. Only those cases which from the summary seem out of the ordinary get my early attention, regardless of type.

KNOW YOUR JUDGE

As I said, judges differ. Some are more receptive to oral argument and willing to meet with lawyers than others. Our attitudes differ on supplemental jurisdiction. And certainly in your area of practice our attitudes differ in our approach to substantive questions of law depending largely on our life experiences and world views. I have a t-shirt hanging on my bookcase in chambers with the name and citation of my first reported case. I published it because I took an exactly opposite position of a colleague in an ERISA case. On like facts, he denied benefits and I awarded benefits. A psychologist, or better still, a psychiatrist, would be needed to explain why we came to opposite conclusions. Better yet, simply looking at who we voted for president in the last election might have been a good predictor.

Importantly, you should know about each judge separately. You cannot assume we do things exactly alike. You can find out about me from l) Lexis and Westlaw; 2) the Detroit Chapter of the Federal Bar Association's newly published practice manual; 3) the Oakland County Bar Association's District Court Guidelines; 4) three articles I have published on trial practice and brief writing in the Michigan Bar Journal; 5) my motion practice guidelines and requirement for briefs typically attached to my various forms of pretrial and scheduling orders; 6) my semi-annual reports on motions pending more than six months and cases more than three years old; and 7) when in doubt call Judy Cassady, my case manager.

With regard to my motion practice guidelines, requirement for briefs and the boilerplate part of the pretrial and scheduling order, most lawyers do not seem to read them or to take advantage of my willingness to do things informally by conference calls to move matters along. Too frequently my requirement that a motion for summary judgment be accompanied by a statement of material facts not in dispute is ignored and too often I am faced with a discovery motion that could have been resolved by a phone call.

LABOR AND EMPLOYMENT PRACTITIONERS

I know the Labor and Employment Law Section has wide-ranging purposes. I have read the last several issues of *Lawnotes.* You try hard to keep up with the substantive law in your areas of expertise and educate yourselves to new techniques and concerns. This most recent issue contains a long essay on after-acquired evidence. It is a good piece written at a level of abstraction a judge, or better still, a law clerk, can understand. The next time you have such a case you might consider sending the article to the judge.

Interestingly, when you summarize the results of a case you never seem to note which judge or judges decided the case. This would be helpful information. Today I believe you can almost predict the result of a case in the Michigan Court of Appeals by simply knowing the names of the panel members.

With regard to lawyer writing, I encourage it. Last week the Detroit Legal News contained an excellent essay on the extra-legal practices of the Oakland County Circuit Court in appointing special masters. Judges like being criticized and good judges do not mind honest criticism.

I also know some of you personally by meeting you in trial or in a conference in chambers. Many of you are very thorough and very direct. You instill confidence with your professionalism; credibility with a judge is important. Some of you write overly long briefs and do not clearly analyze the facts of your case. Those of you who regularly represent employers or labor organizations tend to do a better job for your clients than some of you who represent plaintiffs, be they an employee or dissatisfied member of a labor organization. I am compelled to that conclusion because lawyers representing plaintiffs in labor and employment cases seem to have less experience and the more difficult side of a case at trial or resisting summary judgment. While I have not done a statistical analysis I have a feeling that more often than not substantive decisions tend to go against plaintiffs more than defendants in labor and employment cases.

CASE MANAGEMENT

I am sure you all know that l9-out-of-20 of our cases settle without a trial. Of the l9, about half settle before we lift a finger. As to the other nine, some are dismissed on l2(b)(6) motions and others are disposed of by summary judgment. ERISA cases settle or are resolved on summary judgment almost always. Labor cases such as breach of the duty of fair representation and internal union disputes have difficulty surviving a motion to dismiss or, if they do, a motion for summary judgment. Lawyers tend to jump into these cases without recognition of the likelihood of their entering a Cretan labyrinth and with no idea of how they are going to successfully exit. On the other hand, discrimination cases more often survive summary judgment as I will mention in a moment.

As your cases move forward you will find most of us are active case managers, particularly at the final pretrial conference. I, for example, want to know exactly who the witnesses will be and what exhibits will be offered. I frequently insist a bench book of exhibits be lodged with me the morning of trial. Failure by a judge to assure that a case to be tried is really ready for trial is a self-inflicted wound, as I have frequently found.

ADR

Many labor and employment cases are suitable candidates for alternate dispute resolution mechanisms, particularly in the form of mediation by a second judge. A good lawyer will recognize when a case should be diverted in this manner. This is particularly true for wage-hour cases and sex and race discrimination cases once somebody has gotten a bloody nose decision, as I call them. As to arbitration, I find a reluctance all the way around to use that form of dispute resolution.

Parenthetically, I do find employer lawyers overly optimistic when they come to court to overturn an arbitrator's decision. They fail to realize that, as is true for widows, orphans, sailors, and *pro se* plaintiffs, courts are there to protect arbitration decisions. That is, as long as the arbitrator did not exceed his or her jurisdiction.

SUMMARY JUDGMENT

Summary judgment is where the most effort in labor and employment cases is expended in the cases that I see as a judge. There are lots of problems here. First, it is dangerous to win on summary judgment if you are not sure you can hold on to a favorable decision in the court of appeals. From my experience sitting as a court of appeals judge, I know that the judges in Cincinnati look carefully at such dispositions

I am of the view that if a statement of material fact not in dispute runs more than l0 pages, there is a genuine issue over a material fact lurking in the case. Most labor and employment law is well-formed and needs no great elaboration. What is always different in each case is the fact scenario. This is where your effort should be directed. The material facts over which there is no genuine issue must be laid out with clarity and completeness and must lead to the inevitable conclusion that the non-movant has no case.

Employment cases, particularly discrimination cases, whether race, sex or disability, lend themselves less well than breach of the duty of fair representation or ERISA cases to summary judgment. You frequently see in discrimination cases language such as:

> There is no fixed, easy formula to prove the circumstances of discrimination. Such claims generally involve nebulous circumstantial evidence.

This tells you a judge is on firmer ground when he or she denies summary judgment than when he or she grants it.

Some years ago I tried a breach of the duty of fair representation case which illustrates very well the impact of circumstantial evidence. Briefly, the facts showed an employee discharged for theft. The union declined to take his case to arbitration. The facts showed that the employer's plant labor relations person always consulted with the unit manager if the employee was wanted back. In this case there was no evidence of consultation. There was in the file a sidebar note from the plant labor relations person to the central labor relations person who periodically sat down with the union representative to decide which cases would go to arbitration and which would be settled by a suspension. The note read "Hang tuff kid." I took the note to mean the plant labor relations person did not want the employee back regardless of the unit manager's desires, and that meant the plaintiff was treated unfairly. I found liability. The note evidence was circumstantial. I drew what I felt was a reasonable inference.

JURY TRIALS

Jury trials are different. Few labor cases are tried to a jury. Most employment discrimination cases, and that includes *Toussaint* cases, are tried to a jury. In such cases the greatest difficulty is finding agreement on the true issues and getting a consensus on jury instructions. I tell lawyers to first agree on the form of the verdict and the Rule 49(b) interrogatories, if appropriate, and then go to the instructions. I want the plaintiff to do the initial draft of the instructions and the defendant to then add, subtract or modify, instruction-by-instruction. I am always surprised, I should say, disappointed, at the low level of understanding and agreement on instructions by lawyers in such cases. And I strongly dislike trying to get agreement on instructions late in the afternoon on which the proofs closed with final argument to begin the next morn-

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ing. If lawyers have a weakness, it is not knowing how to draft a full and understandable set of instructions and if I have a weakness, it is not insisting that they do so before a trial starts.

OBSERVATIONS

There are some peculiarities about your cases which bear mention. Statutes are more often involved than common law principles. My job is to fill in the open spaces, as Carodozo put it. An example is *Raczak v. Ameritech.* My decision is reported at l994 W.L. 780899. The partial reversal is reported at l03 F.3d l257 (6th Cir. l997). I look forward to some commentary on my differences with Judge Boggs on when a statute is ambiguous.

Your cases engender more *pro se* plaintiffs and in defending such cases you tend to use too much paper.

Attorney fees, pre-exemption principles of removal and statute of limitations issues are more present than in other types of cases.

All of these distinct features tend to be exaggerated because, as I said earlier, judges do differ. On that point, look at my dissent in *NLRB v. The Mead Corporation,* 73 F.3d 74 (6th Cir. l996).

CONCLUSION

Let me now elaborate on my early comment about the debate over principles of judging which occupies so much print media space and engenders pull-string feelings today. In my view, this is really a debate over results. Two quotations which I frequently use illustrate this. The first comes from an early Twentieth Century English judge:

> The law as laid down in a code, or in a statute or in a thousand eloquently reasoned opinions, is no more capable of providing all the answers than a piano is capable of providing music. The piano needs the pianist, and any two pianists, even with the same score, may produce very different music.

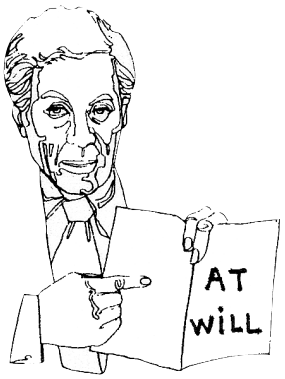
The second quotation is from Chancellor Kent, an early Nineteenth Century New York State judge. In describing how he approached deciding a case, Kent said his practice was to make himself fully familiar with the facts and then:

> I was master of the cause and ready to decide it. I saw where justice lay and the moral sense decided the cause half the time, and I then sat down to search the authorities until I had exhausted my books, and I might once and a while be embarrassed by a technical rule, but I most always found principles suited to my views of the case.

And so with all judges.

(**Editor's Note:** The three articles reflecting Judge Cohn's views published in the *Michigan Bar Journal* are: "Effective Trial Practice: One Judge's View: (December 1982); Effective Writing: One Judge's Observation" (November 1983); and "Effective Advocacy In My Court" (October 1990). Taking Judge Cohn's suggestion, where appropriate *Lawnotes* columnists will identify judges deciding cases discussed in their columns.)

DEVELOPMENTS IN WRONGFUL DISCHARGE EMPLOYMENT LITIGATION



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Editor's Note: This outline includes cases decided between July 1996 and mid April 1997. For other recent developments, *see* Joseph J. Vogan, "Recent Decisions and Developments In Wrongful Discharge Employment Litigation: Michigan, Sixth Circuit and U.S. Supreme Court Review," Vol. 6, No. 3 *Labor and Employment Lawnotes* (Fall 1996).

Under Michigan law, there are two general theories of liability: (1) breach of contract; and (2) unlawful motivation. Under the contract theory, there are two different sub-theories: (A) express agreement; and (B) legitimate expectations arising from company policies. This outline addresses contract claims.

I. ESTABLISHING A JUST CAUSE CONTRACT

A. ORAL REPRESENTATIONS

1. Statements by the personnel director that the at-will provision was intentionally excluded from the employee handbook to discourage unionization, and that the handbook was designed to "communicate to employees that Carr was a good place to work" are *not* sufficient to show that a just cause contract had been formed. *Conley v Carr & Son, Inc,* No. 183681, Mich LW Op #26468 (Mich Ct App, 1996);

2. Statements by employer's representatives to plaintiff, who was holding a temporary position, that plaintiff had a good chance of obtaining a permanent position were not enough to instill a legitimate expectation of just cause employment. *Laurens v City of Southfield,* No. 181615, Mich LW Op #26016 (Mich Ct App, 1996);

3. Oral statements that "as long as if [sic] I did a good job and came on time and followed the rules, I would always have a job" were not sufficiently "clear and unequivocal to overcome the presumption of at-will employment." Especially not where the employee was given a handbook and an employment application subsequent to this statement that stated unequivocally that the employment relationship was at-will. *Marceau v J C Penney,* No. 95-70091, Mich LW Op #25659 (ED Mich, 1996);

4. Summary disposition for the employer is proper where plaintiff resigned after he was required to report to a supervisor he disliked. There was no breach of employment contract nor was there a constructive discharge. Plaintiff failed to prove the existence of

an enforceable agreement that he would not be required to work for this supervisor. Additionally, he was unable to prove that his working conditions were so intolerable that he was constructively discharged. *Sheats v Akzo Coatings*, No. 180171, Mich LW Op #28444 (Mich Ct App, 1997).

5. Oral statements made by a supervisor to an employee concerned about her job security that she should not worry and "I don't expect any changes in [your department] and even if I do, you're okay," did *not* modify her at-will employment relationship into a just cause relationship. The plaintiff's promissory estoppel claim fails as well because these statements do not create a clear and definite promise. *Burns v House of Representatives*, No. 192552, Mich LW Op #28477 (Mich Ct App, 1997).

6. Where plaintiff "hoped" he would continue his employment until his 65th birthday and where two of the employer's agents told him that they "understood" and "interpreted" his employment to be for cause, no just cause employment contract was created. *Barstow v Marshall Area of Chamber of Commerce*, No. 136184, Mich LW Op #28553 (Mich Ct App, 1997).

7. Where plaintiff fails to present evidence that he specifically engaged in preemployment just-cause negotiations involving discussion of job security, his claim for breach of a just-cause contract fails. Little significance was given to the fact that plaintiff did not sign defendant's employment application, which provided for at-will termination. Also, plaintiff's subjective expectancy that his non-compete agreement created just-cause employment is not sufficient to establish a contract. *Kammerer v Meadowbrook, Inc*, No. 183261, Mich LW Op #28550 (Mich Ct App, 1997).

8. Plaintiffs' vague observations and vague statements made by managers stating that employees who were laid off might be rehired are not enough to overcome the presumption of at-will employment where plaintiffs were employed for an indefinite period of time. Employer also properly notified employees that layoffs could be made on *both* seniority and performance. This modification was legitimate. *Albers v Chrysler Corp*, No. 187985, Mich LW Op #28643 (Mich Ct App, 1997).

B. EMPLOYEE HANDBOOKS AND PERSONNEL MANUALS

1. Where plaintiff applies for and is granted a leave of absence pursuant to a leave policy, no employment contract is created. This is true despite language in the leave application that states that plaintiff will be reinstated to a job of like status and pay. The express at-will language on the cover of the leave material was unambiguously clear that there was no intent to enter into an employment contract. *Rochau v AT&T Corp*, No. 95-71077, Mich LW Op #27733 (ED Mich, 1997);

2. Summary disposition in favor of the employer was proper where plaintiff failed to overcome the presumption of an at-will policy. Statements by the president and the plant manager that they thought there should be a reason to fire an employee did not create a unique position nor do they support a finding of an employment contract. Lastly, no specific language in the employer's policies supports plaintiff's legitimate expectations of just-cause employment. *Demeter v Multi-Molding Co*, No. 188923, Mich LW Op #28606 (Mich Ct App, 1997).

C. EXPRESS WRITTEN AGREEMENT

1. Where criminal plea agreement stated that plaintiff agreed not to contest any disciplinary action taken against him by his employer, the state court properly dismissed his wrongful discharge action. *Catalano v Charter Township of Clinton, et al*, No. 93-005412, Mich LW Op #25754 (Mich Ct App, 1996);

2. An oral at-will employment contract is modified by a subsequent written document. The court held that a letter suspending plaintiff's commission pay was "an unambiguous lawful change in the employment contract relationship." An employer may unilaterally alter an at-will employment contract. *Lukianoff v Reliable Glass Co*, No. 92-229922-CK, Mich LW Op #25475 (Mich Ct App, 1996);

3. Where plaintiff had a formal month-to-month employment agreement with defendant, plaintiff's employment was terminable at-will and plaintiff had no legitimate expectation of just cause termination, except for the one-month notice period. *Zeeff v General Motors Corp*, No. 188360, Mich LW Op #26757 (Mich Ct App, 1996);

4. Where plaintiff cannot prove an employment relationship, there is no cause of action for breach of the alleged employment contract. The economic reality test is used to determine if a relationship exists. The relevant facts considered include: (1) control of a worker's duties; (2) payment of wages; (3) the right to hire, fire, and discipline; and (4) performance of the duties as an integral part of the employer's business toward the accomplishment of a common goal. *Harrington v First Independence Corp*, No. 183383, Mich LW Op #28588 (Mich Ct App, 1997).

II. WHAT CONSTITUTES JUST CAUSE?

A. MISCONDUCT

1. Where defendant's employee handbook states that unapproved contact with patients is "misconduct that will result in immediate termination, except under the most extenuating circumstances," defendant was justified in terminating plaintiff, who had sexual relations with a patient who was a survivor of sexual abuse. The plaintiff could be terminated despite the fact that he, too, was also in therapy. *Schillinger v Mercy Health*, No. 184643, Mich LW Op #25800, (Mich Ct App, 1996);

2. Where an employee twice violated the bank's cashiers check policy, employee was properly fired because her violation caused a loss to the bank. *Wear v D&N Bank*, No. 173987, Mich LW Op #28441 (Mich Ct App, 1997).

3. Where an employee claims that she was improperly fired because she was a satisfaction employee, but was fired for failing to comply with the employer's statement of business principles to which she had agreed to abide, the employee should have no

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legitimate expectation of continued employment. *Alexander Hamilton Life v Household Int'l,* No. 187615, Mich LW Op #28641 (Mich Ct App, 1997).

B. ECONOMIC JUSTIFICATION

1. Where plaintiff is terminated because of economic necessity and admits that he was terminated as a direct consequence of the company's "serious financial difficulties," judgement NOV is properly granted to defendants. "A plaintiff has no cause of action for wrongful discharge when his position is eliminated for bona fide economic reasons." *Logue v. Crankshaft Machine and Avis International Corp,* No. 184658, Mich LW Op # 28753 (Mich Ct App, 1997).

2. Where a reduction in workforce eliminates the plaintiff's position, the just-cause employment contract is not breached. *Boehm v Providence Hospital,* No. 189704, Mich LW Op #28829 (Mich Ct App, 1997).

III. STATUTE OF LIMITATIONS

Where plaintiff's right against retaliatory discharge does not arise from any implied promise or term agreed upon by the employer, the claim sounds in tort and not in contract. Therefore, the statute of limitations is three years. *Perry v Huron County,* No. 173241, Mich LW Op # 25297 (Mich Ct App, 1996).

IV. PUBLIC EMPLOYEES

A. Where plaintiff, a public employee, is not entitled to continued employment, she has no protected property interest in her government employment and cannot sue under § 1983. *Bailey v Floyd Co. Bd of Ed,* 106 F3d 135 (6th Cir, 1997). Plaintiff claimed that there was an implied contract in a policy manual which changed her into a just cause employee entitled to due process protection. "Government employees with a protectable property interest in their jobs are ordinarily entitled to pre-deprivation notice of the charges, an explanation of the employer's evidence, and an opportunity to present their account of the events. *Bailey* at 141, quoting *Cleveland Bd of Ed v Loudermill,* 470 US 532, 546 (1985). As an at-will employee, plaintiff had no such property interest and so her claim failed.

B. Where plaintiff was appointed to his position by the mayor and he "works under the direction of the mayor," he was a political appointee and defendants were free to terminate him without cause. The termination policy in the policy manual listing the reasons an employee can be terminated does not change his position into one of just cause. *James v City of Burton,* No. 180040, Mich LW Op #27776 Mich Ct App, 1997).

PROTECTING THE RIGHT TO UNIONIZE

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I. THE RIGHT TO ORGANIZE

A. THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 151-169, "seeks to improve labor relations . . . in large part by granting specific sets of rights to employers and employees," including the right of employees "'to self-organization, to form, join, or assist labor organizations, to bargain collectively" and for other mutual aid or protection. *NLRB v. Town & Country Electric, Inc.*, 133 L.Ed.2d 371, 376 (1995). "It is fundamental to the statutory framework of the Act that unions play an integral role in the fulfillment of these Section 7 rights." *52nd Street Hotel Associates, d/b/a Novotel*, 321 NLRB No. 93, 152 LRRM 1201, 1211 (1996).

B. PRESERVING "LABORATORY" CONDITIONS

Congress has entrusted the National Labor Relations Board ("Board" or "NLRB") "with a wide degree of discretion in establishing the procedure and safeguard necessary to insure the far and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330-331 (1946). "Over the past 60 years, the Board has exercised that discretion on numerous occasions to develop rules and policies governing the conduct of representation elections. At all times, the Board's paramount concern has been, and still is, assuring employees full and complete freedom of choice in selecting a bargaining representative." *Kalin Construction Co.*, 321 NLRB (1996). As part of its efforts to ensure prompt elections, the NLRB has implemented new procedures to avoid delays. *General Counsel Memorandum* 96-2, February 23, 1996.

The Board seeks to conduct elections under the "laboratory conditions" necessary to ensure freedom of choice:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault of others, the requisite laboratory conditions are not present and the experiment must be conducted over again. *General Shoe Corp.*, 77 NLRB 124, 127 (1948).

See, generally, *An Outline of Law and Representation Cases* (GPO 1992); *Bro-Tech Corp. v. NLRB*, 154 LRRM 2359, 2363 (3rd Cir. 1997) (the "Board has chosen to develop union election law through *ad hoc* adjudication," it sometimes "puts forth such a patchwork of adjudications without adequate rationalization, thereby abandoning potential litigants inside a maze of decisions with no means to map an exit.")

It is "not necessary" for the Board to find that the employer committed an "unfair labor practice in order to find conduct objectionable" because the "'effect of preelection conduct on an election is not tested by the same criteria as conduct alleged by a complaint to violate the Act.'" *Siemens Manufacturing Company*, 322 NLRB No. 180, p. 1 n. 2 (1-31-97).

Selected decisions by the NLRB announcing "new rules" or simply applying well-established precedent, as well as selected court decisions, addressing how some employers try to undermine organizing drives, are discussed below.

II. NEW WAYS FOR AN EMPLOYER TO ENGAGE IN OBJECTIONABLE CONDUCT

The NLRB recently has overruled precedent, or announced new principles, to reduce the employer's ability to coerce or intimidate employees during union organizing drives.

A. OFFERING TO PAY OR PAYING EMPLOYEES TO VOTE IS OBJECTIONABLE, BUT PAYING TRANSPORTATION COST IS PERMITTED

Sunrise Rehabilitation Hospital, 320 NLRB 212, 151 LRRM 1234 (1995)(ruling that the "Employer's offer to pay employees' 2 hours pay to come in on election day constitutes objectionable conduct," overruling *Young Men's Christian Assn.*, 286 NLRB 1052, 126 LRRM 1329 (1987); the "monetary payments that are offered to employees as a reward for coming to a Board election and that exceed reimbursement for actual transportation expenses" is objectionable.)

Lutheran Welfare Services, 321 NLRB No. 131, 153 LRRM 1020 (1996) (applying *Sunrise*, employer's offer of 2 hours pay to off-duty employees who came to vote in election was not linked in any way to transportation expenses and is an unlawful reward for voting.)

Good Shepard Home Inc., 321 NLRB No. 56, 152 LRRM 1137 (1996) (finding union reasonably gave employee $25 to cover transportation cost where employee lives 50 miles from the employer's premises, rejecting the employer's argument that cost must be "actual" or "precise to a mathematical certitude.")

52nd Street Hotel Associates d/b/a Novotel New York, 321 NLRB No. 93, 152 LRRM 1201 (1996) (ruling it lawful and not an objectionable grant of benefits for a union during an organizing drive to provide legal services to file a lawsuit on behalf of employees alleging the employer violated the Fair Labor Standards Act; distinguishing *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995).)

B. USING PHOTOGRAPHS OF EMPLOYEES IN EMPLOYER'S VIDEOTAPE IS UNLAWFUL

Sony of America, 313 NLRB 420, 145 LRRM 1242 (1993) (ruling as unlawful the use of photographs of employees in employer's anti-union videotape without the employees' consent.)

Allegheny Ludlum Corp., 320 NLRB 484, 484 n.2, 152 LRRM 1142 (1996) *enfd.*, 104 F.3d 1354 (D.C. Cir. 1997) (employer violated the Act "by requiring employees who objected to being included in its antiunion videotape to submit a request to be excluded from the videotape and by maintaining a list of objectors as, by its actions in this regard, the Respondent effectively polled employees concerning their union sentiments.")

Overnite Transportation Co. v. NLRB, 104 F.3d 109, 154 LRRM 2164, 2169 (7th Cir. 1997) (rejecting employer's argument that union "still photographs and videotaping amounted to campaign surveillance that was threatening enough to interfere with the election. Here again, context is crucial. We do not have a case where the photographs target anti-union activities with express or implied threats that they will rue the position they have taken."); *Kmart Corp.*, 322 NLRB No. 188, 154 LRRM 1113 (1/6/97) (union did not interfere with election when it took photographs and videotape of handbilling).

C. CHANGING THE PAYROLL METHOD OR HOW PAYCHECKS ARE ISSUED DURING ORGANIZING DRIVE

The Board adopted a "new rule, similar to the one set forth in *Peerless Plywood Co.*, 107 NLRB 427 (1953), prohibiting the kind of eleventh-hour campaign tactics employed by the Respondent." *Kalin Construction Company, Inc.*, 321 NLRB No. 94, p. 1, 152 LRRM 1226 (1996). The Board "overruled prior cases that are inconsistent with the rule." 321 NLRB at 4 n. 1.

In *Kalin*, the Board announced "that last-minute changes in the paycheck process have an unsettling effect on the employees and disturb the laboratory conditions necessary for a free election." 321 NLRB at 4. The Board will set aside an election upon filing of valid objections if there is a change in any of the four elements:

1. The paycheck itself.
2. The time of paycheck distribution.
3. The location of paycheck distribution.
4. The method of paycheck distribution.

* * *

In sum, the rule merely prohibits campaign-motivated changes in the paycheck process during and immediately before a Board election. 321 NLRB at 4.

The Board found the employer engaged in objectionable conduct because it issued split paychecks — one for "dues" and the rest for wages — contrary to its "standard single paycheck" and it changed the method of distribution. 321 NLRB at 5.

D. DISTRIBUTION OF ANTI-UNION PARAPHERNALIA

Employers can "make anti-union paraphernalia available to employees at a central location unaccompanied by any coercive conduct." *Barton Nelson, Inc.*, 318 NLRB 712, 150 LRRM 1074-5 (1995); *House of Raeford Farms*, 308 NLRB 568, 141 LRRM 1057 (1992).

The employer's method of distributing t-shirts or hats to employees often is a source of objectionable conduct. In *House of Raeford*, the NLRB ruled that the distribution of "vote no" t-shirts was illegal because even though the clerk gave them only to employees who requested them, the clerk required employees requesting a shirt to sign a list. The "practice of recording the names of employees who accepted the anti-union apparel reasonably tended to interfere with employee free choice in the election." 141 LRRM at 1060. The employer "did not simply provide a supply of t-shirts at a central location, unaccompanied by any coercive conduct." This is consistent with *Allegheny Ludlum*, 320 NLRB 484 (1996), where the employer maintained a list of employees who objected to being in a videotape.

Likewise, in *Barton* the employer distributed anti-union hats illegally because "various supervisors personally distributed the hats, presumably to a large number of unit employees, a week before the election" and "*solicited* them to wear anti-union or pro-employer paraphernalia" so that employees were forced to "make an observable choice that demonstrates their support for or rejec-

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tion of the union." *Barton*, 318 NLRB at 712 (emphasis added); *Dual Temp Co.*, 322 NLRB No. 44, p. 5 (1996) (setting aside election lost by the union where the employer offered "vote No" badges to employees during "captive audience meeting," which had effect of polling employees; noting that "supervisors were involved, especially during require in-plant meetings.")

Like an employer, a union can distribute "inexpensive pieces of campaign propaganda such as buttons, stickers or t-shirts." In *Owens-Illinois*, 271 NLRB 1235, 117 LRRM 1104, 1105 (1984), the Board found it objectionable for a union to give away $16 union "jackets" on election day between voting sessions, since it "could well have appeared to the electorate as a reward for those who had voted" for the union and "as an inducement for those who had not yet voted to do so" in the union's favor. Chairman Gould believes that the opinion in *Owens-Illinois* "does not withstand scrutiny." *Sunrise Rehabilitation Hospital*, 320 NLRB 212, 213 n. 7 (1996); *See, Wells Aluminum Corp.*, 319 NLRB 798, 153 LRRM 1115 (1995) (union's distribution of "about 25 t-shirts and hats" was not objectionable where only "some" were distributed on election day and most were made available to employees attending union meetings.); *But see Trencer Inc. v NLRB*, 154 LRRM 3027 (5th Cir. 4/8/97) (refusing to enforce NLRB order when union promised "the biggest party in the history of Texas" during campaign).

III. "HALLMARK" VIOLATIONS: NEW USES OF THE OLD WAYS EMPLOYERS ENGAGE IN OBJECTIONABLE AND UNLAWFUL CONDUCT

A review of selected NLRB decisions issued from September 1995 (NLRB volume 319) through the present (NLRB volume 323) reveals a large number of cases in which employers destroyed the laboratory conditions during organizing campaigns.

These employers adopt "a classic 'carrot and stick' approach" during an organizing drive: discharge of union supporters, threats to close, interrogations, surveillance and telling employees bargaining will start from scratch and other tried and true tactics; at the same time, the employers offer benefits if the union loses, the "fist inside the velvet glove" strategy. *Adam Wholesalers*, 322 NLRB No. 50, p. 2 (1996).

A. DISCHARGING UNION SUPPORTERS

"Threats of discharge and the discharge of union adherents have long been considered by the Board and the courts to be 'hallmark'" violations. *Adams Wholesalers*, 322 NLRB No. 50, p. 2 (1996).

Town and Country Elev. Inc. v. NLRB, 133 L.Ed.2d 371 (1995) (paid union organizers, a/k/a salts, are employees and cannot be discharged by the employer); *See also NLRB v. Fluor Daniel, Inc.*, 102 F.3d 818 (6th Cir. 1996).

McClain of Georgia, Inc., 322 NLRB No. 58 (1996) (employer violated Act by discharging and laying off union supporters and soliciting grievances for employees and promising benefits in return for opposing union.)

Obars Machine & Tool Co., 322 NLRB No. 45, p. 5 (1996) (layoff of employee was for union activity, noting that "the timing of an employer's action can be persuasive evidence of its motivation" and that the "term 'attitude' has sometimes been used as an indirect reference to an employee's union activities or support.")

Aero Detroit, Inc., 321 NLRB No. 135, p. 2 (1996) (ruling that discharge was unlawful "based upon the abundant evidence of anti-union animus," including fact that employer never applied its rule concerning absences in this fashion.)

Yesterday's Children, Inc., 321 NLRB No. 97 (1996) (applying *Wright Line*, the Board, in reversing the ALJ, found the discharges arose out of employees' protected concerted activity, including attending a union meeting; as the supervisor's "dislike began from animosity over protected activity, we infer that this 'dislike' was a product of animus toward" employees' lawful activity.)

Intersweet, Inc., 321 NLRB No. 4, p. 1 (1996) (employer "reacted to the first hint of a union campaign by terminating the entire bargaining unit and failing to recall most of the union supporters.")

Florida Coca-Cola Bottling Co., 321 NLRB No. 1 (1996) (employer violated Act during organizing drive by threatening to discharge employee for his union activity, creating impression of surveillance, promulgating a rule prohibiting employees from discussing "the Union with other employees," and withholding paychecks after the election, among other things.)

Washington Nursing Homes, Inc., 321 NLRB No. 48, p. 10, 153 LRRM 1222 (1996). ("While there is no direct evidence of union animus in this record, the record as a whole clearly warrants the inference that such animus motivated the discharges," including the fact that the employer "failed to question other employees about the alleged acts of misconduct.")

McCarty Feeds, Inc., 321 NLRB No. 8, p. 4 (1996) (finding discharge of union supporter was illegal where the "series of warnings occurred in a short time when the facilities' personnel director had illegally warned [employee] about his union solicitation activities and the facilities' highest ranking official has expressed a desire to get him out of there 'whatever it takes.'")

Schaelf, Inc., 321 NLRB No. 34, p. 16 (1996) (discharge of three union supporters during organizing drive was unlawful, noting that all "three employees who had met with Sturgen [union organizer] were terminated, a factor which, of itself tends to 'give rise to an inference of violative discrimination.'")

Opportunity Homes, Inc. v. NLRB, 153 LRRM 2961, 2963-4 (6th Cir. 1996) (upholding NLRB decision that employer's discharge of a "well-known union supporter" and others was due to the support for the union, especially where the dischargees "had exemplary records prior to the unionization effort.")

B. THREATS OF PLANT CLOSING OR JOB LOSS

Threats of "plant closure and other types of job loss" have long been held to be more "likely than other types of unfair labor practices to affect the election condition negatively for an extended period of time." *Electro-Voice, Inc.*, 320 NLRB 1094, 152 LRRM 1042, 1044 (1996). Threats of closure and job loss are "hallmark" violations whose effect on employees "cannot be underestimated." *Gerig's Dump Trucking*, 320 NLRB 1017, 152 LRRM 1045 (1996). That is because such "threats serve as an insidious reminder to employees every time they come to work that any effort on their part to improve their working conditions may be met with complete destruction of their livelihood." *Electro-Voice*, 320 NLRB at 1095.

Genesee E. Family Restaurant, 322 NLRB No. 36 (1996) (finding a variety of illegal conduct: threat to close, interrogation, impression of surveillance, promise of benefits, suspensions and discharges, actual closing, and reopening as alter ego.)

Weldun International Inc., 321 NLRB No. 103, p. 1-2, 153 LRRM 1021 (1996) (ruling that employee's "permanent layoff of 29 employees" violated the Act; the employer did not single out union adherents, but "used a mass layoff to intimidate its employees and the discourage them from voting for union representation.")

Gravue Packaging, 321 NLRB No. 169, p. 5 (1996) (employer violated Act by telling employees "that he would do everything in his power to keep the union out," which constitutes a "threat that the employees' efforts to gain representation would be futile.")

Laser Tool, Inc., 320 NLRB 105, 111 (1995) ("totality of the circumstances show that the Respondent's oral remarks threatened its employees with plant closure if they selected the union," such remarks included references to plant closure and job loss as a direct result of unionization.)

Harbor Cruises, Ltd., 319 NLRB 822, 153 LRRM 1101 (1995) (employer violated Act and engaged in objectionable conduct when it told employees it "would go out of business" if it had to provide health and vacation benefits.)

C. "FIST INSIDE THE VELVET GLOVE:" GRANTING WAGE INCREASES OR OTHER BENEFITS BEFORE THE ELECTION

In an attempt to quell an organizing drive, some employers make improvements in working conditions and grant wage increases or improve benefits while also making threats — the "carrot and stick" approach. The Supreme Court recognized that employees perceive the "fist inside the velvet glove" implicit in such tactics and made it illegal. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *Electro-Voice*, 320 NLRB at 1096. "Unlawfully granted benefits have a particularly long lasting effect on employees and are difficult to remedy by traditional means not only because of their significance to the employees, but also because the Board's traditional remedies do not require a Respondent to withdraw the benefits from the employees." *Gerig's Dump Trucking*, 320 NLRB 1017, 1018-9, 152 LRRM 1045, 1046 (1996).

Siemens Manufacturing Company, 322 NLRB No. 180 (1-31-97) (election overturned where employer's president made a captive audience speech the day before the election, telling employees the company has given wage increases every year, plus bonuses; "If the Union wins, ... [d]uring that [first] year, everything including wages, is frozen until we reach an agreement at the negotiating table"; the employer "did not make it clear that wages and bonuses were subject to negotiations with the Union or frame them in terms of a prediction concerning the outcome of bargaining.")

Lampi, L.L.C., 322 NLRB No. 81, 153 LRRM 1243, 1244 (1996) (ruling that the employer's "wage increase was unlawful and objectionable" during organizing drive where "before the election, the Respondent had indicated to the employees that it could not afford wage increases that year, *inter alia*, because it had just built a warehouse," and then later granted a large increase, "accompanied by a bulletin board announcement.")

Selkirk Metalbestos, 321 NLRB No. 9, 154 LRRM 1210 (1996) (" 'I will sit down with all employees to devise a plan for the handling of complaints' is a promise that there will be a complaint procedure if the Union loses the election.")

Laser Tool, Inc., 320 NLRB 105, 111 (1995) (employer violated Act when it told employee it "would like to pay him more, but because of the union campaign his hands were tied" since it implies that the "union bears the animus for withholding benefits.")

Skyline Distrib. v. NLRB, 153 LRRM 2801, 2805 (D.C. Cir. 1996) (while upholding the Board's finding that the employer granted new benefits to "discourage the maintenance employees from union activities," the court criticized *Exchange Parts* as "counterintuitive, it has been challenged by preeminent labor law scholars, who question whether certain ULPs do in fact adversely affect free and uncoerced choice by workers.")

D. THREATS, INTERROGATIONS AND SIMILAR TACTICS

In weighing the likely impact of an alleged threat by an employer, the Board "must take into account the economic dependence of the employees on their employer, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

Delta Mechanical, Inc., 323 NLRB No. 5, p. 3 (2-26-97) (employer violated the Act by telling employees that they would be fired if anyone "was union.")

Hudson Moving and Storage Co., 322 NLRB No. 187, p. 5 (2-11-97) (unlawful interrogation where employer's president asked employee "why the employees want to join the Union, why he didn't tell her about such activities, and that she knew the identity of every employee who signed a card" and that company would "never sign" a contract with the union.)

Appollo Construction Co., 322 NLRB No. 182 (1-31-97) (in order to "impede the Union's organization effort," the employer unlawfully "segregated those employees who had worn the union's insignia from its other employees, engaged in close surveillance of its employees, restricted access to, from, and within the" shop, informed them in "effect that it was futile for them to support the Union and that it would close down its operations first and discharge union supporters.")

Eaton Technologies, 322 NLRB No. 148 (1-10-97) (finding interrogation of employee unlawful where supervisor "approached the employee at the workplace, during working time;" citing *Rossmore House*, 269 NLRB 1176, 1177 (1984), where Board held that interrogations must be evaluated under the standard of "whether under the circumstances the interrogation reasonably intended to restrain, coerce, or interfere with rights guaranteed by the Act, looking at the background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation.")

Lampi, L.L.C., 322 NLRB No. 81, 153 LRRM 1243, 1244 (1996) (an employer's "prohibition against employees discussing their wages" is a "ground for setting aside the election.")

McGaw of Puerto Rico, Inc., 322 NLRB No. 73, p. 10 (1996) ("blackballing" union supporters, threatening "to interfere with the ability of employees who were laid off to obtain other employment because of their union activities," had a "dampening effect on prounion ardour and inhibited union activities.")

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Galloway School Lines Inc., 321 NLRB No. 178, pp. 2-3, 153 LRRM 1105 (1996) (successor employer violated the Act by "its discriminatory hiring plan," designed to avoid *Burns* bargaining obligations.)

Gravure Packing, 321 NLRB No. 169, p. 17 (1996) ("threatening to use unlawful means to keep the union out, to sell or close the plant, to make the employees' organization efforts futile, to reduce or eliminate benefits," to discharge or eliminate employees who supported the union," "by interrogating employees concerning the union activities," etc.)

Aero Detroit, Inc., 321 NLRB No. 136, p. 1 n. 3, 153 LRRM 1231 (1996) ("In adopting the judge's conclusions that the Respondent coercively interrogated employees about their union sympathies and activities, Chairman Gould and Member Browning note that the interrogations were accompanied by threats or promises of benefits. Accordingly, they find it unnecessary to rely on *Rossmore House*.")

Simmons Industries, 321 NLRB No. 32, p. 6 (1996) (employer violated Act by "telling employees that designation of the union as bargaining agent would be futile and that they could suffer unspecified reprisals as a consequence.")

Fairlane Town Center, 321 NLRB No. 22, p. 4 (1996) ("respondent's decision to invoke a new, unwritten, and unannounced policy and apply it to the sole union protagonist soon after the election petition was filed cannot be attributed to sheer coincidence.")

Laser Tool, Inc., 320 NLRB 105, 109 (1996) (although not the supervisor's style, the ALJ was "persuaded by the overall record that he [supervisor] was deeply affected by the sudden turn of events and I conclude that he reacted to the pressure of the union organization threat with a change in style that betrayed an apparent outrageous animus.")

E. TELLING EMPLOYEES BARGAINING WILL BE FROM SCRATCH OR IT WOULD BE FUTILE TO SELECT A UNION

In *Bi-Lo*, 303 NLRB 749, 750 (1991) the Board stated that in evaluating "'bargaining from scratch' comments that a distinction must be made between (1) a lawful statement that benefits could be lost through the bargaining process and (2) an unlawful threat that benefits will be taken away and the union will have to bargain to get them back." *See also Lear-Siegler Management Service Corp.*, 306 NLRB 393 (1991).

Laser Tool, 320 NLRB 105 (1995) (ordering a rerun election where employer used such terms as "bargain from scratch," "wind up losing more than you have," "no guaranteeing you anything if the union comes in," such comments announce that the employer would "engage in regressive bargaining, leaves the impression that it would not bargain in good faith, and clearly implies employees could lose existing benefits and that it would be futile for the employees to select the Union.")

Baby Watson, 320 NLRB 779, 785 (1995) ("an employer's threat that it would be futile for employees to select a union as their bargaining representative because the employer would never sign an agreement with the union violates Section 8(a)(1) of the Act.")

Mediplex of Wethersfield, 320 NLRB 510, 518-522 (1995) (ruling that while video did not unlawfully disparage the union, it did "inform the employees that it would be futile to select the union.")

F. PROHIBITING DISPLAY OF UNION INSIGNIA

"It is well-settled that absent some special circumstance, such as maintenance of production and discipline, safety, or preventing alienation of customers, employees have the protected right to wear union buttons at work." *Sonoma Mission Inn & Spa*, 322 NLRB No. 160, p. 6 (1/23/97) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945)).

Meyer Waste Systems, Inc., 322 NLRB No. 39, 153 LRRM 1255 (1996) (employer "applied its alleged policy against the wearing of insignia in an unlawfully discriminatory manner" and employer failed to show that the union insignia unreasonably interfered with a public image which the employer has established as part of its plan; "customer exposure to union insignia alone is not a special circumstance.")

Caterpillar, Inc., 321 NLRB No. 163 (1996) (employees who wore t-shirts critical of company official engaged in protected concerted activity.)

Simmons Industries, 321 NLRB No. 32, p. 6 (1996) (finding "no-soft-hat rule" applied to union hat was not illegal due to valid sanitation objective.)

Autodie International, 321 NLRB No. 98, 153 LRRM 1242, 1242 (1996) (ordering employees to remove union insignia unlawful.)

Yenkin-Majestic Paint Corp., 321 NLRB No. 50, 153 LRRM 1252 (1996) (employer violated the Act when it "unlawfully suspended" an employee for "displaying a prounion placard on his forklift" because a display of union support is protected activity unless the employer can show "special circumstances.")

Casa San Miguel, 320 NLRB 534, 540, 153 LRRM 1280, 1281 (1995) (employer did not violate Act when it prohibited nurses from wearing union button on uniform where they are in patient areas, especially where employer did not permit "other kind of emblems or messages" to be worn.)

G. CAPTIVE AUDIENCE MEETINGS: THE 24 HOUR RULE

Peerless Plywood Co., 107 NLRB 427, 133 LRRM 1151 (1953) established the 24 hour captive audience rule. It prohibits employers, as well as unions, from "making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." The Board found that such last-minute, captive audience speeches "have an unwholesome and unsettling effect and tend to interfere with that sober and thoughtful choice which a free election is designed to reflect." This 24 rule has been applied "with vigilance." *Industrial Acoustics Co. v. NLRB*, 912 F.2d 712, 720 (4th Cir. 1990).

An employer violates the *Peerless* rule by holding a captive audience meeting after the election ballots were mailed out even though the employer did not receive notice of the mailing date other than in the election agreement. *American Red Cross*, 322 NLRB No. 59, 153 LRRM 1239, 1239 (1996).

Bro-Tech Corp. v. NLRB, 154 LRRM 2359, 2362-3 (3rd Cir. 1997) (NLRB erred in failing to set aside election won by the union where it used a soundtruck to broadcast "songs" in violation of *Peerless Plywood*; the NLRB has applied the *Peerless Plywood* rule in the past to limit the "use of soundtrucks as well as assembly speeches.")

H. SURVEILLANCE OR SPYING ON UNION ACTIVITIES

"Employees should be free to participate in union organizing campaigns without fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. An employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement." *Electro-Voice, Inc.*, 320 NLRB 1094, 1094 (1996).

Albertson's, Inc., 323 NLRB No. 1 (2/20/97) (during a decertification election, the employer violated the Act by "engaging in surveillance of employees' union activities by confiscating prounion material from employees and copying them.")

McGaw of Puerto Rico, Inc., 322 NLRB No. 73, p. 9 (1996) (asking a "vote no" employee to engage in surveillance of union supporters and "to report on union activities" unlawful.)

Casa San Miguel, 320 NLRB 534, 537 (1995) (finding employer asked employees to spy on other employees' union activities, noting that the employer "decided not to discipline" the spies because they "had agreed to mingle with the other employees to find out about their union activities and act as informants for Respondent"; also "videotaping" of picketing to support organizing drive was unlawful.)

Reno Hilton Resorts, 320 NLRB 197, 153 LRRM 1126, 1126 (1995) (employer "engaged in an extensive campaign of employee surveillance" by employees who either had "volunteered their services" or "were recruited" by the employer "as paid campaigners against the union.")

Joy Recovery Technology Corp., 320 NLRB 356, 366, 153 LRRM 1188 (1995) (employer violated the Act "by asking employees to ascertain and to disclose to the employer the union membership, activities, and sympathies of other employees.")

I. ACCESS TO PRIVATE PROPERTY

The Supreme Court ruled that Section 7 does not protect nonemployee union organizers who seek to handbill on private property "except in the rare case when 'the inaccessibility of employees makes ineffective the reasonable attempts to communicate with them through the usual channels.' Where reasonable alternative means of access exist, § 7's guarantees do not authorize trespasses by nonemployee organizers." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 537 (1992) (quoting *NLRB v. Babcock*, 351 U.S. 105, 112 (1956).

The Board has noted that the "*Lechmere* decision does not disturb the Court's statement in *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956), that 'an employer may validly protect his property ... if (it) does not discriminate against the union by allowing other distribution." *Be-Lo Stores*, 318 NLRB 1, 10 n. 27 (1995). In *Be-Lo* the NLRB applied *Babcock's* non-discrimination principle to find that the employer illegally enforced its no-solicitation rule to deny access to the union. The employer permitted "non-union groups and individuals to solicit in and around its stores". *But see Cleveland Partners v. NLRB*, 95 F.3d 457 (6th Cir. 1996) (applying *Lechmere* and *Babcock* non-discrimination principle to deny enforcement to an NLRB decision even though other groups were allowed to handbill, holding that "the term 'discrimination' as used in *Babcock* means favoring one union over another, or allowing employer-related information while barring similar union-related information.")

FAQs (frequently asked questions)

- Under the Elliott-Larsen Civil Rights Act: Must an employee file a complaint with the Michigan Department of Civil Rights prior to filing a lawsuit? Can a successful plaintiff recover punitive damages?
- Under the Michigan Handicappers' Civil Rights Act: Is drug addiction or alcoholism a handicap? How much must an employer spend to provide an accommodation for a handicapped employee?
- Under Title VII of the Civil Rights Act: Can a plaintiff recover compensatory and punitive damages? How long does a claimant have to file a charge of discrimination with the EEOC?
- Under the Bullard-Plawecki Employee Right to Know Act: Does an employer have to maintain personnel files? What is a personnel file? When can an employee review, copy and add the employee's own statement to the personnel file?
- Under the Michigan Polygraph Protection Act: Can an employer require an employee or job applicant to take a polygraph exam? Can an employee voluntarily take a polygraph exam?

The answers to these and many other FAQs are available on the Labor and Employment Law Section's new World Wide Web page.

LELS On The Internet

The Section joined with the Institute of Continuing Legal Education to create an Internet presence. Section members can access the Section's new World Wide Web page at http://www.icle.org/sections/labor/. Resources presently or soon to be available on the web page include:

- Information on Section council meetings, seminars and activities.
- The complete text of *Lawnotes*, the Section's quarterly.
- An extensive list of frequently asked questions (FAQs), with answers, prepared by Thomas P. Brady. The list covers federal and Michigan discrimination law, the NLRA, the Whistle-Blowers' Protection Act, the Polygraph Protection Act, WARN, and the Bullard-Plawecki Employee Right to Know Act. The list will be expanded in the future to cover FMLA, OSHA, the Fair Labor Standards Act and re-employment rights under the Veterans Benefits Act.
- A comprehensive list of links to other labor and employment law resources on the World Wide Web.
- Selected papers from the ICLE-LELS-FMCS-sponsored Twenty-Second Annual Labor and Employment Law Seminar.

The web site is in constant development. Your comments and suggestions are encouraged. Contact Karl Brevitz, ICLE education director, by mail at 1020 Greene Street, Ann Arbor, MI 48109-1444, by telephone at (313) 764-0533, or via e-mail at Karl@ icle.law.umich.edu.

EEOC GUIDANCE ON THE EFFECT OF STATEMENTS MADE IN OTHER FORUMS ON ADA CLAIMS

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On February 12, 1997 the Equal Employment Opportunity Commission ("EEOC") issued "EEOC Enforcement Guidance on the Effect of Representations Made in Applications for Benefits on the Determination of Whether a Person is a 'Qualified Individual with a Disability' Under the Americans with Disabilities Act of 1990 (ADA)" ("Guidance"). This Guidance addresses perhaps the most significant issue in current ADA case law development: whether individuals with disabilities should be forced to choose between applying for disability benefits and vindicating their rights under the ADA.[2] The Guidance explains why individuals should not be placed in this untenable position and why representations made in other contexts about ability to work are not necessarily a bar to an ADA claim. The following discussion will highlight the key aspects of the Guidance and provide some practical suggestions concerning the issues addressed.

The issue concerning the effect of statements made in other forums about the ability to work usually arises in motions for summary judgement on the individual's ADA case. For example, plaintiffs may believe they have been discharged because of their disability. Unable to find work, they will apply for disability benefits (sometimes at their former employer's suggestion) and fill out the required benefit applications. In order to obtain benefits applicants generally must provide detailed statement concerning their disability (with medical documentation) and their inability to work. After the ADA case is filed the defendant may argue that because the plaintiff asserted an inability to work in another forum they should be judicially estopped from now claiming that they are a qualified individual with a disability who can perform the essential functions of the job that they held or desired - a prima facie element of their ADA claim.

While some courts have accepted this judicial estoppel theory, other courts have recognized the inherent inequity in barring a plaintiff from pursuing their civil rights as a matter of law solely because they applied for benefits in other forums applying different standards. The Guidance clarifies and provides support for the EEOC's position that statements made in benefit applications in different forums are simply evidence to be considered in determining whether the individual can perform the essential functions of the job in question.

The Guidance initially emphasizes that the ADA's purpose and standards are "fundamentally different from the purposes and standards of other statutory schemes and contractual rights". *Guidance* at 3. Thus the purpose of ADA is to eliminate barriers that prevent disabled individuals from participating in the economic and social mainstream and to provide legal remedies to individuals who have been discriminated against because of their disability. It is in the context of this broad remedial purpose that the statute sets specific standards for determining whether an individual is a qualified individual with a disability entitled to the ADA's protection. Other statutes or contracts which use similar terms are designed for other purposes. Accordingly, statements made in applications for benefits in these forums may be relevant to determining ADA qualified status, but cannot bar a finding that the individual is qualified for purposes of the ADA. *Guidance* at 3.

The most frequently cited evidence used to try to bar ADA claims are statements made to the Social Security Administration ("SSA"). The Guidance explains in detail why the Social Security benefit qualification determination is different from the ADA qualified status determination. *Guidance* at 7-13. Initially, the purpose of the SSA disability insurance program is to provide a basic level of benefits to individuals with disabilities who are generally incapable of gainful employment. *Guidance* at 7. No determination is made as to whether they are able to perform a specific job. Moreover, the SSA program does contemplate that some individuals may be able to work in certain jobs even though they are entitled to benefits. Thus SSA has trial work period and supplemental benefit provisions (when earnings fall below a statutory level). *Guidance* at 9.

Unlike the ADA, SSA does not make individualized inquiries about ability to perform essential functions; it permits generalized presumptions about an individual's ability to work, including that some conditions are presumptively disabling. *See,* 42 U.S.C. § 404.1520 (d). Nor does the SSA distinguish between the marginal and essential functions of a job or consider the possibility of accommodation. Some courts have refused to bar ADA claims on the basis of these distinctions. *See, Eback v. Chater,* 94 F.3d 410, 412 (8th Cir. 1996) (SSA determination is based on functional demands and duties as ordinarily required throughout the national economy and broad vocational patterns, not on requirements of individual position or consideration of accommodation); *Overton v. Reilly,* 977 F.2d 1190 (7th Cir. 1992) (determination of disability for SSA purposes cannot be construed as a judgement that the individual cannot perform the functions of a given position); *Mohamed v. Marriott International, Inc.,* 944 F. Supp. 277 (S.D. N.Y. 1996) (SSA benefits could be available to individuals because few jobs are structured to accommodate disability, but the particular position could be modified to accommodate the disability for purposes of the ADA); *Guidance* at 11-13.

Other courts have rejected this analysis. *See McNemar v. The Disney Store,* Inc., 91 F.3d 610 (3rd Cir. 1996) (court rejected argument that ADA standards and purposes are different from SSA and affirmed summary judgement even though plaintiff had AIDS, an SSA presumptive disability); *Kennedy v. Applause Inc,* 90 F.3d 1477 (9th Cir. 1996) (employee and doctor's statements of complete disability on claim forms for SSA and state disability benefits preclude ADA claim).

Statements made in forums other than Social Security likewise should not bar an ADA claim. For example, an individual is entitled to benefits under the Michigan Workers' Compensation Act ("Act") when they sustain a work related injury resulting in diminished wage earning capacity. MCL 418.301(4). The purpose of the Act is to provide fair compensation for the industrial injury. The determination that the individual is disabled focuses on what they cannot do rather than the ADA standard of what they *can* do with a reasonable accommodation. *Guidance* at 14. Some courts have nonetheless applied the estoppel theory based on statements made

in the workers' compensation context. *See, Lamury v. Boeing,* 1995 WL 643835 (D. Kan.); *Berg v Fairfax County Public Schools,* 105 F.3d 646 (4th Cir. 1997) (unpublished).

Similarly, statements made in applications for disability insurance are made in a context different from an ADA disability determination. The purpose of these policies is to provide partial wage replacement for employees unable to work due to injury or illness. The contractual right is determined based on eligibility standards defined in the policy. The policies typically provide coverage when the individual is unable to perform the duties of his or her own occupation. There is no distinction between essential and marginal functions and no consideration of accommodation. *Guidance* at 16-17. Some courts have recognized this distinction. *See, D'Aprile v. Fleet Services Corp.,* 92 F.3d 1 (1st Cir. 1996); *Pressman v. Brigham Medical Group Foundation, Inc.,* 919 F. Supp. 516 (D. Mass. 1996). Other courts have barred ADA claims based on statements in disability insurance plans, *See, Reiff v. Interim Personnel Inc.,* 906 F. Supp. 1280 (D. Minn. 1995).

The Guidance explains that statements in other forums should not be applied to bar ADA claims because of the ADA requirement of an individualized assessment of the particular individual's ability to perform the functions of a particular job while the other forums engage in more generalized inquiries and presumptions. *Guidance* at 18-22. Similarly the ADA requirement that qualified status be determined based on consideration of the effect of reasonable accommodation distinguishes the findings or statements in other forums which do not consider same. *Guidance* at 23-26.

The Guidance further explains why the principle of judicial estoppel is particularly inappropriate in this context. More specifically, the different standards in the forums suggests that the statements are not necessarily inconsistent, the prior statements were not made in another judicial forum and application of the judicial estoppel in a civil rights proceeding is contrary to public policy as it undermines the public interest goals of this federal statute. *Guidance* at 27-29, 35-37.

After concluding that prior statements in other forums should not bar an ADA claim, the Guidance provides factors to be considered in determining the weight to be given to the statements. These factors include whether the statements were in the charging party's own words; whether the statements were qualified in any way; when the representations were made and whether the charging party's condition has changed since then; the effect of advances in technology; whether the employer suggested that the charging party apply for the benefits (which is often the case); and, whether the charging party was denied a reasonable accommodation. *Guidance* at 38-39.

From a practical standpoint practitioners should be aware that the EEOC will process charges and weigh this evidence. Plaintiff's counsel should advise their clients as to the impact of inability to work statements in other forums. In any event, the EEOC will continue to litigate cases on behalf of individuals who have made disability statements in other forums. The EEOC has successfully avoided summary judgement in two cases in the Eastern District of Michigan where judicial estoppel was raised based on statements made in SSA proceedings and are awaiting a decision on a third case. The recent Sixth Circuit opinion in *Blanton v. Inco Alloys International,* 108 F.3d 104 (6th Cir. 1997), supports the EEOC's position in this regard. There, while the Sixth Circuit ruled that a district court did not abuse its discretion by barring a plaintiff from taking a contrary position as to ability to perform essential functions in an ADA claim under some circumstances,[3] it remanded the case on an accommodation issue. The court thus made clear that it will consider the effect of reasonable accommodation and will examine the statements in the context made. For example, it will consider whether the employer encouraged the employee to apply for disability benefits even though the employee was seeking work, as well as the result obtained (i.e., whether benefits were paid pursuant to a determination as opposed to a benefit denial or settlement). *Id.* at 109

The Guidance contains a detailed analysis of the developing law concerning the effect of disability statements in other forums on the individual's right to proceed with an ADA claim. The Guidance should be very helpful for practioners as it is written like a legal brief and contains numerous citations on both sides of this significant issue.

END NOTES

[1]Adele Rapport is the Regional Attorney for the Detroit District Office of the EEOC. The views stated in this article are her own and do not constitute EEOC policy or guidance.

[2]*See Smith v. Dovenmuehle Mortgage Co.,* 859 F. Supp. 1138 (N.D. Ill. 1994) (barring individual from bringing an ADA claim who applies for disability benefits is placing him in the untenable position of choosing between the right to seek disability benefits and the right to seek redress for an alleged violation of the ADA).

[3]In *Blanton* the Court found an "overwhelming weight of medical evidence", as well as specific admissions as to inability to perform specific functions.

COMMITTEE SPECIFIES CRITERIA FOR LELS DISTINGUISHED SERVICE AWARD AND SEEKS NOMINATIONS

This year the Labor and Employment Law Section established the Section's Distinguished Service Award. The first recipient, Ted Sachs, was presented with the Award at the Section's 1997 mid-winter meeting. The Distinguished Service Award committee — Virginia Metz, Art Przbylowicz, Kendall Williams, Andrea Roumell Dickson and Janet Cooper — seek nominations of future recipients.

The Award is to honor individuals who: (1) have made major contributions to the practice of labor and/or employment law; (2) reflect the highest ethical principles; (3) have advanced the development of labor and/or employment law; (4) have a long established commitment to excellence; and (5) are recognized and respected by all constituencies in the Section.

For additional information, or to submit a nomination, contact committee chair Virginia Metz at Vercruysse, Metz & Murray, 31780 Telegraph Road, Suite 200, Bingham Farms, MI 48025-3469.

THE VIEW FROM THE CHAIR

The Labor and Employment Law Section acted once again as co-sponsor with ICLE and FMCS of the "Annual Labor and Employment Law Seminar." Section members served as presenters and assisted in organizing this event. I am pleased to report that we had a record attendance of 192. This is the largest turnout since the Section has actively participated, up from a low of 87 attendees in 1989 and a high of 176 in 1996. This year, we experimented with a dual track system, with six seminar tracks and twenty topics, allowing registrants to customize their learning. A review of evaluations demonstrated registrants were pleased with the speakers and content.

The first day featured a luncheon with the Hon. Avern Cohn who delivered an informative and entertaining view from the bench on labor and employment litigation (printed in this issue of *Lawnotes*). The first day ended with a reception sponsored by the Section which was well-attended and provided an excellent opportunity to network with faculty and colleagues.

Allow me to extend my thanks to all the speakers, the LELS council members who took part in the planning and presentations, and especially, Karl Brevitz, the very able and hard working ICLE education director who makes the whole thing work.

The LELS council recently received the "Model Employment Policy Governing Family and Medical Leave" from the committee of Section members, assembled by former Chair Robert McCormick, to prepare it. We approved the model policy and are awaiting formal adoption by the State Bar Representative Assembly.

We are now planning our seminar, reception and dinner in conjunction with the State Bar annual meeting in Detroit on September 17, 1997 at the Crown Plaza (Pontchartrain) Hotel. The afternoon seminar will include panel discussions on voluntary alternative dispute resolution of employment cases and on the rights of strikers, cross-overs and replacement workers, and an update on the tax ramifications of employment settlements.

At the business meeting on September 17, I will pass the Section gavel to Sheldon Stark and we will elect several new council members to two-year terms and extend some first term members to second two-year terms.

In addition, we find it necessary to put before the Section a proposed by-law amendment raising annual dues from $20 to $30. The State Bar Board of Commissioners approved the $10 increase and we will ask Section members to approve the increase at the September 17 meeting. Section dues have not been increased in recent memory. The need for the increase became obvious after viewing a detailed financial report and projection of Section income and expenses prepared by treasurer Virginia Metz. We must reduce expenses this year and next year. We will not realize the impact of the proposed $10 dues increase until 1999.

Our single biggest expense is the production and mailing of *Lawnotes* — one of the most valuable and popular services we provide to Section members. *Lawnotes* editor Stuart Israel and associate editor John Adam put great effort into this quality product. Unfortunately, due to increases in printing and mailing expense, they have found it necessary to institute cost cutting measures, including bulk mailing and reduction of the number of *Lawnotes* pages.

Section dues also subsidize our biggest event of the year — the LELS annual mid-winter meeting. Each year, the Section provides a friendly, open environment for all of us to meet, a stimulating after-dinner speaker and comprehensive seminars. Section dues also subsidize our seminar, reception and dinner held each year in conjunction with the annual State Bar meeting. In addition, the Section makes an annual contribution to the Gottfried Symposium and provides scholarships enabling the attendance of students from all law schools in Michigan. We are exploring formal co-sponsorship of this event, which is tentatively scheduled in 1997 for October 16. In the name of the 1997 LELS Distinguished Service Award recipient, Ted Sachs, the Section provided a $1,000 scholarship to a Michigan law student to support the study of labor law. In the past the Section has sponsored a law student writing competition and is now considering additional CLE initiatives.

As past Chair Paul Kara wrote recently, "in addition to *Lawnotes*, we provide our membership with a full range of continuing legal education with several opportunities each year to build the collegiality among our membership for which we are so well known." To continue all of the activities outlined above, we need your support, and your approval of the dues increase.

Ronald D. Helveston, *Chairperson*
Labor and Employment Law Section

NLRB PRACTICE AND PROCEDURE

William C. Schaub, Jr.
Regional Director, Region Seven
National Labor Relations Board

The members of the NLRB Local Practice and Procedure Committee met on April 18, 1997 to discuss (1) the use of facsimile (fax) transmissions by the regional office to transmit petitions and unfair labor practice charges and (2) revisiting the issue of "whose affidavit is it".

For some time now Region Seven has routinely faxed to the employer or charged party representation case petitions and to a lesser extent unfair labor practice charges on or about the date the case is docketed in the regional office. Obviously this practice occurs only where the party has a fax machine, but given the high tech climate we live in most businesses have a fax machine. This practice is an outgrowth of the General Counsel's desire to initiate case handling activity, especially in the representation case area, as quickly as possible. As most of you are aware, the region is currently making every effort to get to hearing in representation cases in about 14 days. When we can make our initial contact on the first or second day after the representation petition is filed, we are much more likely to be at hearing in 14 days.

Questions were raised as to whether this practice is beneficial where the employer or charged party receives this fax information from the regional office, including often a follow up telephone call from the Board agent, before they have had an opportunity to retain or consult with counsel. It was suggested that if counsel has the opportunity to discuss the matter with the client first, counsel may be better able to direct the clients action and to avoid the conflict that "often arises when an unsophisticated party is confronted by an agent from the government." If the region is aware that the employer or charged party is represented by counsel, we make every effort to contact counsel first and certainly one of the first questions we ask is whether we should be dealing with counsel. On the other hand, in many cases the employer or charged party does not have regular counsel or is unsure whether counsel will be retained. In these situations time constraints require that we begin the investigative process at once. This is especially so in the representation case area where time constraints are much stricter. In unfair labor practice cases, I suspect that most charged parties are not contacted until 5 - 7 days after receipt of the charge which should, in most cases, allow ample time to retain counsel if so desired.

There was also concern raised about the region's faxing of representation petitions or unfair labor practice charges to a non-confidential fax person. It was suggested that when the region inquires about faxing such material, the contact should be with a manager or supervisor who can decide whether such information should be kept confidential. I agreed to look into the feasibility of doing this.

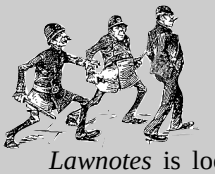
The question of "whose affidavit is it" is a recurring one and has been the subject of much debate at our local practice and procedure meetings and in other forums. The obvious answer to the question is that it's the affiant's affidavit. When the affiant is a party and is represented by counsel, counsel may participate in the interview process. When, however, counsel for a party seeks to be present at the interview session of a non-party, difficult issues often arise. The Board's Case Handling Manual ("CHM") offers some guidance in this area. CHM Section 10056.2 states *inter alia*,

> Where a witness, whether offered by the charging party or the charged party, who is not a representative or an agent of any party to the proceeding is represented by counsel or other representative and the witness requests that counsel or other representative be present during an interview, the interview should be conducted with counsel or other representative present so long as this presence does not delay or hamper the interview. *This policy will normally not prevail where counsel or other representative also represents a party to the case unless the Region, in the exercise of its discretion, wishes to proceed with the interview under such circumstances.* (Emphasis added)

After many years of struggling with application of this provision, I concluded that the approach to be taken in Region Seven would be to allow counsel, who also represents a party, to be present at the interview of a non-party witness if that non-party witness in writing requests counsel's presence and counsel enters a written appearance on behalf of the non-party witness. The region has observed this practice for some time now and I believe for the most part it has worked quite well. Because of events that occurred in recent months, however, I felt it necessary to clarify two aspects of this policy which had not heretofore been addressed. Thus, allowing counsel to be present during the interview process does not mean that counsel may also bring in a third party to assist in the interview session. Only one representative will be allowed to be present and even that representative's presence requires that he/she not unduly delay or interfere with the interview session. There also may be cases where the presence of counsel for a party presents such a conflict that the region will not permit counsel to be present. I anticipate such occurrences will be rare. Finally, once counsel has entered an appearance on behalf of a non-party witness, the region will deal with counsel rather than the witness absent instructions to the contrary. While I doubt that this is the final word on this subject, I hope that this offers some clarification.

The next meeting of the Local Procedure and Practice Committee is scheduled for July 18, 1997. I welcome any questions or comments you may have for this group which can be directed to any member of the Practice and Procedure Committee or sent directly to me at the NLRB.

(Editor's Note: For the views of two union lawyers on the NLRB affidavit process, *see* Stuart M. Israel and John G. Adam, "NLRB Affidavits" published in 45 *Labor Law Journal* 669 (1994) and in Vol. 4, No. 1 *Labor and Employment Lawnotes* (Winter 1994).)



WANTED!

Lawnotes Contributors

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

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

For information, contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam, Miller, Cohen, Martens, Ice & Geary, P.C., 1400 North Park Plaza, 17117 West Nine Mile Road, Southfield, Michigan 48075. (810) 559-2110.

U.S. SUPREME COURT: AS THE 1996-7 TERM NEARS ITS END

Russell S. Linden
Honigman Miller Schwartz and Cohn

As the 1996-97 term nears its end, the U.S. Supreme Court has issued decisions addressing ERISA, FLSA and negligent hiring claims. Since the first decision, announced November 6, 1996, the Court issued five labor and employment decisions, two of which were previously reported in this column. The two prior decisions involved Title VII and the First Amendment, *Walters v Metropolitan Education,* 65 LW 4059 (1997) and *Arizonans For Official English v Arizona*, 65 LW 4169 (1997). In addition, the Court granted certiorari in a case addressing the enforceability of a release under the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. §§ 623, 262, 630. *Certiorari* petitions were filed in several significant cases and the Court declined *certiorari* petitions in several notable civil rights, ADA and FLSA cases.

As of May 6, 1997, there were forty-one cases argued and awaiting decisions by the Court. Three cases involve civil rights issues arising under 42 U.S.C. § 1983 — *Johnson v Fenkell,* 65 LW 3170 (Idaho, 1996), *Richardson v McKnight,* 88 F.3d 417 (6th Cir. 1996) and *McMillan v Monroe County,* 88 F.3d 1573 (11th Cir. 1996) — and the fourth case involves the interface between ERISA, state community property law and heirs of predeceased non-employees spouses, *Boggs v Boggs,* 82 F.3d 90 (5th Cir. 1996). During this term the Court will not decide a single case addressing the NLRA or the ADA or involving a dispute between a union and employer, a significant departure from prior terms.

ERISA ANTI-DISCRIMINATION PROVISION APPLIES TO WELFARE PLANS

On May 12, 1997, a unanimous Court, in a two page opinion by Justice O'Connor, ruled that the anti-discrimination provision of the Employee Retirement Income Security Act of 1974 (ERISA), Section 510, 29 U.S.C. §1140 protects "any right" under a covered welfare plan. *Intermodal Rail Employees Association v Atchison, Topeka and Santa Fe Railway Company*, 65 LW 4319 (1997). Section 510 makes it unlawful to "discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary. . . for the purpose of interference with attainment of any right to which such participant may become entitled under the plan." In this case, plaintiff employees were entitled, among other things, to pension, health and welfare benefits under a collective bargaining agreement. The employer contracted out the work and terminated employees who declined to continue employment with the contractor. The pension and welfare benefit plans offered by the contractor were less generous than those previously provided. The employees filed suit alleging their terminations violated Section 510. The Ninth Circuit affirmed dismissal of the lawsuit, ruling that Section 510 only protects vested rights, i.e., pension benefits, and not employee welfare benefit plans that are subject to unilateral changes. The Supreme Court reversed, noting that the Ninth Circuit's ruling was contradicted by Section 510's plain language, which defines the word "plan" to include an employee welfare benefit plan. 29 U.S.C. 1002(3). Had Congress intended to confine Section 510 protection to vested pension rights, the Court noted, it could have substituted "pension plan" for plan, or nonforfeitable right, for "any right." The fact that an employer may reserve the right to unilaterally amend or eliminate its welfare plan, the Court held, does not justify a departure from Section 510's "plain language."

COURT UPHOLDS SECRETARY OF LABOR'S SALARY TEST UNDER FLSA

On February 19, 1997, a unanimous Supreme Court, in an opinion by Justice Scalia, upheld the Secretary of Labor's "salary basis" test for determining an employee's exempt status under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 et seq. A*uer v Robbins*, 65 LW 4109 (1997). The case presents an excellent overview of the FLSA and the salary basis test.

JURY AWARD FOR NEGLIGENT HIRING OF POLICE OFFICER THROWN OUT

On April 28, 1997, in a 5 to 4 vote, the Court vacated a jury award of $872,500 to a plaintiff who sued for negligent hiring of a reserve police officer who used excessive force during plaintiff's arrest for a traffic violation. The officer had a history of arrests, including misdemeanor assault charges. Plaintiff sued the county, county sheriff and deputy under the Civil Rights Act of 1871, 42 U.S.C. §1983. In *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 65 LW 4286 (1997), the Court absolved the municipality from liability. Justice O'Connor, for the majority, found there was "insufficient evidence on which a jury could find" that the county's decision to hire the officer "reflected a conscious disregard of an obvious risk that a use of excessive force would follow." At 4291.

COURT TO ADDRESS REPAYMENT OF RELEASE CONSIDERATION PRIOR TO ASSERTING AGE CLAIM

Last issue reported that *certiorari* was denied in *Hines v. ABB Vetco Gray, Inc.*, U.S. Sup. Ct. No. 96-56, where the Fifth Circuit held that agreements to waive age discrimination claims that failed to meet the requirements of the OWBPA are voidable at the employee's election, but that failure to return the consideration paid in exchange for the waiver in a timely manner precludes a discharged employee's lawsuit on those claims. In *Oubre v. Energy Operation, Inc.*, U.S. Sup. Ct. Case No. 96-1291, the Court has agreed to address whether return of the release's consideration is a pre-requisite to suit; apparently to resolve a conflict among the circuits. In contrast to *Hines* and *Oubre*, which both held repayment is required, the Sixth Circuit in *Raczak v. Ameritech Services, Inc.*, 72 FEP Cases 1357 (6th Cir. 1997), held repayment is not required.

Certiorari was denied in the following cases of interest:

CERTIORARI DENIED IN SIXTH CIRCUIT "PARTNER" OR "EMPLOYEE" STATUS CASE

Certiorari was denied in *Ernst and Young v. Simpson*, 100 F.3d 436 (6th Cir. 1996) which addresses whether an accountant holding the title of partner is an employee covered under the ADEA and ERISA. The Sixth Circuit ruled that the accountant was an employee because she had no bona fide ownership interest, no fiduciary relationship, no share in profits, no significant management control, no job security and no vote for chairman or member of the firm's management committee.

EXTRA SHOWING REQUIRED FOR PUNITIVE DAMAGES RECOVERABLE UNDER CIVIL RIGHTS ACT OF 1991 DOES NOT GRAB COURT'S ATTENTION DESPITE CONFLICT AMONG CIRCUITS

Review was denied in *Karcher v. Emerson Electric Company,* U.S. Sup. Ct. No. 96-1304, ruling below, 94 F.3d 502 (8th Cir. 1996), which vacated a jury award of punitive damages for sex discrimination. Under the Civil Rights Act of 1991, punitive damages are recoverable for intentional violations of Title VII where the defendant acted with "malice or reckless indifference to the federally protected rights" of the plaintiff. The Eighth Circuit ruled that proof of intentional discrimination alone is insufficient to support such a claim. The decision conflicts with decisions of other circuits holding that a showing of intentional discrimination is sufficient to support a punitive damages award.

FLSA ANTI-RETALIATION PROVISION DOES NOT PROTECT PERSONNEL DIRECTOR

Certiorari was denied in *McKenzie v. Renberg's Inc.*, U.S. Sup. Ct. Case No. 96-1293, ruling below, 94 F.3d 1478 (10th Cir. 1996), which held that a personnel director who informed her employer of the possibility that it was violating the Fair Labor Standards Act ("FLSA"), was not protected under that statute's anti-retaliation provision, 29 U.S.C. §215(a)(3). The personnel director had responsibility for monitoring compliance with state and federal laws. She became concerned that employees were not receiving proper overtime pay and raised this with the company's president and attorney. Sixteen days later she was fired. She sued under the FLSA's anti-retaliation provision. The Tenth Circuit held that when she informed her employer of the possible violations, she was not engaged in protected activity under the FLSA. She "never crossed the line from being an employee, merely performing her job as personnel director, to an employee lodging a personal complaint about the wage and hour practices of her employee and asserting a right adverse to the company."

COURT DECLINES REVIEW OF INVALIDATION OF FLINT'S AFFIRMATIVE ACTION PLAN

In *City of Flint v. Middleton*, U.S. Sup. Ct. Case No. 96-1211, ruling below, 92 F.3d 396 (6th Cir. 1996), the Court declined to review the ruling that the Flint Police Department's affirmative action plan mandating that half of all department promotions up to the rank of sergeant be set aside for minority group members constituted a racial quota not tailored to remedy past discrimination.

COURT DECLINES REVIEW OF ADA CASES WHICH ARE FLOODING ITS DOCKET

In *Lucky Stores, Inc. v. Holihan*, U.S. Sup. Ct. No. 96-723, ruling below, 87 F.3d 362 (9th Cir. 1996), the Court declined to review the Ninth Circuit's reversal of summary judgment in favor of the employer and found a genuine issue of fact as to whether the employer regarded a former employee as mentally ill when it decided to fire him. The employer, after receiving complaints about the plaintiff, gave him the choice of suspension or leave of absence, if he contacted an employee assistance program ("EAP"). After opting for the leave, he was diagnosed with stress related problems precipitated by work. His leave was extended, but the employer denied another extension and fired him. The Ninth Circuit held that there was evidence to infer that the employer regarded the plaintiff as having a disabling mental condition that substantially limited his ability to work. The Court also declined to review in *McNemar v. Disney Stores, Inc.*, which held that an employee who applied for social security and state disability benefits because he was totally disabled was estopped from asserting that he is a qualified individual with a disability under the ADA (see EEOC attorney Adele Rapport's article in this issue of *Lawnotes*) and *American Nonwovers, Inc. v. Moses*, which addressed the burden of proof under the ADA to establish that an employee is a direct threat to himself or others.

COURT DECLINES TO REVIEW *HEURTEBISE*

Previously we reported that *certiorari* was requested in *Reliable Business Computers v. Heurtebise*, which asked the Court to address the Michigan Supreme Court's decision that an arbitration provision in an employee handbook, which gave the employer sole discretion to modify any policy, was not enforceable. On March 24, 1997, the Court denied *certiorari.*

FEDERAL RULE AMENDMENTS

The Supreme Court amended Federal Rules of Civil Procedure 9 and 73, Rules of Evidence 407, 801, 803 and 807, and Rules of Bankruptcy Procedure 1010, 1020 and 2007, among others. The amendments will take effect December 1, 1997 unless otherwise provided by Congress. 65 LW 4243, 4251.

EEOC PAYROLL METHOD

Following the Court's decision upholding the EEOC payroll method for counting employees under Title VII, *Walters v Metropolitan Education*, 65 LW 4059, 72 FEP Cases 1211 (1997), reported in the last issue of *Lawnotes*, the EEOC issued a new May 2, 1997 guidance to explain its method, applicable under Title VII, ADA and ADEA. (FEP 405:701)

MARK YOUR CALENDARS FOR THE LELS ANNUAL MEETING

In conjunction with the State Bar of Michigan's annual meeting, this year in Detroit, the Labor and Employment Law Section will hold its annual meeting and continuing legal education program on September 17, 1997.

The LELS program will begin with a brief business meeting and Council elections at 2:00 p.m. The afternoon program will continue with presentations on the rights of strikers, replacement workers and management; the taxability of settlements and awards in employment cases; and the resolution of employment cases through alternative dispute resolution.

The CLE program will be followed by a reception and then by a dinner with a scintillating speaker to be announced.

Reserve the afternoon and evening of Wednesday, September 17 for the LELS annual meeting.

FEDERAL COURTS UPDATE

E. Sharon Clark

DUAL-EMPLOYMENT POLICY A DEFENSE TO FAILING TO HIRE A PAID UNION ORGANIZER

In *Architectural Glass & Metal Co., Inc. v NLRB*, 1997 FED App. 0074P (6th Cir., Feb. 24, 1997), the Sixth Circuit held that an employer may assert the defense that it refused to hire a paid union organizer because of a legitimate nondiscriminatory policy regarding applicants who intend to work simultaneously elsewhere. Zell, a full-time paid field representative for the Glaziers Union, applied for a position at AGM, but did not reveal that he was a Union employee. Following a telephone conversation with the employer in which Zell revealed his status, he was not hired. The Union alleged AGM violated the National Labor Relations Act by its refusal to hire Zell and its inquiries which the Union claimed constituted unlawful interrogation about Zell's union activities and status.

AGM maintained that it did not hire Zell based on its policy against hiring individuals who intend to work simultaneously for another employer on a full-time basis. The Board refused to recognize the legitimacy of this policy as a defense. The court disagreed, noting that although full-time paid union organizers are employees within the meaning of the Act and cannot be denied employment solely on the basis of union activity or status, an employer may lawfully refuse to hire an applicant on the basis of a nondiscriminatory policy such as a policy against hiring an individual who intends to work simultaneously for more than one employer. Under its *de novo* review of the Board's determination as to what qualifies as a defense against an unfair labor practice charge, the court found that the Board applied the wrong legal standard.

The court found an employer could ask an applicant whether he intended to work full-time for two employers if the information was related to a legitimate employer policy. In the absence of other circumstances suggesting that the inquiry was coercive, the interrogation would be lawful. The court found the Board's decision on the unlawful interrogation allegation had no "reasonable basis in law" and concluded that the Board applied the wrong legal standard. (Opinion by Judge Kennedy.)

NO "TENDER-BACK" REQUIREMENT FOR ADEA PLAINTIFFS

The Sixth Circuit declined to impose a "tender-back" requirement on ADEA plaintiffs in *Raczek, et al. v Ameritech Corporation, et al.*, 72 FEP cases 1357 (Jan. 9, 1997). Following a workforce reduction program, plaintiffs sued, alleging they were selected to be fired solely on the basis of age. Defendant employers countersued for breach of contract, claiming that plaintiffs received enhanced severance packages in return for waiving age discrimination claims and that their refusal to return the enhanced severance amounts barred them from contesting the agreements' validity. The District Court for the Eastern District of Michigan held that the waivers were unenforceable because the information furnished to the employees relating to job titles and ages of individuals eligible or selected for the downsizing program did not comply with the Older Workers Benefit Protection Act. The district court held that plaintiffs' failure to tender back the additional severance benefits did not "ratify" the defective waivers and did not preclude plaintiffs' suit.

Plaintiffs maintained that the waivers did not comply with OWBPA because the information provided by their employers was organized by "salary grade" instead of "job titles," "job classifications" and "organizational units," the terms used by the OWBPA at 29 U.S.C. § 626(f)(1)(H)(ii). The court found, however, that the terms "job title," "job classification" and "organizational unit" should be interpreted on a case-by-case basis rather than as a "dogmatic exercise in definition," with the test being whether the information is "understandable to the average worker," as required by the OWBPA. If the employer provides information that purports to comply with the statute, then the inquiry should proceed to the understandability of the information provided. In this case the information provided by the employers was sufficient to withstand the employees' motion for summary judgment.

The court identified relevant factors to be considered in determining "understandability": (i) whether the company used its proferred titles and classifications in its work processes prior to the layoffs; (ii) whether the titles and classifications were used in assessing or choosing workers for layoffs; and (iii) whether the titles and classifications were meaningful to the average worker in his or her understanding of the workplace and the layoff process. The court reversed and remanded the case, with instructions to determine whether the data supplied by defendants fulfilled the requirements of the OWBPA.

On the tender-back issue, the Sixth Circuit adopted the reasoning of the Seventh and Eleventh Circuits and disagreed with the Fourth and Fifth Circuits, which have imposed a tender-back requirement. The court relied on the one Supreme Court case dealing with a tender-back requirement, *Hogue v Southern Ry.*, 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed.2d 73 (1968). The court noted that although *Hogue* was a FELA case, the decision has been followed in cases besides FELA cases and may be extended logically to ADEA claims. The court also found that it would be inequitable to require plaintiffs to tender back benefits and would deter meritorious ADEA filings, because potential plaintiffs would be faced with the choice of signing a release and receiving payments immediately or filing an age discrimination claim that would take years to resolve. The court concluded that a more equitable remedy would be requiring that release amounts be subtracted from judgment amounts. Judge Boggs dissented, opining that a tender-back requirement is not barred by *Hogue* and is instead consonant with basic notions of fairness in contract law. (Opinion on selection information issue by Judge Boggs; opinion on tender-back issue by Judge Jones.)

SAME-SEX HARASSMENT ACTIONABLE

In *Yeary v Goodwill Industries-Knoxville, Inc., et al.*, 1997 FED App. 0072P (6th Cir., Feb. 24, 1997), the Sixth Circuit held that same-sex sexual harassment is cognizable under Title VII.

The Sixth Circuit has held that the elements of a *prima facie* hostile environment claim of sexual discrimination are: (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and created an intimidating, hostile, or offensive working environment

that affected seriously the psychological well-being of the plaintiff; and (5) the existence of respondent superior liability, *Rabidue v Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986). The court identified the third element as the determinative issue in this case.

The court described this case as a "traditional" hostile environment case because it is about an employee making sexual propositions to and physically assaulting a coworker because he finds that coworker attractive. Thus, the plaintiff was harassed "because of" his sex — he had to put up with abuse and harassment that women employees at Goodwill did not have to endure. The court noted that it is not required in this case to decide whether same-sex sexual harassment can be actionable only when the harasser is a homosexual; rather, it is required to decide only that when a male sexually propositions another male because of sexual attraction, the behavior is a form of harassment that occurs because the propositioned male is a male, i.e., because of sex, and is therefore actionable conduct under Title VII.

The Eighth Circuit has recognized same-sex sexual harassment claims while the Fifth Circuit has rejected them. The Fourth Circuit has recognized same-sex cases where the perpetrator of the sexual harassment is homosexual. The Seventh, Ninth, Second and First Circuits have suggested in *dicta* their willingness to entertain same-sex sexual harassment claims. (Opinion by Judge Ryan.)

PITT'S TEN WAYS EMPLOYERS CAN ENHANCE A PLAINTIFF'S CASE

Michael L. Pitt
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1. Always lie about your reasons for termination.
2. Alter documents — the more important the better.
3. Cause plaintiff to suffer a disabling psychiatric injury.
4. Don't take the case seriously.
5. Employ arrogant and obnoxious trial counsel.
6. Leave litigation management decisions to the inexperienced.
7. Overestimate the trial judge's willingness to dismiss the case.
8. Terminate a disabled or older person so that it is unlikely he or she will work again.
9. Let outrageous acts of racial, ethnic or sexual harassment go unchecked.
10. Forget the golden rule.

MICHIGAN SUPREME COURT UPDATE

David A. Rhem
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PRIVATE ARBITRATION AGREEMENTS CANNOT DICTATE ROLE FOR THE COURTS.

While encouraging the use of alternate dispute resolution procedures, the Supreme Court ruled 5-0 (Riley and Kelly not participating) that private parties may not dictate a public institution's role, including the courts, within those procedures. *Brucker v McKinley Transport*, 454 Mich 8 (1997), involved a commercial arbitration case. The court's ruling, however, applies equally to employment cases. The parties' arbitration agreement contained a provision stating that the circuit court would resolve discovery disputes, resolve contract interpretation issues, and enter judgment on the arbitration award. The Macomb County Circuit Court did, in fact, issue an advisory opinion on a contract interpretation issue during the arbitration process. It later entered judgment on the arbitration award. The Court of Appeals subsequently vacated the circuit court's judgment finding the *entire* arbitration agreement to be invalid because it exceeded the scope of statutory arbitration. This case involved statutory arbitration because the parties agreed that judgment would be entered on the award. The agreement exceeded the scope of statutory arbitration because it provided for contract interpretation questions to be decided by the court instead of the arbitrator.

The Supreme Court, to its credit, crafted a practical "win-win" solution to this long-running case. The court ruled that once statutory arbitration is invoked, it governs. (See MCL 600.501; MSA 27A.501, and MCR 3.602) Private parties may not dictate a role for the courts contrary to, or in excess of, what statutory arbitration permits, i.e., providing advisory opinions. The court refused, however, to invalidate the entire agreement and found that only the specific offending provisions were unenforceable. The court made its ruling prospective only because the parties had not been prejudiced by an arbitration process to which they had agreed, and the integrity of the judicial system had not been compromised. The court also noted, in a footnote, that parties could not dictate the role of the courts in common law arbitration situations either.

(**Editor's Note:** On May 20, 1997, the Michigan Supreme Court denied the union's application for leave to appeal in *Berrien County Probate Judge and Berrien County v Michigan AFSCME Council 25*, 217 Mich App 205 (1996), but stated: "We further DIRECT that the opinion of the Court of Appeals shall have no precedential force or effect." The Court of Appeals refused to enforce an arbitrator's award, which applied the joint employer doctrine to find a county and a probate court jointly responsible for breaching obligations to probate court workers, based upon the Michigan constitution's separation of governmental powers doctrine. The appellate court decision is discussed in *Lawnotes*, Vol 6, No. 3, p. 28 (Fall 1996). Although no reasons were provided in the Supreme Court order, MCLA §600.837, part of the 1996 court reorganization legislation adopted after the arbitration award provides, among other things, that the "county is the employer of the county paid employees of the probate court in that county.")

MICHIGAN COURT OF APPEALS UPDATE

Daniel Misteravich

Plaintiff failed to establish a prima facie case of reverse discrimination under the Elliott-Larsen Civil Rights Act

In *Allen v Comprehensive Health Services*, No. 187357, March 25, 1997, (Richard A. Bandstra, Janet T. Neff, and Michael E. Dodge), the Court of Appeals established the elements of a prima facie case of reverse discrimination under the Elliott- Larsen Civil Rights Act. The plaintiff employee claimed that he had been denied certain job opportunities; however, he did allege or uncover any direct evidence of discriminatory intent on the part of the defendant. The trial court dismissed the complaint pursuant to MCR 2.116(C)(10). The Court of Appeals affirmed.

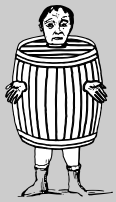
The Court of Appeals adopted the approach to reverse discrimination taken in *Parker v Baltimore and Ohio RR Co*, 209 US App DC 215; 652 F2d 1012 (1981). "Accordingly, we hold that a reverse discrimination plaintiff who had no direct evidence of discriminatory intent may establish a prima facie ELCRA claim of gender discrimination with respect to a promotion decision by showing (i) background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against men; (ii) that the plaintiff applied and was qualified for an available promotion; (iii) that, despite plaintiff's qualifications, he was not promoted; and (iv) that a female employee of similar qualifications was promoted." The Court of Appeals found that the plaintiff had failed to provide evidence to establish a prima facie case of reverse discrimination in what appeared to be "personality disputes" between the plaintiff and supervisory personnel.

Employer's fear of a workers' compensation claim is not a legitimate reason for refusing to return a handicapped person to work—Plaintiff failed to mitigate his damages under the Handicappers' Civil Rights Act—Statutory interest rate applies to award of back pay—Issue of attorney fees not reviewable.

In *Morris v Clawson Tank Company*, No. 183374, January 28, 1997 (Clifford W. Taylor, Maura D. Corrigan, and Donald A. Johnston), the plaintiff, an unskilled laborer, lost his left eye. The employer refused to let him return to work. The trial court entered a judgment under the Handicappers' Civil Rights Act.

The Court of Appeals held that when the plaintiff establishes a prima facie case an employer does not provide a legitimate reason for discrimination when it asserts that it was fearful of a future workers' compensation claim. The Court held that the plaintiff failed to mitigate his damages when he took a non-comparable job and ceased to look for work and that his ignoring an offer of reinstatement without investigating the offer eliminated an award of front pay. The Court found that the statutory interest rate applied to awards of back pay. The Court held that an issue of attorney fees was not reviewable because the order awarding fees was entered after the claim of appeal was filed and no claim of appeal from the attorney fee order had been filed.

(Continued on page 23)



THE JOY OF LABOR LAW

"Stinky Chickens" Justify Discharge. "This case arises from the sights, smells and early morning sounds emanating from the yard" of plaintiff Cabrol, who challenged his dismissal as assistant to the mayor of Youngsville, Louisiana. *Cabrol v Town of Youngsville*, 12 IER Cases 953 (5th Cir. 2/24/97). The court rejected Cabrol's myriad constitutional and statutory claims, noting that plaintiff "does not contend that he did not raise chickens in his yard, he does not contend that the mayor did not receive complaints and he does not contend that his chickens are not 'stinky', 'unsightly' or 'noisy." 12 IER at 955. Only in Louisiana.

Pugilistic Mime Strikes Out In Civil Rights Claim. The Ninth Circuit addressed the clash between a professional mime and her employer on the battleground of Title VII of the Civil Rights Act of 1964. *Folkerson v Circus Circus*, 73 FEP Cases 219 (2/21/97). The mime lost. The court ruled that mime Kelbi Folkerson, who performed in a casino as "Kelbi the Living Doll", was not engaged in activity protected by Title VII when she was fired for "hitting a patron in the mouth" after he touched her in an attempt to show onlookers that the mime was a real person. Kelbi alleged that she was sexually harassed by the patron and fired in retaliation for rejecting the harassment. The mime reportedly had no comment after the adverse decision.

"Bong-To-Mouth" Defense Rejected. The Fourth Circuit was not sympathetic to a nurse's ADA claim that she was not "currently engaging in the illegal use of drugs" when she was discharged a month after the hospital learned she was diverting drugs for personal use. *Shafer v Preston Memorial Hospital*, 6 AD Cases 682, 685 (4th Cir. 2/26/97). The court ruled that the word "currently" in ADA refers to periodic or ongoing activity. The court rejected plaintiff's narrower view that "currently" means something more like "right then". The court noted that under plaintiff's view "an employee would be considered currently engaging in the illegal use of drugs only if his employer discovered her needle-in-arm or bong-to-mouth and terminated her on the basis of such current use". 6 AD Cases at 685. So much for the "lack of *in flagrante delicto"* defense.

What has happened to our standards of outrage? The Arkansas Supreme Court ruled that plaintiff (not Paula Jones) had no tortious outrage claim against her employer, a 68 year old physician, who she says repeatedly cursed her, called her "whore" and "prostitute" (and other things not fit to be quoted even in this column!), used the "F" word, and threatened to "kill her if she quit or caused trouble" while alluding to his "mob" ties. *Hollomon v Keadle*, 12 IER Cases 194 (9/20/96). The court, upholding summary judgment for the doctor, noted that plaintiff knew by her second day of work that defendant was "a singularly unpleasant man given to constantly yelling and cursing". One can only imagine how the California mime would have responded to this singularly unpleasant Arkansas employer.

Likewise, a Florida federal district court shot down an airline employee's intentional infliction of emotional distress claim against her employer, despite her being repeatedly subjected to "foul language," "belching," pornographic pictures, and other conduct not fit to be described even in this column. *Pucci v U.S. Air*, 12 IER Cases 197, 198 (9/27/96). The court noted that while the alleged conduct was "not civilized behavior", it was not sufficiently outrageous to support the tort suit.

The legal principle to be drawn from these cases: In employment litigation it's better to be a dirty old man than a stinky-chicken-lover or a Rambo-like mime who thinks actions speak louder than words.

John G. Adam

NLRB SPRING UPDATE

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E-MAIL MESSAGES

In *Timekeeping Systems, Inc.*, 323 NLRB No. 30, 154 LRRM 1233 (February 27,1997) (Gould, Browning and Fox), the Board ruled that an employee's e-mail message to fellow employees constituted protected concerted activity. The dispute started when the CEO issued an e-mail message to employees proposing changes to the vacation policy and inviting comment. The Charging Party responded by sending fellow employees a lengthy e-mail message criticizing the proposed changes. He was terminated for his conduct. The Board also cleared up uncertainty in prior decisions by confirming that an employer can assert a defense based upon *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 105 LRRM 1169 (1980); *enfd.* 662 F.2d 899, 108 LRRM 2513 (1st Cir. 1981), in a case alleging discrimination based upon protected concerted activity.

MAIL BALLOTS

In *Williamette Industries, Inc.*, 322 NLRB No. 151, 154 LRRM 1168 (January 10, 1997) (Gould, Browning, Fox and Higgins), a Regional Director directed a mail ballot election because the Employer's facility was located 80 miles from the Regional office. The Board granted the Employer's Request for Review and concluded that, under current Board precedent and policy, manual elections are favored over mail ballot elections. The Board found that the sole factor cited in favor of a mail ballot, that the facility is 80 miles from the Regional office, alone is insufficient to depart from the normal practice of a manual election. Chairman Gould, a proponent of mail ballots, issued a concurring opinion agreeing with the majority because there was no showing that the resources of the Regional office were burdened. He stated, however, that if such a showing had been made, he would have concluded that the Regional Director did not abuse his discretion in ordering a mail ballot.

REMEDY FOR FAILURE TO PROVIDE NOTICE OF *BECK* AND *GENERAL MOTORS* RIGHTS

In *Rochester Mfg. Co.*, 323 NLRB No. 36, 154 LRRM 1249 (March 12, 1997) (Gould, Fox and Higgins), a Region 7 case, the parties' union security clause required unit employees to be "members in good standing." In addition, the Union did not provide the unit employees with notice of their *Beck* and *General Motors* rights. The Administrative Law Judge concluded, *inter alia*, that the clause was facially unlawful and that the failure to provide the requisite notices ran afoul of *California Saw and Knife Works*, 320 NLRB 224, 151 LRRM 1121 (1995), and *Paper Workers Local 1033 (Weyerhauser Paper Co.)*, 320 NLRB 349, 151 LRRM 1157 (1995).

The Board affirmed the ALJ's findings concerning the failure to provide notice but disagreed that the union security clause was facially unlawful. As it is impossible to identify employees who, considering the relative advantages of union membership and nonmembership, would have chosen not to become union members and obtained a *Beck* reduction of fees and dues, the Board directed that the Union give all unit employees notice of their *Beck* and *General Motors* rights in a manner sufficient for them to intelligently decide whether to object. If any employees object within a reasonably prompt period of time, the Union must process their objections and reimburse any portion of fees and/or dues used for nonrepresentational purposes.

UTILITY INDUSTRY BARGAINING UNITS

In *Peco Energy Co.*, 322 NLRB No. 197, 154 LRRM 1147 (February 14, 1997) (Gould, Fox and Higgins), the Board revisited its rule which favors systemwide bargaining units in the public utility industry. This rule was developed because the industry is characterized by a high degree of interdependence of its various segments and the public has an immediate and direct interest in the uninterrupted maintenance of the essential services that this industry alone can provide. The Board has been reluctant to fragmentize a utility's operations without compelling evidence that collective bargaining in a unit less than systemwide in scope is a "feasible undertaking" and there is no opposing bargaining history.

Here, the Board elected not to apply the systemwide presumption and determined that the petitioned-for power generation and nuclear units were appropriate. The Board noted that the two units operated as autonomous divisions with separate management and human resource functions and there was little interchange of work functions.

EMPLOYERS GET LEEWAY ON DISCLOSING PERSONNEL INFORMATION

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In case you missed it, a Michigan statute, effective February 25, 1996, limits "the liability of employers under certain circumstances" for disclosing information about current or former employees. MCL §§ 423.451 to .452. Section 452 states:

> An employer may disclose to an employee or that individual's prospective employer information relating to the individual's job performance that is documented in the individual's personnel file upon the request of the individual or his or her prospective employer. An employer who discloses information under this section in good faith is immune from civil liability for the disclosure. An employer is presumed to be acting in good faith at the time of a disclosure under this section unless a preponderance of the evidence establishes 1 or more of the following:
>
> (a) That the employer knew the information disclosed was false or misleading.
>
> (b) That the employer disclosed the information with a reckless disregard for the truth.
>
> (c) That the disclosure was specifically prohibited by a state or federal statute.

While this statute is not identified as an addition to the Bullard-Plawecki Employee Right To Know Act, MCL §§ 423.501 to .512, these statutes should be considered together. Among other things, the Bullard-Plawecki Act prohibits disclosure of personnel information to a third party (other than the employee's union) without "written notice" to the employee. MCL § 423.506(2).

MERC UPDATE

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SUPREME COURT DIRECTS MERC TO APPLY NEW DEFINITIONS OF "CONFIDENTIAL" AND "EXECUTIVE" EMPLOYEES

In *City of Grandville,* MERC Case No. R91 H-180, the Supreme Court directed the Commission to apply its new definitions of "confidential" and "executive" employees, as set out in *Ingham County Road Commission,* 1995 MERC Lab Op 306, and *Detroit Police Dept.,* 1996 MERC Lab Op 84, to the positions covered by the petition in this case (assessor, clerk, treasurer, police chief and fire chief). *Grandville Municipal Executive Association v City of Grandville,* 453 Mich 428 (1996).

The matter began in 1990 when the union sought to represent a group of supervisory employees. In July 1991, the Commission issued a decision and direction of election among supervisory employees, but excluded the positions of city clerk, treasurer, police chief and fire chief because they were executives. *(Grandville I).* That decision was not appealed.

In August 1991, the union sought to represent all executive employees, including city clerk, treasurer, police chief and fire chief. The Commission dismissed the union's petition because executive employees are so intrinsically connected with determination of policy that their engagement in concerted activity would damage, not enhance, the statutory purpose. *(Grandville II).*

The Court of appeals reversed the Commission in *Grandville II* and held that executive employees were entitled to the rights and privileges granted by PERA. *City of Grandville v Grandville Municipal Executive Association,* 213 Mich App 586 (1995). It also concluded that the Commission's exclusion of executive employees from collective bargaining on public policy grounds was inappropriate.

Since the Court of Appeals decision, MERC issued the two opinions fashioning new definitions of the terms "executive" and "confidential." In *Ingham County,* the commission concluded that "executive" should be limited to those employees who are essential for developing and administering labor relations policy at the highest level. In *Detroit Police Dept.,* the Commission: (1) held that individuals who formulate, determine and effectuate confidential labor relations policies at the highest level of a public employer should be properly labeled confidential and excluded from participating in collective bargaining on that basis; (2) overruled its holding in *Ingham County* that employees whit responsibility for making labor relations policy should be termed executive rather than confidential employees; and (3) returned to its traditional concept of executives as individuals responsible for making high-level policy decisions in areas such as labor relations.

In October 1996, the Supreme Court issued its decision and concluded that MERC's power to delineate appropriate bargaining units under Section 12 of PERA gave it the authority to exclude executives from all units as a matter of public policy. The court remanded the case to the commission because it had altered its definition of executive and confidential employee in the two post-*Grandville* cases.

On remand, the Commission concluded that the five positions at issue were executives under the reformulated definition just as they were under prior definitions. In doing so, the Commission stated; (1) executives should not have the right to participate in collective bargaining under PERA for public policy reasons; (2) in *Detroit Police Dept.* it repudiated both parts of *Ingham County,* which restricted the definition of executive to individuals with labor relation responsibilities, and the corollary holding that positions with policy-making responsibilities in other areas were merely supervisors who should be included in supervisory units; and (3) its attempt to redefine the term executive was done in light of the Court of Appeals decision and not intended as a radical departure from past decisions.

HIRING A SUBSTITUTE EMPLOYEE TO FILL A BARGAINING UNIT POSITION BEFORE THE BEGINNING OF THE SCHOOL YEAR VIOLATES PERA

In *Allendale Public Schools,* MERC Case No. C96 B-39, the Commission reversed ALJ Wicking's recommended decision regarding an unfair labor practice charge filed by the Allendale Education Association. The Association alleged that the employer unilaterally changed the terms and conditions of employment of a newly hired teacher.

The employer posted a permanent vacancy for the position of tech ed instructor. Since no bargaining unit member applied for the job, notices of the vacancy were posted at local colleges and universities. The employer learned of Greg Kruse through a neighboring school district. Although Kruse was certified and met the posted job requirements, the employer decided to hire him as a long term substitute teacher. As a substitute teacher, Kruse was not covered by the Association's collective bargaining agreement.

The Commission first held that the Association's unfair labor practice charge was timely filed. The statute of limitations began to run on August 25, 1996, when the employer claimed it informed the union of its decision to hire Kruse. The charge was received and date-stamped in the Lansing office on February 23, 1995. The Commission rejected the employer's argument that the Lansing office is an office of the Bureau of Employment Relations only, and therefore the charge could not be filed with the Commission there. The Commission reaffirmed that both the Lansing and Detroit offices are offices of both the Commission and the Bureau.

The Commission next held that the employer violated Section 10(1)(3) of PERA by hiring Kruse as a substitute teacher to fill a permanent vacancy before the school year began. The collective bargaining agreement only allowed the employer to fill a permanent vacancy with a temporary employee when that permanent vacancy occurred *during the school year.* There was no recognized practice allowing the employer to take such action. The employer failed to give the union the opportunity to demand to bargain, and upon demand, to bargain to impasse before proceeding to fill the position with a substitute employee.

UNILATERALLY REQUIRING EMPLOYEE TO SIGN WAIVER OF RIGHT TO SUE PSYCHOLOGIST RETAINED TO EXAMINE HIM VIOLATES PERA

In *City of Oak Park*, MERC Case No. C95 J-204, the Commission adopted ALJ Wicking's recommended order finding that the employer violated PERA by requiring an employee, under penalty of discharge, to sign a waiver of his right to sue a psychologist retained by the employer to examine him.

A police officer was under investigation for alleged misconduct in connection with his failure to wear appropriate body armor, and for refusing a direct order to do so. As a result, the officer was ordered to appear for a fitness evaluation, and sign a waiver of his right to sue the examining psychologist regarding his recommendation to the employer.

First, the Commission held that although the collective bargaining agreement did not provide for psychological testing, there was a policy or practice allowing this procedure. Therefore, the employer had no duty to notify the union and give it an opportunity to bargain before ordering the officer to undergo psychological testing. Second, the Commission found no evidence of an established policy that an employee sign a waiver of his right to bring civil litigation against the psychologist in connection with undergoing a psychological exam. Thus, the requirement that an employee sign a waiver of his right to sue the psychologist was separate from the requirement that the employee undergo psychological evaluation as a condition of continued employment. The employer violated its duty to bargain by unilaterally requiring the employee to sign the waiver.

EMPLOYER DID NOT VIOLATE PERA BY MAKING CHANGES IN DRESS CODE POLICY WHEN IT HAD CONTRACT OR PAST PRACTICE GROUNDS FOR DOING SO

In *Wayne County (Juvenile Detention Facility)*, MERC Case No. C96 G-155, the Commission adopted the recommended order of ALJ Kurtz, dismissing the union's unfair labor practice charge, which alleged that the employer unilaterally implemented a revised dress code policy, repudiating a section of the contract which stated "any uniform or change in dress shall be subject to negotiation."

In June 1995, the employer issued a memorandum setting forth its expectations about dress, jewelry and grooming of employees. In January 1996, the employer sent a draft professional dress policy to the union. This policy was revised in May 1996. On May 7, 1996, the union sent a letter to the employer objecting to the subjective nature of the proposed policy. A few weeks later, a meeting was held between the parties. Several grievances were filed as a result of this policy. A subsequent meeting was held between the parties to discuss the policy further.

The Commission first held that the employer did not engage in repudiation of the contract because it had contract or past practice grounds for its actions. Bargaining took place and resulted in a signed agreement, and there was no reason to intervene in any subsequent contractual issue. The Commission also held that the dispute was contractual in nature, and there was no evidence of bad faith by the employer. The union's disagreement with the interpretation of the contract can only be resolved by an arbitrator, not the Commission.

ELEMENTARY ADMINISTRATIVE ASSISTANTS LACK COMMUNITY OF INTEREST WITH CLERICAL OR TEACHING UNITS

In *Grand Rapids Public Schools*, MERC Case Nos. UC95 B-11 and UC95 I-40, the professional union and the clerical union sought to accrete to their respective bargaining units the newly created position of elementary administrative assistant (EAA). The EAAs have building-wide responsibility for monitoring student behavior and enforcing the employer's discipline code.

The Commission concluded that the record was insufficient to determine whether the EAAs were supervisors of either unit. The commission also held that the EAAs shared no community of interest with either bargaining unit. Unlike the clerical unit employees, EAAs have no clerical responsibilities, skills or training, and there is no evidence of interchange between the EAAs and the clerical unit. Unlike the teaching unit employees, EAAs are not required to have a college degree, are not responsible for curriculum, and there is no evidence of employee interchange between the EAAs and the teaching unit. Although EAAs, teachers and behavior specialists work cooperatively to develop techniques and strategies to curtail disruptive student behavior, make students aware of the discipline code, assess students' needs, and communicate with parents, each has a different role in the maintenance of discipline within the school.

MICHIGAN COURT OF APPEALS UPDATE

(Continued from page 20)

The circuit court has jurisdiction to hear claim against state official under Whistle-Blower's Protection Act—The continuing violations doctrine applies to statute of limitations defenses—State employee is not protected by governmental immunity—Report of larceny is a violation of law for purposes of the Act

In *Phinney v Adelman et al*, Nos. 175485, 175857, 176940, April 4, 1997, (Myron H. Wahls, William B. Murphy, and Charles D. Corwin), the Court of Appeals addressed no fewer than twenty-nine appellate issues. The plaintiff, a researcher for the University of Michigan, prevailed in part in the trial court on her claims of the theft of her research by her superior. The opinion of the Court of Appeals is lengthy and covers a wide range of issues. The Court made four holdings which have significance for future cases under the Whistle-Blowers' Protection Act (WPA). The Court held that the circuit court has jurisdiction to hear a WPA claim brought against a state employee. The Court addressed an issue of first impression and held that the doctrine of continuing violation applies to statute of limitation defenses under the WPA. The Court held that a state employee does not enjoy governmental immunity from WPA claims. Addressing the elements of a prima facie case under the WPA, the Court held that larceny of one's own property is a "violation of law" for purposes of the WPA. Because of the volume of holdings in this opinion, the reader is advised to engage in a personal safari.

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- Joe Vogan and Allyn Lebster survey recent decisions and developments in wrongful discharge litigation.
- John Adam reviews the NLRB's efforts to preserve "laboratory conditions" during union organizing drives.
- EEOC Regional Attorney Adele Rapport provides guidance on what effect claimant statements made in other forums have on the claimant's ADA claims.
- Information on upcoming events and LELS business: the annual business meeting, seminar, reception and dinner on September 17 in Detroit; Distinguished Service Award nominations; and the new LELS World Wide Web page.
- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Michigan Supreme Court, the Michigan Court of Appeals, the NLRB, MERC and more.
- Authors John G. Adam, Heather Beard, E. Sharon Clark, Avern Cohn, Ronald R. Helveston, Allyn R. Lebster, Russell S. Linden, George M. Mesrey, Daniel Misteravich, Michael L. Pitt, Adele Rapport, David A. Rhem, William C. Schaub, Jr., Joseph J. Vogan, Douglas V. Wilcox, and more.

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