LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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KEEPING AN EYE ON PICKETLINE OBSERVERS

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A union's use of observers at gates reserved for neutral employers on a construction site is not a new phenomenon. But it raises issues that the Board has not clearly resolved when dealing with potential violations under the secondary boycott provisions of 8(b)(4)(B) of the National Labor Relations Act and the standards of *Moore Dry Dock.*[2] The Board's concern centers on whether a union's use of an observer at a neutral gate is really a subterfuge for "signal picketing" to other union trades at the jobsite, which is determined by examining all the circumstances of the observer's activity.

Although the Board has never directly said as much, prior General Counsels have maintained the position that a union has the right to observe or monitor neutral gates to determine whether their integrity is being violated, i.e. whether primary contractors or primary suppliers are using the gates. *Laborers Local 500 (Sheraton Westgate Inn),* Cases 8-CC-1136-2, etc., Advice memorandum dated October 7, 1983; *Electrical Workers IBEW Local 577 (Town & Country Electric),* Case No. 30-Cc-381, Advice Memorandum dated January, 31, 1983; *Electrical Workers IBEW Local 400 (Jaden Electric),* Cases 4-CC-1261 etc., Advice Memorandum dated May 19, 1980.

TOTALITY OF THE CIRCUMSTANCES

The stationing of an observer to monitor neutral gates has not been found violative of Section 8(b)(4)(B) unless the totality of the Union's conduct, including acts of patrolling, communications with neutral employees, and the use of signs either on, or near, the Union observer, is intended to have, or has the foreseeable consequence of having, the effect of signaling neutral employers or their employees to engage in a work stoppage or to refrain from entering the site. See *Carpenters Local 1245 (New Mexico Properties),* 229 NLRB 236, 242 (1977); *Iron Workers (Robert E. McKee),* 233 NLRB 283, 287 (1977), enf. in pert. part, 598 F.2d 1154 (9th Cir. 1979); *Miami Valley Carpenters District Council (Brell Corp.),* Case 9-CC-1178, Advice Memorandum dated September 29, 1982 *(Brell Corp. I).* Consequently, in determining whether a union acts with an unlawful objective in observing a neutral gate, the Board considers all the evidence accompanying the union's conduct. *Retail Store Employees Local 345, (Gem of Syracuse, Inc.),* 145 NLRB 1168, 1172 (1964).

Based on this totality of the circumstances standard, in *New Mexico Properties* the Board found that there was no unlawful activity or impact where a union picket intermittently left a primary gate and walked to an intersection to observe whether there were employees of the primary employer at another gate, and if the neutral gate had been tainted. The individual was the only picketer at the site and never came closer to the neutral gate than 225 feet. See also, *Laborers Local 1290 (Walthers Foundation),* 203 NLRB 397 (1973), where no violation was found in occasional picketer observation of a jobsite from a considerable distance, but within sight of the secondary employer's workers.

However, in *Plumbers Local 274 (Industrial Products Group),* 267 NLRB 1111, 1114 (1983), the Board adopted the ALJ's finding that the Union's retired members assigned to collect information and wear signs at the neutral gate were not mere "observers," but rather were pickets. The men actively patrolled the street in front of the neutral gate with placards — at first walking back and forth across the street and then patrolled the sides of the street. The Board believed such conduct constituted a "signal" to the employees of secondary and neutral employers. Thus one driver who approached the gate refused to make a delivery notwithstanding being told that there was no strike. The Union's defense that the men patrolling the gate were "observers," who sought merely to collect information concerning whether the gate was misused, was found to be without merit inasmuch as the men were assigned to the neutral gate from the very inception of the picketing — even before any alleged breaches of the neutrality of the gate could have occurred. By "picketing" the neutral gate, the Union not only made no attempt "to avoid enmeshing neutrals in [the] dispute," or to "minimize its impact on neutral employees" but rather such picketing demonstrated that its object was to enmesh neutral employers in the Union's labor dispute with the primary employer. See *electrical Workers IBEW Local 323 (Renel Construction),* 264 NLRB 623 (1982); *NLRB v. Nashville Building Trades Council,* 425 F.2d 385, 391 (6th Cir. 1970).

TAINT OF NEUTRAL GATE NOT NECESSARY

Most recently in *Electrical Workers IBEW Local 98 (Telephone Man),* 327 NLRB 593 (1999), in affirming the ALJ's unfair labor practice findings, the Board rejected the premise that there must be an allegation or evidence of misuse of the reserved neutral gate to justify the Union's having an observer at that gate. However, they did agree with the ALJ that the overall conduct of the observer at the neutral gate could reasonably be construed as "signal picketing" undertaken for an impermissible secondary object. The Union previously had demonstrated a secondary objective at this project by picketing for several hours at the neutral gate. A few days later a Union representative stationed himself on a concrete divider between the entrance and exit sides of the neutral gate, wearing an "observer" sign that conveniently flipped over from time to time, revealing the identical message directed at the primary employer that was used in picketing at the primary gate. When this happened, that message would "show itself to everyone else entering that area." See *Sheet Metal Workers Local 19 (Delcard Associates),* 316 NLRB 426, 437-438 (1995) (alleged "observers" at neutral gate dispensed with "observer" language on sign and, at times, displayed conventional protest language written on other side of sign). In the middle of the gate, where he had stationed himself, the observer was well positioned to talk to employees as they approached to enter

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STATEMENT OF EDITORIAL POLICY

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

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

KEEPING AN EYE ON PICKETLINE OBSERVERS

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the gate, and on at least one occasion, he conversed with employees of a neutral employer, who then turned away without reporting to work on the project. On yet another occasion, several pickets walked slowly from the primary gate to the neutral gate, spoke with the observer (who was stationed in his usual location there, wearing his observer sign), turned around, and then slowly walked back to the primary gate. In these circumstances, the board found that the observer was not merely a benign spectator but rather was engaged in impermissible signal picketing at the neutral gate. The Board also noted that the record did not show that the observer could not have carried out his observer function in some place other than the middle of the gate area.

NO ACTUAL INTERFERENCE WITH NEUTRALS

The General Counsel's Advice Division has granted rather considerable leeway to observers at a picket line if there is no evidence of actual interference with neutrals or there employees. In *Sheraton Westgate*, supra, in addition to a sign on an orange vest denoting individuals as "neutral observers," an observer photographed entrants going into a jobsite, recorded there license numbers, and moved around the site. Moreover, an observer gave an employee of a neutral employer a handbill. However, Advice believed it was unclear how many neutral observers were present at any given time, how often they photographed entrants and recorded license numbers, or what else they did while acting as observers on the site. Consequently, Advice believed the charge should be dismissed.

In another Advice case, *Town & Country Electric*, supra, there was no evidence that the observers were patrolling in front of the neutral gates or that the observers initiated any conversations with neutral employees that could have had the effect of inducing them to refuse to enter the gates. The fact that business agents from other unions congregated on public property near the neutral gates and spoke to neutral employees would not constitute a violation, absent evidence that their conversations constituted inducement, and evidence that the neutral observer and the business agents were acting in concert. Further, there was no evidence to indicate that the picketer who joined the observer at the neutral gate on one occasion for five minutes engaged in any patrolling of that gate or other inducements to neutral employees. Cf. *Brell I*, supra. The short duration of the picketer's presence at the gate and the fact that this conduct was not repeated also was considered significant.

However, where there is evidence of impact on secondary employers, complaint has been found warranted by the General Counsel. In one case, the union posted observers directly at a neutral gate even though the gate was easily observed from the primary employer's gate less than 100 feet away and there was no evidence of any taint. The employer claimed that the presence of these observers caused employees of its neutral plumbing subcontractor to refuse to report to work and caused its neutral electricians to leave work early. It was decided that the union's activity fell within the category of unlawful signal picketing since it was believed Board precedent indicated that a union must use observers in an unobtrusive a manner as possible, particularly in terms of distance from the gate at issue. Here, the union's use of observers at unnecessarily close range to gate unrelated to the primary employer was evidence of an unlawful (and in this case successful) attempt by the union to send a signal to employees of neutral employers to refuse to work.

SIGNS DESIGNATING OBSERVER

It was further concluded in the *Town & Country Electric*, supra, that a sign merely identifying the Union agent as a reserved gate observer would not, without more, be sufficient to constitute a signal to engage in a work stoppage. Compare *Carpenters Local 625 (Gerard Construction)*, Case 1-CC-1978, Advice Memorandum dated October 23, 1980, with *Carpenters District Council (Compositor Construction)*, Case 31-CC-1495, Advice Memorandum dated april 14, 1981 and *Steamfitters Local 614 (W. R. Naylor & son)*, Case 26-CC-401, Advice Memorandum dated February 27, 1980. In contrast, in *W. R. Naylor*, supra, Advice found that the "observer's" sign was an apron that was placed on a truck near the neutral gate when the "observer" left the gate. This was found unlawful as a signal to neutral employees. However, in *Town & Country Electric* there was no evidence that the sandwich boards were used in a similar manner and, thus, were used in a manner inconsistent with mere observation of the gates, i.e., as a signal.

PHOTOGRAPHING AT NEUTRAL GATE

In addition, Advice has stated that the act of photographing neutrals can be viewed as consistent with the observation of neutrals, and the monitoring of gates. Compare *Brell Corp. I*, supra at pg. 5, with *Plumbers Local No. 145 (Lunsford Brothers Mechanical Contractors)*, Cases 27-CC-698, 1-3, Advice Memorandum dated June 20, 1979 at pg. 2. Likewise, an observers' notation of license plates, by extension, would also be viewed as being consistent with observation, in the absence of open exhortation to the neutrals not to enter the jobsite. Cf. *Lunsford Brothers*, supra at pg. 2. Accordingly, absent additional evidence that would be inconsistent with the Union's mere observation of the neutral gate, such as actual patrolling by the observer, or the use of the sandwich board signs by themselves as signals, or statements to neutrals by the observer or nearby union agents that could constitute express inducement, Advice found the charge should be dismissed in *Town & Country Electric*.

— END NOTES —

[1]The views expressed are those of the author and do not constitute NLRB policy.

[2]*Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547 (1950). ■

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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.

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NEWS ALERT!

As *Lawnotes* was going to press, the Supreme Court decided *BE & K*. The answer to the question in John Canzano's title is "Yes, kind of." See The Joy of Labor Law, page 23.

WILL THE SUPREME COURT OVERRULE *BILL JOHNSON'S RESTAURANTS V. NLRB?*

John R. Canzano
Klimist, Mcknight, Sale, McClow & Canzano, P.C.

Since the Supreme Court's 1983 decision in *Bill Johnson's Restaurants v. NLRB*,[1] the NLRB has consistently held that it is an unfair labor practice for an employer (or a union) to prosecute a meritless lawsuit for a retaliatory purpose. For almost 20 years, *Bill Johnson's* has served as a powerful tool to protect victims of retaliatory lawsuits filed to punish and discourage the exercise of protected activity under Section 7 of the NLRA. Under *Bill Johnson's*, a plaintiff filing a retaliatory lawsuit does so at its peril. If the lawsuit is ultimately proven to be "without merit" – i.e., if the plaintiff loses – the NLRB will conclude that the lawsuit was an unfair labor practice and award make-whole relief by ordering the losing plaintiff to reimburse the charging party all litigation costs and attorneys' fees incurred in its defense.

The continuing vitality of *Bill Johnson's* is now in doubt, however, following the Supreme Court's January 4, 2002 decision to grant *certiorari* in *BE & K Construction Co. v. NLRB*.[2]

The Supreme Court in *Bill Johnson's* was confronted with two competing interests: protecting the right of access to the courts under the First Amendment *vs*. protecting employees from lawsuits which "no doubt may be used by an employer as a powerful instrument of coercion or retaliation."[3] The Court carefully balanced these two concerns by creating a clearly articulated two-part test. If a retaliatory lawsuit is still pending, it cannot be enjoined if it is "well founded," but only if it is "baseless." Once a retaliatory suit is completed, however, the Board will find it unlawful and order make-whole relief (costs and attorneys' fees) if the suit is "without merit," *i.e*., if the plaintiff loses.

As to the first part, the Court stated:

> The filing and prosecution of a well-founded lawsuit **may not be enjoined** as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act.[4]

In concluding that a retaliatory suit could be enjoined only if it were "baseless," the Court relied by analogy on the *Noerr-Pennington* doctrine. Under the *Noerr-Pennington* doctrine, those who petition the government for redress are generally immune from antitrust liability. Under this doctrine, one can seek legislation or institute litigation for a monopolistic or anticompetitive purpose without incurring antitrust liability, unless the petitioning activity is a mere "sham."[5] The Supreme Court in *Bill Johnson's* expressly considered the *Noerr-Pennington* "sham" exception, citing by analogy a 1972 antitrust case, *California Motor Transport Co. v. Trucking Unlimited*,[6] in support of its conclusion that the NLRB cannot enjoin state litigation unless it is "baseless."[7]

As to the second part of the bifurcated test, the Court held that where a retaliatory suit is not "baseless" the Board must allow the suit to proceed to its conclusion, but can still find the suit unlawful if it is ultimately "shown to be without merit." The Court plainly did not hold that the "mere sham" or "baseless" standard applied

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WILL THE SUPREME COURT OVERRULE *BILL JOHNSON'S RESTAURANTS V. NLRB?*

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in the non-injunction context. The Court made a clear distinction between the standard for enjoining a retaliatory lawsuit ("baseless"), and the standard for finding unlawful a retaliatory lawsuit prosecuted to its conclusion ("without merit"). As the Court explained in the key passage of the case:

> In instances where the Board must allow the lawsuit to proceed, if the employer's case in the state court ultimately proves meritorious and he has judgment against the employees, the employer should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice. If judgment goes against the employer in the state court, however, or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the state in providing a forum for its citizens has been vindicated, and the Board may then proceed to adjudicate the § 8(a)(1) and 8(a)(4) unfair labor practice case. The employer's suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' § 7 rights. If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses.[8]

The Court concluded:

> In short, then, although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis.[9]

Ever since the *Bill Johnson's* decision, the Board has consistently applied the two-part test laid out by the Supreme Court. In the typical case, the charging party files a *"Bill Johnson's"* charge alleging that a union or employer has filed a lawsuit for the purpose of coercing or retaliating against the exercise of rights protected by Section 7 of the Act. Unless the lawsuit is obviously baseless, the Board will preliminarily conclude that it is well founded, and hold the ULP charge in abeyance until the lawsuit is finally concluded. If the plaintiff prevails, the ULP charge will be dismissed. However, if "judgment goes against the employer [or union] ... or if his suit is withdrawn or is otherwise shown to be without merit,"[10] the Board will then proceed to determine whether the suit was brought for a retaliatory motive. If the Board finds the suit retaliatory, it will order the losing plaintiff to reimburse the charging party's litigation expenses.

In 1993, the Supreme Court decided an antitrust case, *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc*.,[11] in which it clarified the "sham" exception to *Noerr-Pennington* antitrust immunity in the litigation context. In *Professional Real Estate Investors*, the Court decided a question left open in *California Motor Transport v. Trucking Unlimited* – whether in the antitrust context litigation can be a sham merely because a litigant has no "subjective" expectation of success. The Court held that a person cannot incur antitrust liability merely by bringing a lawsuit unless the lawsuit is "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits."[12]

> Nothing in *Professional Real Estate Investors*, however, suggests that this "objectively baseless" standard should be applied outside the antitrust context, or that it modifies the "non-injunction" prong of *Bill Johnson's*. In fact, the Court in *Professional Real Estate Investors* cited *Bill Johnson's* with approval, albeit specifically in the context of the "injunction" prong of *Bill Johnson's*:[13]

Indeed, by analogy to *Noerr's* sham exception, we held that even an "improperly motivated" lawsuit may not be enjoined under the National Labor Relations Act as an unfair labor practice unless such litigation is "baseless." *Bill Johnson's Restaurants, Inc. v. NLRB* (citation omitted)

Bill Johnson's and *Professional Real Estate Investors* thus appear to be perfectly harmonious. *Professional Real Estate Investors* relied on *Bill Johnson's* in clarifying *California Motor Transport*, and *Bill Johnson's* relied, in turn, on *California Motor Transport*. And nothing in *Professional Real Estate Investors* questions the clear holding of *Bill Johnson's* that "although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis."[14]

It was therefore both puzzling and ominous when the Supreme Court granted *certiorari* in *BE & K Construction Co. v. NLRB,*[15] limited to the following question:

> Did the Court of Appeals err in holding that under *Bill Johnson's Restaurants* the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under *Professional Real Estate Investors?*[16]

The decision was puzzling because the Court had denied a petition for certiorari on precisely the same issue less than 3 months earlier in *Petrochem Insulation v. NLRB.*[17] The decision was ominous because it could only mean that at least some justices were ready to overrule *Bill Johnson's* and felt that the *BE & K* case was the best vehicle by which to do so.

In *BE & K*, a number of California building trades unions engaged in a multifaceted corporate campaign against BE&K, a non-union industrial construction contractor, after it was awarded a major contract to modernize a steel mill. BE&K sued the unions under the federal antitrust laws and under 29 U.S.C. §303. The unions filed a *"Bill Johnson's"* charge which the NLRB held in abeyance pursuant to its standard procedure pending resolution of the underlying litigation. Ultimately, all BE&K's claims were dismissed or withdrawn with prejudice. The Board accordingly found that the BE&K litigation was "without merit" under *Bill Johnson's*. After further finding that the litigation was retaliatory, the Board held the litigation unlawful and ordered BE&K to pay all of the unions' litigation expenses.[18]

The Sixth Circuit enforced the Board's order.[19] In the Sixth Circuit, BE&K argued inter alia that it could not be liable under *Bill Johnson's* simply because its underlying lawsuit was without merit, but only if the suit completely lacked a reasonable basis. The Sixth Circuit rejected this argument as entirely at odds with the clear language of *Bill Johnson's.* The Sixth Circuit also rejected BE&K's claim that *Bill Johnson's* was modified by *Professional Real Estate Investors:*

> BE&K directs this court to the Supreme Court decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993), in support of its contention that the Court's most recent pronouncements indicate that only baseless or "sham" suits serve to restrict the otherwise unfettered right to seek court resolution of differences. That decision, however, involved only a claim of *Noerr-Pennington* immunity from *antitrust* liability. Moreover, in analogizing the situation presented in that case to the principles discussed in *Bill Johnson's*, the Court referred solely to labor law situations in which attempts were made *to enjoin* employer-initiated litigation, not situations in which court rulings had already been rendered. *Id.* at 59, 113 S.Ct. 1920. Thus, the principles BE&K seeks to extract from *Professional Real Estate Investors* are totally inapplicable to the circumstances presently before us in this case. *See Petrochem Insulation,* 240 F.3d at 31-2.[20]

It is difficult to see how the Supreme Court could reverse the Sixth Circuit in *BE & K* without expressly overruling *Bill Johnson's*. The Court will have to conclude that in *Bill Johnson's* it did not say what it said, did not mean what it said, or should not have said what it said. The law in this area is (or was) unusually and extremely well settled. The decisions in both *BE& K* and *Petrochem* were by unanimous panels, and no judge voted to rehear either case *en banc*. There is no conflict among or within any of the circuits on the meaning or application of *Bill Johnson's*.

It is equally difficult to see how the Court could conclude that *Professional Real Estate Investors* implicitly modified or overruled *Bill Johnson's*. *Bill Johnson's* expressly considered the *Noerr-Pennington* rationale which was the subject of *Professional Real Estate Investors*, and *Professional Real Estate Investors* in turn cited and relied on *Bill Johnson's* without in any way questioning its holding or its reasoning. And, as the NLRB and the union parties have argued to the Supreme Court, *stare decisis* principles weigh heavily against overruling *Bill Johnson's* because, for nearly 20 years, Congress has impliedly accepted its holding by failing to modify it through new legislation. Moreover, as those parties have further argued, there is no bright-line constitutional rule, under *Professional Real Estate Investors* or otherwise, that the government may not provide for make-whole relief against a party who files and prosecutes an ill-motivated lawsuit unless the lawsuit is objectively baseless. Indeed, such a rule would invalidate many long-established principles of federal and state law which allow the recovery of attorneys' fees by a prevailing party against an opponent whose lawsuit is not objectively baseless. Such a rule would not only wrongly constitutionalize the "American Rule"[21] that a prevailing party is not ordinarily entitled to collect attorneys' fees from the loser, it would cast doubt on the common law tort of abuse of process, Rule 11(b)(1) of the Federal Rules of Civil Procedure, and the inherent authority of the federal courts to award attorneys' fees against those who prosecute lawsuits in bad faith.

If the Court were intellectually honest, it would simply conclude that it should not have said what it said in *Bill Johnson's*. More likely, based on a reading of the oral argument transcript,[22] if it reverses *BE & K*, the Court will conclude that it did not mean what it said – in other words, that its holding was *dicta.* Hopefully, *stare decisis* will prevail and the Court will not overrule *Bill Johnson's*. Union attorneys involved in the case are cautiously optimistic.

One final note: Practitioners should be aware of NLRB General Counsel Division of Operations-Management Memorandum 02-26.[23] According to the memo, pending a decision by the Supreme Court in *BE & K*, the NLRB will withhold further processing of charges and complaints that involve allegations that a concluded suit is an unfair labor practice.

— END NOTES —

[1] 461 U.S. 731, 103 S.Ct. 2161, 76 L. Ed.2d 277 (1983)
[2] 246 F.3d 619 (6thCir. 2001), *cert. granted*, ___ U.S. ___, 122 S.Ct. 803 (2002)
[3] 461 U.S. at 740
[4] 461 U.S. at 743 (emphasis supplied)
[5] *See, Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); *Mine Workers v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed.2d 626 (1965)
[6] 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed.2d 642 (1972)
[7] 461 U.S. at 741-744
[8] 461 U.S. at 747 (emphasis supplied)
[9] 461 U.S. at 749 (emphasis supplied)
[10] 461 U.S. at 747
[11] 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed. 2d 611 (1993)
[12] 508 U.S. at 60
[13] 508 U.S. at 59 (emphasis supplied)
[14] 461 U.S. at 749
[15] 246 F.3d 619 (6th Cir. 2001), *cert. granted*, ___U.S.___, 122 S.Ct. 803 (Jan.4, 2002)
[16] ___U.S.___, 122 S.Ct. 803 (2002)(citations omitted)
[17] 240 F. 3d 26 (D.C. Cir. 2001), *cert. denied* ___U.S.___, 122 S.Ct. 458 (Oct. 29, 2001)
[18] 329 NLRB No. 68 (1999)
[19] 246 F. 3d 619 (6th Cir. 2001)
[20] 246 F. 3d at 629.
[21] *See, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 95 S. Ct.1612, 44 L. Ed.2d 141 (1975).
[22] The case was argued April 16, 2002. The transcript is available on the Supreme Court's website at www.supremecourtus.gov/oral_arguments/argument_transcripts.html.
[23] Available through the NLRB's website at www.nlrb.gov/ommemo/om02-26.html. ■

WHY THE BURDEN OF PROOF MATTERS

Sheldon J. Stark, ***Education Director, Institute of Continuing Legal Education***

The burden of proof and who bears it can determine the outcome of a case. The power of the burden was only brought home to me fairly late in my practice. The lesson was made painfully clear as a result of a series of blunders and poor judgments made all along the way in a specific case. Let's call the case *Smith v. Jones, Inc.*

Blunder #1: Wouldn't you think I'd have learned early on not to take a case that two or three other lawyers already handled and abandoned? Not so. Somehow, my avoidance instinct was always overpowered by a good story and the siren of rescue fantasies.

Background: At the time of my involvement, Jones, Inc. was a very large, successful enterprise run by Tom Jones, a shrewd but unscrupulous businessman. John Smith, my client, was an entrepreneurial upstart in the same industry. Lack of success had done nothing to reduce the size of Smith's ego. When a third business entity in the industry, Carcass Corp., began publicly failing, Smith and Jones found themselves competing for the bones. They soon found they had much in common. Before long Smith was hired to be President of Jones, Inc. and Carcass was abandoned by both. Smith, of course, was required to liquidate Smith & Company to devote himself full time to Jones, Inc. Smith's hire was accompanied by fanfare and a big media splash. Thirty days later, however, Jones had had enough of Smith and terminated him "for cause" effective immediately. Smith sued for wrongful discharge and detrimental reliance. By the time Smith consulted me, little had been done on the case, and a trial date was looming. The only discovery taken was Smith's deposition consisting of 60 pages of insults traded by the two opposing lawyers, whose harsh opinions of one another mirrored those of Smith and Jones themselves. Hardly a single question had been answered. Not one interrogatory had been filed, nor one request to produce. Jones, Inc. was on its' third lawyer, and Smith's second lawyer — the one who neglected to file a demand for trial by jury — had literally abandoned Smith's case, his entire practice and indeed, it seemed the whole of the State of Michigan. I was unable to locate him anywhere to find out what he knew.

Blunders #2a & 2b: I should have conditioned representation of Smith on winning a motion to file a delayed jury demand. I did not do so. When I lost the motion, I should have gotten out. I don't know what made me think I could still win the case.

Truncated discovery: The court granted my motion to depose Jones. Defense counsel was denied a second chance to depose Smith. As a result, I was not able to see the kind of witness my new client would make. (If you argue that this constitutes yet another blunder, I won't quarrel. At the time I calculated losing the opportunity to see Smith under fire was outweighed by the opportunity to deprive defense counsel of real deposition testimony to use at trial.)

Jones turned out to be a terrible witness. For a time, I considered Jones the worst witness I had ever encountered. For a short time. Until the day Smith testified at trial.

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WHY THE BURDEN OF PROOF MATTERS

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During Jones' deposition, you could actually see the wheels turning in his brain, skating and making up his testimony as he went along. Here's how I remember one line of questioning:

Q. How can you seriously assert there was cause for discharge after only 30 days?

Long pause. The wheels visibly turn. He looks around the conference room. A framed poster on the wall suddenly seems to capture his interest. He looks at his lawyer. His lawyer is waiting for an answer. there is no escape. He must say something.

A. I didn't fire him for cause.

Q. You didn't fire him for cause?

Counsel is unable to hide his shock and amazement. Jaw falls open.

Why *did* you fire Smith?

A. I didn't fire him. His contract expired.

Long pause. The wheels are now turning in counsel's head.

Q. What do you mean his contract "expired?"

A. I hired him on a 30 day contract.

Longer pause. The wheels grinding to a halt.

Q. As a try out?

A. No. His contract to run Jones, Inc. was for 30 days. Period.

Q. Why would Smith have shut down his business and notified his customers if he was only going to be President for 30 days?

A. I thought it was dumb, too!

There was more — like why would you hire someone so dumb to be president of your company — but you get the idea.

Blunder #3: I didn't subpoena Jones for trial. I made the judgment not to tip off the defense that Jones would be my first witness. As if he needed to be tipped off. Jones had attended every proceeding, and appeared for the first trial date when we were unable to start. I don't think it ever dawned on me that defense counsel would direct him to make himself scarce on the next trial date!

Trial: There was no way I was going to put Smith on the stand before Jones. Without Jones, that left only one strategy: Delay. I called Smith's former employees first, therefore, to establish that his little enterprise had been on the verge of success if only he had continued to operate. The trial day wasn't over. I called the former CEO of Carcass to establish that Smith had been a real contender to purchase Carcass and take it out of bankruptcy. They day still wasn't over. There were no more witnesses out in the corridor, and, of course, no sign of Jones. At last, I had no choice but to call Smith to the stand.

He wasn't really, really bad. We got through the material we prepared. His case was in — sort of.

Blunder #4: I turned my client over to defense counsel for cross examination. Okay, it wasn't a mistake because I had no choice. It only *seems* like a mistake.

Trial continued: Cross examination could not have gone worse. Smith and Jones were clearly birds of a feather. They deserved one another. It was a nightmare. As much impeachment material as I had on Jones, defense counsel had equal amounts on Smith. Moreover, Smith — not unlike Jones — could not give a straight answer to a question no matter how simple. Nor could he stick with the same answer to any question asked twice in two different ways. He refused to be pinned down on anything. At the end of the day, with cross examination not yet over, the judge asked to see the lawyers in chambers, defense counsel first. When it was my turn, the judge advocated settlement. He told me how much settlement authority he had extracted from defense counsel, and urged me to take it. I don't remember what pathetic excuse I offered for rejection, but I will never forget the judge's reply:

Judge: Mr. Stark, I've been on the bench 40 years. Your client is the worst witness I've ever seen!

Mr. Stark: You've only heard one side, your Honor. Wait until you hear Jones. He's ten times worse.

Judge: Yes, Mr. Stark, but *you* have the burden of proof!

Epilogue: Of course, we settled. Not however, before I met privately with Smith and shared the judge's assessment of his performance — an assessment with which, by the way, I did not disagree. To this day, Smith holds the title!

Smith: The judge actually said I was the worst witness he had ever seen?

Me: Yes.

Smith: Does that hurt our case?

I am not making this stuff up!

Conclusion: Despite years of experience as a plaintiff attorney, it was not until *Smith v. Jones, Inc.* that I came to realize the true power and importance of the burden of proof and who bears it. ■

WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for *Lawnotes.* But the muse is elusive. And you just can't find the perfect topic. You make the excuse that it's the press of other business but in your heart you know it's just writer's block. We can help. On request, we will help you with ideas for article topics, no strings attached, free consultation. Also, we will give you our expert assessment of your ideas, at no charge. No idea is too ridiculous to get assessed. This is how Larry Flynt got started. You have been unpublished too long. Contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., 1400 North Park Plaza, 17117 West Nine Mile Road, Southfield, Michigan 48075 or (248) 559-2110 or israel@martensice.com.

GOOD WRITING IS HARD WORK

A well-written brief, letter or article takes time and energy even for the most gifted writers. Good writing is hard. Excellent writing is very hard. In *Writing as a Career,* great Middle East scholar Daniel Pipes, *www.danielpipes.org*, expresses both the pain of writing and the joy of a finished product. His words apply to legal writing.

Pipes is not only is a great writer. He has perceptively warned us for over 25 years of the dangers of militant Islam as the new fascist ideology facing the world. Below, I quote from a *Writing as a Career*, published in 1999, where Pipes reminds that while writing remains a "difficult enterprise" it is rewarding, something we should all keep in mind as we write our briefs, letters, and articles for *Lawnotes:*

> Although I have published some ten books and hundreds of articles, writing remains for me a difficult enterprise. As anyone who has been a student knows, getting one's thoughts down on paper is hard to do. Yes, it does get somewhat easier with experience, but not by much, perhaps because it involves turning the three-dimensional chaos of the world into the neat order of two dimensions on paper. Writing always requires concentration and purpose and there is no way to avoid the first draft, that sloppy and ungainly effort to order one's thoughts. Nor can I avoid the many subsequent drafts and rereadings, sometimes a dozen in all, or even more.
>
> * * *
>
> Despite its difficulty for me, I focus on writing for three main reasons. First, it is consequential. Writing moves the world. Virtually every idea any one of us has ever had ultimately derives from a text someone once wrote. Spiritual life, political ideology, technology, notions of romance — they all derive from words on paper (or, latterly, computer screen). Every newscast and movie flows from the written word. So has it been for millennia and so will it remain even in this era of multimedia and blossoming new technologies. The only way to flesh out an idea, make it permanent, and perfect its expression remains the written word. When I write, I feel I have a chance to participate in this deeply significant human undertaking.
>
> Second, writing is rewarding. Seeing one's name in print, it cannot be denied, is a pleasure. It's partly a matter of ego gratification, partly a satisfaction of memorializing one's thoughts and having them made permanent in a polished form. But writing also rewards me in a more material sense, being the fulcrum of my career. Nearly all the opportunities I have result from writing. Newspaper columns lead to national television, magazine pieces win invitations to visit distant places, scholarly articles bring business consultancies, and books land me in conferences.
>
> * * *
>
> Finally, I write because I feel a wish to express myself....
>
> – John G. Adam

E-MAIL AND THE INTERNET IN THE WORKPLACE

Adam S. Forman
Miller, Canfield, Paddock & Stone, P.L.C.

CASE LAW

Do Employees Have A Protected Privacy Interest In Web-Based E-Mail Accounts? Under Wisconsin's invasion of privacy statute, an employee just might, provided he or she can demonstrate that a reasonable person would consider such an e-mail account private and consider unauthorized access into it "highly offensive." In *Fischer v. Mt. Olive Lutheran Church,* Case No. 01-C-0158-C (W.D. Wis. Mar. 28, 02), the plaintiff employee maintained a Microsoft Hotmail 3-mail account, an account that is web-based, free and resides on a server that is part of the Microsoft Network. Plaintiff accessed his e-mail from his employer's computers using his employer's Internet service provider. After inadvertently overhearing plaintiff engaging in a sexual explicit telephone conversation, the employer hired a computer expert to access plaintiff's e-mail account, printed out messages suggesting that plaintiff engaged in sexual conduct of which the employer disapproved, and terminated plaintiff's employment based on that behavior. Rejecting that employer's motion for summary judgment, the court found a material fact as to whether unauthorized access of the plaintiff's private e-mail account violated Wisconsin's invasion of privacy statute, which imposes liability for intruding upon "the privacy of another of a nature highly offensive to a reason person, in a place that a reasonable person would consider private." In so finding, the court refused to limit the privacy right to a geographical place.

The court also held that, unlike e-mail stored on an employer's computer network, the plaintiff's web-based e-mail were communications "in electronic storage" protected by the Electronic Communications Storage Act. Because the e-mail at issue was still on the service provider's system, rather than downloaded from the e-mail service and saved on the employer's computer system, the court found the decision in *Fraser v. Nationwide Mutual Insurance Co.,* 135 F. Supp.2d 623 (E.D. Pa. 2001) (*See* Lawnotes, Summer, 2001) distinguishable.

Does An Employee Have A State Constitutional Right Of Privacy In A Company-Owned Home Computer? Not according to the California Court of Appeals. In *TBG Insurance Services Corp. v. Superior Court of Los Angeles County,* 18 I.E.R. Cases 545 (Cal. App. 2 Dist. 2002), the defendant-employer terminated the plaintiff-employee for accessing inappropriate sites on the Internet via his company-owned business and home computers, in

(Continued on page 10)

E-MAIL AND THE INTERNET IN THE WORKPLACE

(Continued from page 7)

violation of the employer's policy. The employee sued alleging wrongful termination. During discovery, the employer requested and then moved to compel the production of the employee's home computer. In opposition, the employee argued that the information contained on the home computer was personal, including information regarding his finances, taxes and family's correspondence, and, as such, protected by his state constitutional right to privacy. Rejecting that argument, the court found that social norms surrounding the use of computers has resulted in a diminished expectation of privacy, as electronic monitoring, recording and reviewing was widespread and routine. In addition, the court gave considerable weight to the employer's computer use policy, signed by the employee, that stated, among other things, that the computer was the property of the company, it should not be used for inappropriate means and that the company could monitor computer use.

A similar result was reached in *Muick v. Glenayre Electronics*, 280 F.3d 741 (7th Cir. 2002), where the employer's computer use policy reserving the right to inspect the laptop computers it issued to its employees, eliminated the plaintiffs-employees' Fourth Amendment-based claim to privacy in the contents of their computers. Not only did the court find the employer's policy reasonable, but it also noted that given the widespread abuse of company computers, a company's failure to reserve the right of inspection might be "irresponsible."

"The Truth Shall Set You Free, But First It Will Piss You Off!". . . And It May Not Even Receive First Amendment Protection! In *Pichelmann v. Madsen*, 2002 W.L. 442248 (7th Cir. 2002) (unpublished), the Seventh Circuit affirmed the lower court's dismissal of lawsuit brought by a student-employee who claimed that her state university's instruction to remove a quotation from her e-mail signature violated her First Amendment rights. Attached to each of the employee's e-mails was the Gloria Steinem quote "The truth shall set you free, but first it will piss you off!" According to the court, the employee's speech fell into the private end of spectrum and thus was not a matter of public concern. Even if her speech addressed a matter of public concern, the university had a "wide degree of deference" in judging that the quote was vulgar and should not be included on work-related messages.

Downloading Business Data After Hours And Subsequent Deletion Of The Files Was Trade Secret Theft By "Improper Means." Just before leaving the plaintiff-company to work for a competitor, the defendant-former employee copied information from the company's databases to portable storage device. Thereafter, the company sued the employee alleging, among other things, that the employee's conduct violated Illinois' Trade Secrets Act. Evidence in that case disclosed that: (1) the employee, without explanation, accessed the company's computer from home with his personal computer after business hours; (2) the employee deleted 60 megabytes of data from his computer; and (3) the employee, without reason, defragmented his computer four times. Based on that evidence, the court in *FKI Inc. v. Grimes*, 177 F. Supp.2d 859 (N.D. Ill. 2001) found that the employee used "improper means" to misappropriate the trade secrets.

UPDATES

In the Spring 2002 edition of *Lawnotes*, this column reported on the decision in *United States v. Scarfo*, 2001 Wl 1650936 (DNJ, 2001), holding that the FBI did not violate the criminal defendant's constitutional privacy rights by installing a "key logger" system on his computer to obtain his computer passwords. Whether that decision would have withstood judicial review is now moot, in light of the criminal defendant's guilty plea, entered in February, 2002.

Also reported in the Spring 2002 column was the decision in *Intel Corp. v. Hamidi*, Case No. C033076 (Cal. Ct. App. Dec. 10, 2001), a case in which the California Court of Appeals concluded that sending mass e-mails to former coworkers constituted a trespass to chattels. In March 2002, the California Supreme Court granted review of that decision. *See INtel Corp. v. Hamidi*, Case No. S103781. The San Francisco-based Electronic Frontier Foundation has asked to file an *amicus curie* brief arguing that the Court of Appeal's decision, if upheld, would negatively impact electronic speech and commerce and could impose liability on search engines that link users to other Internet sites without permission. Stay tuned.

SPAM: OUT OF THE CAN AND INTO YOUR EMPLOYEES' COMPUTERS

"Spam," as defined by Netlingo.com, an online Internet dictionary, is "Inappropriate commercial message of extremely low value." Spam typically refers to unsolicited messages that come over many outlets and its targets include e-mail inboxes, search engines and discussion groups. According to Netlingo, the definition is "purposely vague because everybody has his or her own definition." Spam is attractive to those who send it because, unlike junk advertisements sent via snail mail, the cost of sending it is negligible. While a cheap and easy way to reach potential customers, the voluminous amount of spam sent every day is choking some of the nation's largest internet service providers and according to some reports, costing corporate America $1 per piece in lost productivity. According to Jupiter Media Metrix, an Internet research company, consumers will receive about 206 *billion* junk e-mailings in 2006, or an average of 1,400 per person, as opposed to the approximately 700 per person received in 2002.

Governmental Response. Presently, Washington and California are the only states with anti-spam legislation on the books. The Washington law prohibits the sending of unsolicited e-mail messages that use a misleading subject line or disguise their point of origin. It was upheld by the Washington Supreme Court in *State v. Heckel*, 24 P.3d 404 (Wash.), *cert. den.* 122 S. Ct. 467 (2001). The California statute requires, among other things, that senders of commercial unsolicited e-mail include at the beginning of the subject line the letters "ADV:" and "ADV:ADLT" for adult-related spam. Companies, in turn, can simply tailor their filters to block out messages with "ADV:" in the re: line. The statute also requires senders to include a working e-mail address or toll-free number for recipients who want to stop further e-mail from the spammer. Although the statute was recently upheld by the California Court of Appeals in *Ferguson v. Friendfinders Inc.*, 115 Ca.Rptr.2d 258 (Cal. Ct. App. 2002), an appeal is pending with the California Supreme Court.

In addition, 26 other states have spam legislation pending. Many of the states are following California's lead. In March, HR 5777 was introduced into the Michigan legislature. The bill is patterned after the Washington law and would make deceptive e-mail unlawful under Michigan's Consumer Protection Act. Aimed at spammers who steal service from unsuspecting businesses by using their outgoing e-mail servers to send out spam, this bill would also prohibit bulk e-mailers from using the resources of a third party without permission.

Private Companies Respond. Similarly, private companies are responding to spam. Claiming that its employees received at least 6,500 spam messages over a six month period, in March, Morrison & Foerster, California's largest law firm, initiated an action against the offending California-based e-mail marketing company. alleging that the spam violates California's anti-spam law, the law firm is seeking $50 for each e-mail received by its employees, up to a maximum of $25,000 per day. Meanwhile, in April, AOL settled an action against Netvision Audiotext, an online adult entertainment company. Netvision Audiotext was allegedly providing incentives for third-parties to send spam messages to AOL customers. In February, an Australian anti-spam advocate brought a trespass action against a company alleged to have sent millions of spam. The *Intel Corp. v. Hamidi case, supra,* cautions that it is too early to tell whether such a cause of action will withstand judicial scrutiny in the United States.

Ultimately, these cases are the exception, not the rule, as it is still difficult for small companies and individuals to protect themselves against unwanted e-mail. filters, while appropriate in some situations, also come with the risk of blocking out business related e-mails. Loopholes in filters are also plentiful. by simply including a variation of the letters "ADV," such as "A.D.V." or "a d v," spammers in California can circumvent filters while arguably staying within the letter of the law.

NEWS & TRENDS

Instant Messaging In The Workplace Ups The Ante For Monitoring. An even more casual forum than e-mail, instant messaging is literally a typed conversation, in which pieces of text are whisked over the Internet, with each piece instantaneously appearing on the recipient's screen. Moreover, unlike e-mail, instant messages are not automatically stored in servers and inboxes. Interpreting the Securities and Exchange Commission's rules on electronic correspondence to include instant messaging, compliance officers in regulated industries are recommending the installation of archiving software. As instant messaging becomes more prevalent in the workplace, the need to monitor such communication to safeguard the workplace for improper or illegal behavior will significantly increase.

Fraud and Related Activities In Connection With Computers Law Scores First Conviction. In February, the Fraud and Relating Activities In Connection With Computers Law, 18 U.S.C. § 1030, passed in 1994 to combat computer hacking, claimed its first victim, a disgruntled computer programmer who sabotaged his former employer's computers, causing reported losses of over $10 million. The former employee was sentenced to more than three years in prison and ordered to pay $2 million in restitution to his former employer. In a related item, the Southern California Regional High Tech Task Force successfully prosecuted its first case against a former employee who hacked into his company's computer system, shutting it down for 24 hours. The former employee was sentenced to 16 months in state prison and ordered to pay $50,000 in restitution.

Are Public Employees Violating The Law By Deleting Their E-Mail? The answer may come from the decision in a lawsuit recently filed by several new organizations in Utah, which alleges that by deleting e-mail from his computer, Governor Mike Leavitt is destroying public records in violation of the Government Records Access and Management Act and Utah's Uniform Electronic Transmissions Act.

Disclosing Web Anonymity: A Standard Begins To Evolve. This column has previously reported on cases in which courts have granted and denied motions to disclose the identity of anonymous internet posters, allegedly engaging in improper or illegal activity. (*See, e.g., Lawnotes,* Fall, 2001). While courts continue to apply a variety of standards as to when disclosure will be required, many are requiring that the plaintiff: (1) identify the offending statement(s); (2) demonstrate that it has a reasonable chance of prevailing in an action based on those statements; and (3) establish that it cannot ascertain the identities of those responsible for the postings through other means.

It's All "About" The Money. Challenging their status as "independent contractors," 34 human "guides" have sued About.com claiming that the website violated the FLSA by failing to pay them minimum and overtime wages. More specifically, the guides, who assist Internet surfers find information on the Web, claim that the company "would not have function without [their] ongoing labor," and as such, they are properly employees of the company.

Employers Should Beware Of The Cookie Monster. "Cookies" are small data files placed on an Internet user's computer when visiting websites and are primarily used to identify visitors for the purpose of customizing content such as advertising. Some sites, including Microsoft's Hotmail, rely upon cookies for authentication purposes. The cookies are written to the user's hard disk when the user clicks the "keep me signed in" option while logging in. Recently, it was reported that by capturing a copy of the browser cookies file of a Hotmail user, a perpetrator can gain access to the account without a password. Further, this access would be permanent, even if the user changed passwords, as cookies trump even passwords. If employers choose to permit their employees to use the company-provided Internet service for personal use, they would be wise to admonish employees to remember to click the respective web page's "sign-out" icon when finished with a session.

Employees Not As Concerned About Employer Monitoring In Wake of 9-11. In a recent survey conducted by Harris Interactive for the public policy group Privacy & American Business, 81% of the workers polled indicated that they had no complaints about excessive monitoring of staff on the job. An even higher 94% of the workers did not feel that their employer improperly released information about them. ■

NLRB PRACTICE AND PROCEDURE

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

Those of you who attended the recent 27th Annual Labor and Employment Law program put on by ICLE may have heard one of the speakers comment on a possible package of candidates to fill Board member vacancies at the NLRB. As I indicated in a prior column, all four of the current Board members' terms are due to expire sometime in 2002. While the package mentioned was certainly interesting given its Michigan connection, as of the date of the drafting of this column, [5/1/2002] I am aware of only one presidential nomination to the Board that being the re-nomination by President Bush on February 20, 2002 of Deputy Assistant Attorney General Alex Acosta.

The Supreme Court recently issued a significant decision involving both the NLRB and INS. In *Hoffman Plastics Compounds Inc. v. NLRB*, 535 U. S. __, 169 LRRM 2769 [3/27/2002], the Court, in a 5-4 decision, Chief Justice Rhenquist writing for the majority, ruled that the NLRB lacked authority to award backpay to undocumented aliens who were discharged in violation of the National Labor Relations Act while working illegally in the United States. The majority noted that while the Board has wide authority to fashion remedies, it is not unlimited authority and the award of backpay to undocumented aliens is foreclosed by federal immigration policy.

In *International Union of Elevator Constructors*, 337 NLRB No. 55 (3/18/2002), the Board tightened its standards with respect to the acceptance of late filed documents. The Board decided that it would not accept a late filed document if the only reason for the late filing is a miscalculation of the filing date. The Board also noted that a party seeking to file an untimely document, who is claiming "excusable neglect," must submit a sworn affidavit setting forth the specific facts and signed by someone with personal knowledge of these facts.

In *BE & K, Construction Company* v. *NLRB*, 329 NLRB No. 68 (9/30/99) enf'd 246 F. 3d 619, rhg. en banc denied (6th Cir 2001), the Supreme Court recently heard oral argument on whether the Board, in a *Bill Johnson's* type case, may impose liability on an employer who has filed a losing, retaliatory law suit even if the employer can show that the lawsuit was not objectively baseless. Currently in *Bill Johnson's cases*, 461 U.S. 731 (1983), the Board holds its case in abeyance to see what the Court does with the lawsuit. If the Court dismisses, the Board then proceeds to resolve whether the plaintiff acted with a retaliatory motive in filing the suit. The Board does not look behind the Court's dismissal to see if the suit had some objective basis. This may all change depending on what the Supreme Court does in *BE & K*.

In a recent decision by the Sixth Circuit Court of Appeals, a three judge panel decided that if you seek to enjoin an NLRB regional director from prosecuting your client for alleged unfair labor practice violations under the Supreme Court's *Leedom* v. *Kyne*, 385 U.S. 184(1958) decision, you need to show not only that the regional director exceeded his statutory authority, but also that your client will be "wholly deprived" of its statutory rights if the injunction does not issue.. The panel reversed the ruling of a District Court Judge who had enjoined prosecution. The case is *Detroit Newspaper Agency and Detroit News* v *NLRB*, electronic citation 2002 Fed app 0129P (6th Cir 4/15/ 2002).

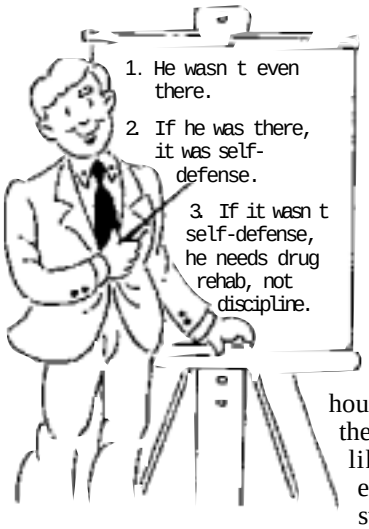
Finally, the General Counsel's office, in an attempt to comply with the Government Paperwork Elimination Act (GPEA), implemented a pilot program to see whether requests for extensions of time to file appeals could be done by an electronic system. I am told that the pilot program was successful and the program will be made available shortly for all field offices. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Oh wise and terrible arbitrator, we live in fear lest we displease you. But your moods seem to us arbitrary and capricious. Is there a method to your madness? — DB, Detroit

Yes, as a matter of fact, there is. I will tell you about one of the things that displeases me. I will tell you about frivolous arguments.



Some lawyers seem to think it is their duty to raise every argument they can think of. Legally, this is a false belief. Strategically, it is an enormous mistake. And it displeases me, which is another good reason not to do it. Raising every argument you can think of is like wearing all your ties at once. It's like cooking with every ingredient in the house. It's like ordering all the desserts on the tray. It's like hanging pictures on every inch of your wall space. It's like wearing four belts and three pairs of suspenders. It's like this paragraph. Only when lawyers do it, it takes much longer to get through than this paragraph does.

Legal arguments do not have an additive, cumulative effect. In fact the opposite is true. Raising an overabundance of arguments has the effect of cheapening your good ones. It dilutes them. It inflates the currency of persuasion. It's redundant and superfluous, extraneous and duplicative. It's supererogatory and it is pleonastic. It is prolix. My friends, it is otiose.

As always, context is important. Consider the following argument:

> Mr. Arbitrator, the employer has not shown that the grievant ever received proper training in this regard. The employer has not produced a signed receipt indicating that the grievant received written notification of the employer's intention to hold him to this standard. Nor have they provided testimony that the grievant was present at any training at which the matter was discussed. Consequently, the employer cannot show the grievant had notice that the employer expected him to avoid committing the charged offense.

Certainly, there are cases in which this argument has merit. But, friends, in the case of *stealing* it does not. Please, if you wish to avoid displeasing arbitrators, do not make this argument in stealing cases.

Certainly it is a good idea for lawyers to think of every argument they can think of. But the next step is just as important. Sort out the frivolous ones and throw them away.

A VIEW FROM THE CHAIR

Roy Roulhac, ***Chair***
Labor and Employment Law Section

While growing up in the 1940s and 50s in the panhandle of Florida, I did not attach much significance to being a Negro with a French surname. The name Roulhac, which in the South is pronounced, "Rolack," was rather common. I did not learn of its origin until 1982 when I discovered the 108-page *Genealogical Memoir of the Roulhac Family in America*, first written in 1849 by Frances Leonard Gregoire Roulhac three years before he died, and published in 1894 by Helen M. Prescott. It revealed that the European Roulhacs were rich, influential, and enemies of the French Revolution. Psalmet Gregoire Roulhac, a seventh generation Roulhac, was the first of the name to come to America from Limoges, France. He arrived in Beaufort County, NC, and was followed by John in 1782, and Francis in 1792 after managing a sugar plantation in Haiti for a few years before being driven out by the outbreak of the Haitian Revolution. They or their antebellum descendants enslaved all Roulhacs of African-descent.

African Americans were listed in the 1790 to 1860 federal censuses in age and sex groups under the name of their owners. In 1850 and 1860 censuses, slaves were enumerated in slave schedules under the names of their owners by sex, age, and color, but without a name. Because slaves were classified as personal property, court records contain important information about their lives and played a significant role in my research. For example, at a November 14, 1831, sheriff's sale in Washington County, N.C., "twelve Negro slaves, the property of Horace Ely, subject to a trust created by a marriage contract" were purchased by Joseph B. G. Roulhac, for five hundred and forty-five dollars. A February 4, 1834, bill of sale describes the sale by Frances Roulhac Ely to Joseph B. G. Roulhac of Daniel, Henry, Lancashire & Ned for $980, plus $75.26 for their hire during 1832, and $66.50 for their hire in 1833. The January 14, 1858, inventory of the estate of John G. Roulhac, included my great-great grandparents' family, twenty other slaves, and personal property. My ancestors were listed as follows: Nero, age 52, $700; Nelly, age 46, $483.33; Fayton, age 10, $600; Peter, age 9, $550; Robert, age 7, $458.33; Angelina, age 12, $583.33; and Chatty, age 19, and her son, Isom, 2 years, $1,116.66. Slaves accounted for $24,323.38 of John's $28,976.30 inventory. John Gray willed three-fourths of his property to his children, and the remainder, in trust to his grandson.

Slaves were prohibited from being taught to read and write and have never been paid for the labor. According to Chief Justice Taney's declaration in the 1857 *Dred Scott* decision, when the Declaration of Independence was adopted and the Constitution was framed, blacks had no rights that whites were bound to respect. Despite their oppression, enslaved Africans vigorously protested their status and frequently took daring measures to gain their liberty. Roulhac's Cesar was among slaves tried for their involvement in the 1802 Bertie North Caroline Slave Conspiracy to slaughter the whites and seize control of the county. Twenty-three slaves were executed and the ears of some of the others were severed. In 1864, eight enslaved Roulhacs in North Carolina and one in Tennessee escaped plantation life by joining the Civil War. Conditions did not improve significantly after the War, and many freedmen, including twenty Roulhacs, accepted the American Colonization Society's offer to emigrate to Liberia.

More than 4,000,000 Africans and their descendants who were enslaved in the United States and in the Colonial territories shared the experience of my ancestors during the antebellum period. The lingering impact of slavery has sparked a growing global movement in favor of reparations. During every session of Congress since the passage of the Civil Liberties Act of 1988 that granted reparations to Japanese Americans for their internment in concentration camps during World War II, Representative John Conyers (D. Michigan) has introduced a reparations bill. The bill does not provide for actual compensation, but would establish the first federally chartered commission to study the impact of slavery and recommend a range of appropriate remedies. In March and April, two lawsuits were filed on behalf of slave descendants seeking to recover damages from various companies — Aetna; CSX, Inc.; FleetBoston Financial; New York Life, Norfolk Southern and Brown Brothers Harriman, a New York bank — that allegedly profited from slavery. Both lawsuits seek undisclosed damages that would be used to fund education and economic development programs for Blacks.

The National Coalition of Blacks for Reparations has announced that after its June conference in Detroit, it plans to file a lawsuit against the U.S. government for enforcing laws that protected the rights of slaveholders to enslave Africans, stole the wealth of their ancestors' labor, and prevented them from passing their wealth to their heirs. A third suit is being planned for later this year by the Reparation Coordinating Committee. The group lead by Randall Robinson, author of *The Debt: What American Owes to Blacks* (Dutton, New York, 2000) and founder of TransAfrica Forum, includes Johnny Cochran and professors Charles Olgletree of Harvard University and Manning Marable of Columbia University. The Committee plans to target corporations and universities benefited from slavery and seek an apology from the U.S. government for its role in perpetuating the institution.

Although the plaintiffs in the reparations lawsuits face major hurdles and it is unlikely that the legislation introduced by Rep. Conyers will be reported out of the Republican-controlled House Judiciary Committee, these efforts may serve to generate a discussion on slavery and its continuing impact on society. Aetna has apologized for its role in insuring slave owners against the death of those they enslaved, and CSX has acknowledged that slave labor was used to construct its railroad lines. In late April, the California Department of Insurance released a report that listed the names of eight insurance companies that issued policies to slave owners and has established a database of the names of approximately 600 insured slaves and their slave owners. (The report and database is available at: http://www.insurance.ca.gov/docs/FS-SEIR.htm). Recently, a committee appointed by the Oklahoma legislature proposed that $33 million be allocated for scholarships, a museum, and tax breaks to encourage business development, in addition to direct payment to more than 70 survivors of the 1921 Tulsa riots.

As we enter the 21st century, race relations continue to dominate the nation's domestic agenda. The Racial Privacy Initiative in California, under the guise of creating a color-blind society, seeks to prohibit government agencies from collecting, distributing and using data about race and ethnicity. The May 14, 2000, 5-4 decision by the Sixth Circuit Court of Appeals in the University of Michigan Law School's affirmative action case (electronic citation: 202 Fed App 0170P) sets the stage for the U.S. Supreme Court to decide the future of affirmative action in higher education. Whatever the outcomes, I believe that a national commitment is needed to address the lingering pattern of white privilege and black inequality that are rooted in slavery and contradict the ideal of equality.

U.S. SUPREME COURT UPDATE

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Seniority Rules Normally Trump Conflicting Requests for Accommodations Under the ADA

The Supreme Court recently established a rule in Americans with Disabilities Act (ADA) cases, 42 U.S.C. 12101 et seq., granting a presumption in favor of an employer's seniority system if it conflicts with an employee's request for an accommodation. In *U.S. Airways, Inc. v. Barnett*, 533 U.S. __ (2002), the plaintiff employee injured his back while working for the defendant and transferred to a less physically demanding job in the mailroom. Two years later, his position became open to seniority-based bidding and at least two other employees senior to him intended to bid on the job. The plaintiff asked the defendant to accommodate his disability by making an exception to the seniority system and allow him to keep his mailroom job. The defendant declined and ultimately terminated the plaintiff.

The plaintiff filed suit under the ADA and the district court granted the defendant's motion for summary judgment. The court of appeals reversed and held that the presence of the seniority system was merely "a factor in the undue hardship analysis." 228 F.3d 1105, 1120 (2000). The Supreme Court disagreed and reversed the court of appeals.

The court first noted that under the ADA, a *reasonable accommodation* may include "reassignment to a vacant position." 42 U.S.C. 12111(9)(B). The court assumed that normally the plaintiff's requested assignment would be reasonable under the statute except that it violated the rules of the seniority system. The court held that ordinarily, the fact that a requested accommodation violates a seniority system's rules renders the accommodation unreasonable. However, the court made an exception to that rule in cases where a plaintiff can show that special circumstances warrant a finding that the requested accommodation is reasonable in a particular case. Examples of facts that would rebut the presumption could include cases where an employer retains the right to change a seniority system unilaterally and exercises that right frequently or where a seniority system already contains so many exceptions that one more is unlikely to matter.

After citing the majority rule, Justice Scalia stated in his dissent, "I have no idea what this means." Slip Op. at 8. It is likely that parties will be arguing over the interpretation of the new rule for some time to come.

NLRB Cannot Award Back Pay to Alien Who Is Not Authorized to Work in U.S.

In *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. __ (2002), the employer laid off the employee after he had supported a union organizing campaign. The National Labor Relations Board (NLRB) later found that the employer had violated the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(3), and ordered that the employer cease and desist from further NLRA violations, post a notice regarding the remedial order, and offer reinstatement and back pay to the employee. At a compliance hearing to determine the amount of back pay owed, the employee testified that he had never been legally authorized to work in the United States and had only gained employment with the employer after submitting false documentation. The administrative law judge held that the NLRB was precluded from awarding back pay or reinstatement because it had been unlawful for the employer to have hired the employee and for the employee to have used fraudulent documents to establish employment eligibility.

Years later, the NLRB reversed with respect to back pay. The Supreme Court reversed. The court noted that although the NLRB had broad discretion to select and fashion remedies for NLRA violations, the court has consistently set aside awards of reinstatement or back pay to employees found guilty of serious illegal conduct related to their employment. In this case, to award back pay to illegal aliens would unduly tread on federal immigration law. Although the NLRB could not award back pay or reinstatement to the employee, the court stated that the employer would not get off "scot-free," slip op. at 9, because the NLRB was free to impose other sanctions, which it had already done.

Regulation Punishing Employer For Not Informing Employee That Absences Counted As FMLA Leave Invalid

In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. __ (2002), the plaintiff employee developed cancer and consequently took off 30 weeks of work under the defendant employer's leave policy. The defendant did not notify the plaintiff that 12 weeks of that absence would count against her leave under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 et seq. After the plaintiff had exhausted her leave under the defendant's policy, the plaintiff requested more leave, which the defendant denied. when the plaintiff did not come back to work, the defendant fired her.

The plaintiff brought suit, claiming that a Labor Department regulation, 29 CFR 825.700(a)(2001), required the employer to provide her with 12 additional weeks of leave since it had not informed her that the initial time off counted against her FMLA entitlement. The district court held that the regulation was in conflict with the statute and granted the defendant's motion for summary judgment. The court of appeals agreed and the Supreme Court affirmed.

The court noted that the Secretary of Labor had authority to draft regulations to carry out the purposes of the FMLA and that the regulations should be given considerable weight. However, the regulations cannot stand if they are "arbitrary, capricious, or manifestly contrary to the statute." Slip Op. at 3 (quoting *United States v. O'Hagan*, 521 U.S. 642, 673 (1997)). To make that determination, the court must consult the act, "viewing it as a 'symmetrical and coherent regulatory scheme.'" Slip Op. at 3 (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).

The FMLA encourages employers to adopt policies that are far more generous than the 12 weeks unpaid leave to which certain employees are entitled. Under 29 CFR 825.208(1).301 (2001), it is the employer's responsibility to tell an employee in writing that

an absence will be considered FMLA leave. The penalty for violating the notice provision is that "the leave taken does not count against an employee's FMLA entitlement." 29 CFR 825.700(a).

The court held that, assuming the regulations' notice provisions were valid, the penalty was not. Under the FMLA, the employee must establish that the employer's violation of the statute prejudiced him or her. However, under the regulation, the employee is entitled to relief even if he or she suffered no prejudice. The regulations were also contrary to the FMLA's encouragement to employers to adopt more generous policies because they might compel employers to only follow the minimum requirements. In rendering its decision, the court specifically did not decide whether the notice requirements were valid or whether other means of enforcing them might be consistent with the statute.

EEOC Relation-back Regulation Valid

Under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e.5, a complainant must file a charge of discrimination with the Equal Employment Opportunities Commission (EEOC) within a certain amount of time after the alleged conduct — 180 days, or in states where a local agency (like Michigan) also institutes proceedings, 300 days — and to affirm or swear that the allegations are true. Under an EEOC regulation, a later oath relates back to an earlier charge. 29 CFR 1601.12(b)(1997).

In *Edelman v. Lynchburg College*, 535 U.S. __ (2002), the plaintiff faxed a letter complaining of discrimination to an EEOC office, but made no oath or affirmation until 313 days after the alleged conduct. After the EEOC had issued a right-to-sue letter and the plaintiff had filed suit, the district court dismissed the Title VII claim, finding that the faxed letter was not a "charge" within the meaning of Title VII, so there was no timely filing for the verification to relate back to. The court of appeals affirmed, holding that the plain language of the statute foreclosed the EEOC regulation, stating: "Because a charge requires verification . . ., and because a charge must be filed within the limitations period, . . . it follows that a charge must be verified within the limitations period." 228 F.3d 503, 508 (4th Cir. 2000). The Supreme Court reversed.

The court first noted that the statute, 42 U.S.C. 2000e-5(b), (3)(1), contained two separate requirements: (1) that charges be in writing under oath or affirmation and (2) that charges be filed within 180 or 300 days. Since neither provision incorporated the other, the statute was open to interpretation as to whether the charge had to be verified within the 180 or 300 day period. The court held that the EEOC rule was the same rule it would have adopted if it were interpreting the statute and therefore the plaintiff's verification related back to his filing of the initial charge. The court left open the issue of whether the letter constituted a charge under the statute.

Statute of Limitations for State Law Claims is not Tolled against Non-consenting State Defendants Dismissed on Eleventh Amendment Grounds.

In *Raygor v. Regents of the University of Minnesota*, 534 U.S. __ (2002), the plaintiffs filed suit in federal district court against the defendant state university under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 et seq., and under state law, pursuant to the supplemental jurisdiction statute, 28 U.S.C. 1367. While that case was pending, the Supreme Court decided *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), which held that the "ADEA does not validly abrogate the States' sovereign immunity." *Id.* at 92. Accordingly, the plaintiffs withdrew their appeal and re-filed their state law claims in state court.

The defendant filed a motion for summary judgment, claiming that the state law claims were barred by the statute of limitations, which had run while the federal case was pending. Although there is a statute tolling the state statute of limitations while federal claims are pending, the defendant argued that the statute did not apply because the federal district court never had jurisdiction over the plaintiffs' ADEA claims. The trial court dismissed the plaintiffs' complaint and the court of appeals reversed. The state supreme court then reversed the court of appeals, holding that the tolling statute was unconstitutional as applied to this case. The U.S. Supreme Court affirmed.

The court held that the tolling statute does not toll the limitations period for state law claims asserted against non-consenting state defendants that are dismissed on Eleventh Amendment grounds. Although the statute could technically be read to do so, its application "raises serious doubts about the constitutionality of the provision given principles of state sovereign immunity." Slip Op. at 7.

***McDonnell Douglas* Shifting Burden of Proof is an Evidentiary Standard, not a Pleading Requirement**

The Supreme Court resolved a split among the Courts of Appeals and held that an employment discrimination complaint need not include facts establishing a *prima facie* case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In *Swierkiewicz v. Sorema*, 534 U.S. __ (2002), the plaintiff brought suit under Title VII alleging national origin discrimination and under ADEA alleging age discrimination. The district court dismissed the plaintiff's case because he had not adequately alleged a *prima facie* case. The court of appeals affirmed and the Supreme Court, in a unanimous opinion written by Justice Thomas, reversed.

The court rejected the court of appeals' holding that the plaintiff had to allege in his complaint, pursuant to *McDonnell Douglas:* (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. In clarifying the pleading standard, the court stated that the *McDonnell Douglas* framework was only meant to be an evidentiary standard in employment discrimination cases. However, in a complaint, the plaintiff is only required to plead facts that show he or she is entitled to offer evidence to support the claim. Under F.R.C.P. 8(a)(2), the complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." The court "may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Slip Op. at 7 (quoting *Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).* ■

SIXTH CIRCUIT ADDRESSES TITLE VII, NORRIS-LAGUARDIA ACT AND NLRA ISSUES

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From February of 2002 through April of 2002, the Sixth Circuit published about 14 cases dealing with a wide variety of labor and employment issues. The full text of Sixth Circuit decisions are available on the Internet at: "http://pacer.ca6.uscourts.gov/opinions/main.php".

Norris-LaGuardia Act

The Sixth Circuit decided two cases addressing the anti-injunction provisions of the Norris-LaGuardia Act. In *Armco v. United Steelworkers*, 260 F.3d 669 (6th Cir. 2002), the Sixth Circuit held that a consent decree constituted an injunction under the Norris-LaGuardia Act. Therefore, it held that the district court erred by entering the decree over the objection of one of the defendants without first conducting an evidentiary hearing. Because the district court did not conduct an evidentiary hearing, it was divested of jurisdiction to enter the consent decree by the Norris-LaGuardia Act.

In *Detroit Typographical Union, Local 18 v. Detroit Newspaper Agency*, 283 F.3d 2718 (6th Cir. 2002), the Sixth Circuit held that enforcement of an arbitrator's award of reinstatement under a job guarantee agreement is not prohibited by the Norris-LaGuardia Act. Contrast *Heheman v. E.W. Scripps*, 661 F.2d 1115, 1124 (6th Cir. 1981), which held that a court may not order specific performance of a job guarantee pursuant to the anti-injunction provisions of the Norris-LaGuardia Act.

Sixth Circuit Affirms Order Compelling Arbitration Over The Issue Of Arbitrarily

In *Detroit Typographical Union Local 18, supra*, the Sixth Circuit also held that the district court properly referred to the arbitrator the issue of whether a striking worker's interrupted job guarantee provided for arbitration over his discharge. The Court of Appeals found no error in the district court's order compelling arbitration based on its finding that the subject of job guarantees was generally arbitrable even though the district court never actually ruled on the issue of whether the grievance concerning an interrupted job guarantee was arbitrable. In so holding, the district court essentially held that the general rule that courts should avoid addressing the merits of a grievance actually prevented the court from interpreting an agreement between the parties to determine the arbitrability of the grievance at issue. Compare *Hyster v. Independent Lift Truck Builders Union*, 2 F.3d 233 (7th Cir. 1993) (a court cannot avoid interpreting the arbitrability of a grievance, even if in doing so it is required to address the merits of the grievance).

Inability To Work Overtime Is Not A Disability

In *Cotter v. Ajilon Services, Inc*, Docket No. 00-2041 (April 25, 2002), the Sixth Circuit held that being physically restricted from performing overtime does not constitute the substantial limitation of the ability to work, and therefore is not a disability under the ADA. The Sixth Circuit also backed away from its recent decision in *Ross v. Campbell Soup, Inc*, 237 F.3d 701 (6th Cir. 2001) in which it held that a "perceived as" disability claim is "rarely" susceptible to summary judgment because it involves a determination of the employer's state of mind. In *Cotter*, the Sixth Circuit held that to overcome summary judgment on a "perceived as" claim, a plaintiff must put forth sufficient evidence that would support a conclusion by a tier of fact that he was regarded as disabled by the employer. The *Cotter* panel explained that *Ross* was a case in which there was substantial evidence that the plaintiff's medical status influenced the employer's decision to discharge the plaintiff. In the *Cotter* case no such substantial evidence existed.

Title VII - Similarly Situated Individuals

In *Clayton v. Meijer, Inc.*, 281 F.3d 605 (6th Cir. 2002), the Sixth Circuit affirmed the district court's grant of summary judgment to the employer on the plaintiff's race discrimination claim. In this case, the plaintiff, a truck driver, was discharged after getting in an accident and injuring a co-worker. Plaintiff's attempted to compare himself to three truck drivers of another race who were not discharged after getting into accidents. These individuals were held not to be similarly situated because they did not injure co-workers in their accidents.

Religious Accommodation

In *Virts v. Consolidated Freightways*, 285 F.3d 508 (6th Cir. 2002), the Sixth Circuit upheld the district court's dismissal of plaintiff's religious discrimination claim. In *Virts*, the plaintiff, a truck driver, claimed that his religious beliefs prohibited him from doing "sleeper runs" with female co-workers. Sleeper runs involve dispatches that use a sleeper truck. The Sixth Circuit found that while the plaintiff may have had sincere religious objections to performing sleeper runs with females, the employer's obligation to follow the seniority job bidding provisions of the collective bargaining agreement relieved it of the obligation to accommodate plaintiff's religious beliefs because the accommodation of those beliefs would have been an undue hardship.

District Court Had No Jurisdiction To Enjoin NLRB

The Sixth Circuit ruled that the United States Supreme Court case of *Leedom v. Kyne*, 358 U.S. 184 (1958) did not provide a United States District Court with jurisdiction to enjoin the prosecution of unfair labor practice charges by the NLRB, even if the NLRB exceeded its statutory authority under Section 10(b) by issuing a complaint based upon charges concerning conduct that occurred more than six months prior to the filing of the charges. In *Detroit Newspaper Agency v. N.L.R.B., Regional Director*, Docket No. 00-0219 (April 15, 2002), the Sixth Circuit held that a plaintiff must have no meaningful opportunity for judicial review and must prove that the agency acted in excess of its statutory authority in order to invoke district court jurisdiction under *Leedom*. In this case, the Sixth Circuit held that the NLRB appeal process, which would eventually lead to the court of appeals, would provide the opportunity for meaningful judicial review even if the NLRB's prosecution of the charges exceeded its statutory authority. The Sixth Circuit, therefore, opted not to review the district court's finding that the NLRB in fact exceeded its statutory authority by prosecuting the unfair labor practice charges against the Detroit Newspaper Agency and Detroit News, Inc. ■

EASTERN DISTRICT UPDATE

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Class Certification for Harassment Action Improper Due to Jurisdictional Defects, Plaintiffs' Inability to Prove Numerosity and Where Each Allegation Presented Unique Circumstances.

Marquis v. Tecumseh Products Co., 206 F.R.D. 132 (E.D. Mich. 2002). Six employees moved for class certification, claiming that the sexual harassment they allegedly sustained was widespread and due to a plant-wide policy of refusing to take action against discriminatory conduct. In an extremely lengthy and detailed opinion, Judge Rosen refused to certify the class action because (1) only two of the six named plaintiffs filed EEOC charges prior to the commencement of the action, both of which asserted wholly individualized claims and neither of which could possibly be construed as asserting class-based claims; (2) the plaintiffs' attorney's alleged statement to an EEOC investigator that "several other women wished to pursue claims of sexual harassment: against the employer "is simply too vague to substitute for concrete allegations of class-wide discrimination;" (3) the plaintiffs' suggestion that they could file class-based EEOC charges after filing suit is insufficient because the procedure would "utterly vitiate" the need to give either the employer sufficient notice or the EEOC an opportunity to expand its investigation and "because it always could be possible, in any case, to file some sort of post-litigation EEOC charge that, in theory, could provide another opportunity for administrative conciliation and settlement, notwithstanding the pending lawsuit," (4) there was no evidence to substantiate the plaintiff's representations that "hundreds" of women suffered sexual harassment or that six plaintiffs who filed the suit were merely the "tip of the iceberg;" and (5) the typicality requirement was lacking because each alleged case rested "upon discrete misconduct by identifiable bad actors, and not upon a general, pervasive atmosphere of offensive remarks or objectionable materials within a particular area or department," and where even the "overlapping allegations often differ in their particulars, such as time frames, severity or pervasiveness of the conduct in question, and the employment relationship between the perpetrator and the victim." Judge Rosen then declined to exercise supplemental jurisdiction over the plaintiffs' state law claims because, *inter alia*, "[o]nly a handful of the individuals will be pursuing federal claims in this case, while Plaintiffs assert that their state-law class will number in the hundreds," which struck the court "as a very large tail wagging on a very small dog."

In ruling on the defendant's motion for summary judgment, Judge Rosen began by exempting out several allegations that were beyond the limitations period and could not come in through a continuing violations theory. After excluding the untimely allegations, one claim could not survive summary judgment because the allegations that a supervisor looked at the plaintiff inappropriately, commented about her hair, touched or squeezed her shoulder a few times and put his hands on her shoulders and pretended to throw her into a box, "all involve offhand remarks and isolated incidents, none of which was severe standing alone" and "when viewed in the aggregate . . . [were] plainly irritating and demeaning" but were "not sufficiently severe and pervasive to alter the conditions of [the plaintiff's] employment." The other claims, which alleged a wide-array of allegations from sexual jokes to the viewing of a videotape of one plaintiff having sex, satisfied the elements of a sustainable harassment claim. In supporting this conclusion, Judge Rosen ruled that one plaintiff's allegation that her estranged husband and co-worker harassed her presented a question of fact because "while it might be reasonable to assume that Daryl's personal animosity toward Rhonda might have been particularly acute at the time, in light of the couple's marital difficulties, it is also possible to infer that Daryl's animosity toward Rhonda as a woman came out at this time because of his opportunity to express it." Also, where several of the alleged harassers were supervisors, and "particularly in light of Plaintiffs' evidence that Defendant's anti-harassment policies and procedures were either non-existent, unpublicized, or largely ineffective" there was a question of fact whether the employer could sustain its affirmative defense.

No Duty to Offer a Disabled Plaintiff a Different Position Where Plaintiff Failed to Follow the Bidding Procedure for the Only Specific Job He Requested.

Calvin v. Ford Motor Co., 185 F.Supp.2d 792 (E.D. Mich. 2002). The disabled plaintiff claimed that his employer violated the PWDCA by failing to offer him one of the several positions the plaintiff claimed he could still perform. Judge Gadola rejected the plaintiff's claim and granted the employer's motion for summary judgment for three principal reasons. First, Judge Gadola reasoned that, because "the ADA [and, hence, the PWDCA] does not except Plaintiff from having to comply with legitimate, nodiscriminatory company policies defining job qualifications, prerequisites, and entitlements to intra-company transfers," the plaintiff could not sustain a failure to accommodate claim where he admittedly refused to follow the bidding procedure in the governing collective bargaining agreement. Second, Judge Gadola ruled that the plaintiff's counsel's generalized request that the plaintiff be considered for "positions in which employees are trained to use computers" was too vague to satisfy the plaintiff's burden to propose an objectively reasonable accommodation. Third, Judge Gadola relied on Sixth Circuit precedent for the proposition that employers must initiate a conference in an effort to find a reasonable accommodation only if the employee's disability impedes his ability to do so.

Jury May Consider Front Pay Damages and Award Damages Beyond Plaintiff's Suicide.

Kulling v. Grinders for Industry, Inc., 185 F.Supp.2d 800 (E.D. Mich. 2002). In accordance with his prior analysis denying the employer's motion for summary judgment, Judge Rosen denied the employer's post-trial motions for JNOV or a new trial in an age discrimination case. In so doing, Judge Rosen ruled that (1) there was sufficient evidence to prove that age, as opposed to a RIF, was behind the plaintiffs' discharges because some evidence showed that younger employees were used to fill the allegedly "expendable" positions the plaintiffs had held; and (2) there was sufficient evidence of willfulness where the defendant generated no paper trail in planning and implementing the RIF, each individual manager independently decided to terminate older workers working in middle-management despite an alleged lack of any standard, and where a general manager failed to express his concern that everyone who was selected for discharge was over 50.

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EASTERN DISTRICT UPDATE

(Continued from page 15)

Next, based on evidence sufficient to find that the allegedly discriminatory discharge prompted one plaintiff to commit suicide, Judge Rosen upheld the jury's decision to award that plaintiff post-suicide front and back pay. Judge Rosen acknowledged some uncertainty as to both the reason for the suicide and the proper amount of damages, but ruled that "calculations of future damages necessarily must rest upon a degree of prediction" and there was sufficient evidence to support the jury's ultimate conclusion. Judge Rosen then rejected the employer's contention that the front pay issue is solely for the court, noting that the jury determines the amount of front pay and the court evaluates the propriety of the award. After evaluating the jury's front pay award in light of the evidence, Judge Rosen concluded that the jury's award was proper and supported by the evidence. Judge Rosen then rejected the employer's contention that the back pay award should be reduced by the amount the plaintiffs received in severance, noting that in exchange for the severance pay the plaintiffs had to forgo state law claims and the possibility of emotional distress damages.

Finally, Judge Rosen rejected the plaintiff's request for injunctive relief because "[t]he discharges at issue in this case all occurred on the same day, as part of a single relatively modest 20-employee reduction in force ordered by Defendants' senior management" and there was no clear pattern of discrimination.

Sex Discrimination and Equal Pay Act Claims Rejected Where Plaintiff Rejected a Comparable Commission Structure.

Weldon v. Great White North Distribution Services, L.L.C., 2002 U.S. Dist. Lexis 6482 (E.D. Mich. 2002). The plaintiff, whose commission percentage was lower than allegedly similarly situated male salespersons, claimed that her employer discriminated against her on the basis of her sex and violated the Equal Pay Act. Judge Roberts dismissed the case due to the plaintiff's inability to prove that the reduced commission was due to her sex. Judge Roberts reasoned that the plaintiff had been offered a commission structure that was "virtually identical" to the male salespersons' structure but opted for a lower commission in exchange for a dedicated customer service representative. Judge Roberts also reasoned that the plaintiff's admission that she does not know whether and had no facts to prove that other allegedly adverse employment decisions were made because of her sex precluded her from surviving summary judgment. Judge Roberts then denied the employer's motion to dismiss the plaintiff's contract-based claims due to material factual disputes.

Removal Proper Where Contested Termination Was Based on Anti-Harassment Policy in a Collective Bargaining Agreement and Despite Settlement Offers Below the Jurisdictional Threshold.

Culik v. University of Detroit Mercy, 2002 U.S. Dist. Lexis 6573 (E.D. Mich. 2002). The plaintiff claimed that the case was improperly removed, despite diversity jurisdiction, because the amount in controversy was below $75,000. The plaintiff supported the contention by showing that he had offered to settle the case for $74,800 and then for $74,000. Noting that the plaintiff had not stipulated to an amount in controversy below $75,000, Judge Rosen ruled that an offer to settle a case for a specific amount generally represents a compromised figure in exchange for avoiding the costs and risks of a trial, meaning that the plaintiff would likely ask a jury for significantly more than the proposed settlement figure if the case went that far. Thus, and particularly where the claims for damages appeared exceed the jurisdictional amount, Judge Rosen rejected the plaintiff's argument and retained jurisdiction.

Limitations Period tolled If Plaintiff Is Mentally Unable To Timely Advance His Claim.

The issue in both ***Reece-Jennings v. Potter,*** 181 F.Supp.2d 727 (E.D. Mich. 2002) and ***Hardy v. Potter,*** 2002 Lexis 3953 (E.D. Mich. 2002), was whether the plaintiffs had filed their respective causes of action within the 45-day time limit applicable to postal workers. In *Reece-Jennings,* Judge Duggan ruled that the *pro se* plaintiff was barred from pursuing her cause of action because she failed to seek EEO counseling relative to her claim within 45 days of the allegedly adverse employment action. in *Hardy,* Judge Hood applied the equitable tolling doctrine to excuse the plaintiff's untimeliness because the plaintiff showed that his mental illness prevented him from handling his affairs or otherwise advancing his discrimination claim. Judge Hood did dismiss one cause of action, however, due to the plaintiff's failure to produce evidence to show that he was incapable of bringing the cause of action when it arose. ■

APPELLATE REVIEW OF MERC DECISIONS May 2001-May 2002

Roy L. Roulhac, ***Administrative Law Judge***
Michigan Employment Relations Commission

Unit Clarification Petition – Confidential Employee Exclusion

Brimley Area Schools, (Docket No. 227901, February 22, 2002 (Unpublished). The Michigan Education Association filed two unit clarification petitions seeking to include a technology coordinator and a central office bookkeeper position in its bargaining unit. MERC followed its long-standing policy of permitting a public employer to designate as confidential, one non-supervisory employee who may be excluded from an existing non-supervisory bargaining unit. The central office bookkeeper was included in the unit because of duties of handing personnel and disciplinary matters were not confidential labor relation duties as defined by the Commission. The Commission assumed that the technology coordinator would be the employer's one designated non-supervisory confidential employer because of its increasing computerization. The Court of Appeals rejected the petitioner's claim that the confidential exclusion should be limited to one employee without regard to whether that employee has a supervisory function. That view, observed the Court, would negate the rational for the confidential exclusion because a supervisory employee is excluded from the bargaining unit because of his or her supervisory duties. The Commission's opinion is reported at 2000 MERC Lab Op 159.

DEFENDANT EMPLOYERS WIN BIG AT THE WESTERN DISTRICT

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NO JURISDICTION TO DETERMINE WHETHER EMPLOYER BREACHED A SETTLEMENT AGREEMENT ENTERED INTO AT ADMINISTRATIVE LEVEL

Connor v. Togo D. West, Jr., Case No. 1:00CV436 (March 25, 2002) Judge David W. McKeague granted summary judgment in favor of defendant employer, the Department of Veterans Affairs, on plaintiff's claim for breach of a July 28, 1994 settlement agreement ("Agreement") which settled a May 13, 1994 formal complaint of employment discrimination based on race, color, sex and handicap.

After entering into the agreement, the plaintiff filed a complaint with the Veterans Administration alleging breach of the agreement. A final agency decision issued on September 5, 1996, found that plaintiff's breach of contract claim was without merit. The plaintiff appealed. The EEOC confirmed the decision and denied the plaintiff's motion for reconsideration on the issue. The EEOC then issued a right to sue letter regarding her appeal and plaintiff filed the instant matter on June 16, 2000, alleging breach of contract.

The Western District Court held it did not have subject matter jurisdiction over the plaintiff's claims for breach of contract. The Court stated although federal courts have inherent power to enforce settlement agreements settling litigation pending before them, the instant matter was not such a claim. Rather, the plaintiff's claim was for breach of an administrative settlement agreement, not a settlement agreement that resolved a discrimination claim pending before the federal court. Accordingly, the Court granted the defendant's motion for summary judgment and dismissed the plaintiff's claim.

SALARIED EMPLOYEE WHO PERFORMS "SOME" MANUAL TASKS IS AN ADMINISTRATIVE EXEMPT EMPLOYEE UNDER THE FLSA

Schafer v. Indiana Michigan Power Co., Case No. 1:00-CV-599 (February 26, 2002). On the party's cross-motions for summary judgment, the Judge Gordon J. Quist granted the defendant/employer's motion and denied the plaintiff's motion. Michael L. Schafer sued his employer, Indiana Michigan Power Co. d/b/a American Electric Power ("AEP"), alleging that AEP violated the Fair Labor Standards Act ("FLSA") by failing to pay him overtime.

Schafer was employed as an environmental specialist during which he worked more than 40 hours per week but was not paid 1½ times his normal rate. AEP denied he was entitled to overtime compensation because his position came within the overtime exemption under the FLSA for "any employee employed in any bona fide executive, administrative or professional capacity." The District Court found Schafer was not a professional employee within the definition of the exemption, but he *was* subject to the administrative exemption.

The court found Schafer was a "salaried" employee because he was paid on a salary basis and received regularly, on a weekly or less frequent basis, a predetermined amount constituting all or part of his compensation. Even though the plaintiff was required to work a minimum of 40 hours per week, and to make up for partial day absences either working hours on another day or taking part of a vacation day, this was insufficient to find that he was a "salaried employee."

Furthermore, Schafer's primary job duties were office or non-manual work because his primary job duty was the planning and oversight of shipments of radioactive materials. Even though Schafer's primary duties were associated with the physical shipment of radioactive materials such as inspecting the shipping container, the truck, and checking for tightness or or installing restraining straps and bracing, his main primary duty involved office or desk work and he did not consider himself to be a manual laborer. Further, the court stated that because failure of Schafer to perform could be substantial and disastrous to both the employer and the public, Schafer's work arose from the very nature of AEP's business.

The court rejected Schafer's argument that because the decisions regarding his work are strictly controlled by DOT and NRC regulations, as well as AEP's internal procedures, this did not mean he did not have independent decision making and discretion with respect to performing his job duties. Accordingly, the court found that Schafer met the elements of an exempt administrative employee and dismissed the complaint.

MEDICATION RENDERS EMPLOYEE UNQUALIFIED UNDER THE AMERICANS WITH DISABILITIES ACT

Mathieson v. American Electric Power, Case No. 1:00-CV-870 (February 7, 2002). Plaintiff filed a lawsuit under the Americans With Disabilities Act ("ADA") against his former employer, Bechtel Construction Company and American Electric Power, the owner and operator of the nuclear plant. Plaintiff was terminated based upon the results of medical review that concluded Marinol, a medication plaintiff took to counter spasms in his amputated left leg, rendered him ineligible for unescorted access to a nuclear plant.

After a lawsuit was filed, Magistrate Judge Joseph G. Scoville submitted a report and recommendation that the defendants' motions to dismiss be granted. The plaintiff filed timely objections to the report and recommendation. Judge David W. McKeague found plaintiff's objections meritless.

Plaintiff argued that if he stopped taking Marinol, he would be qualified to perform the essential functions of the job for which he was terminated. However, there was no evidence that plaintiff ever notified the defendant of his willingness or ability to stop taking Marinol. Because of his use of Marinol, the plaintiff failed to meet the requirements for "fitness for duty" dictated by the Nuclear Regulatory Commission. Because he was not qualified for the position, he did not come within the protection of the ADA. Accordingly, the Court adopted Magistrate Scoville's report and recommendation.

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DEFENDANT EMPLOYERS WIN BIG AT THE WESTERN DISTRICT

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A SINGLE ACT WITHIN THE RELEVANT LIMITATIONS PERIOD IS INSUFFICIENT TO APPLY THE CONTINUING VIOLATIONS THEORY

Rene v. Principi, Case No. 2:00-CV-002. Plaintiff, a board certified physician in internal medicine, sued her employee, the Veterans Affairs Medical Center, alleging sex discrimination and retaliation. Because plaintiff was a government employee, she was first required to contact the employer's EEO counselor within 45 days of the alleged discriminatory act. Failure to do so could result in dismissal of a complaint for failure to timely exhaust administrative remedies.

Plaintiff filed a discrimination complaint with the Department of Veterans Affairs Office of Resolution Management ("ORM") on May 28, 1999. This complaint included allegations of discrimination that occurred in November of 1998 and January 1999 where males were awarded bonuses, denial of part time status requested in June of 1998, being forced to use a breast pump in an unlocked clinic between March 15, 1998 and December, 1998, and various other acts of discriminatory treatment that were not identified by date. Plaintiff also alleged retaliation when she was denied the position of acting chief of staff. The ORM dismissed most of plaintiff's allegations of discrimination complaint as untimely. The only claim that was accepted as timely was a March 1999 denial of request for vacation and leave time. On August 4, 1999 plaintiff filed a second discrimination complaint alleging failure to promote to acting chief of staff based upon sex and retaliation. The ORM also dismissed this complaint for failure to consult with an EEO counselor within the 45-day period.

Plaintiff argued her claims of discrimination and retaliation were timely under the continuing violations doctrine. The Sixth Circuit recognized that the continuing violations theory is applicable in two instances: (1) where there is some evidence of present discriminatory activity giving rise to a claim for a continuing violations; and (2) where there exists a longstanding and demonstrable police of discrimination. The District Court analyzed plaintiff's claims under the first category of continuing violations where the plaintiff must establish a nexus between the types of alleged discrimination that constitutes the continuing violation and the single act that is within the 45 day limitations period.

The plaintiff alleged disparate work assignments throughout the course of her employment. However, the one single act that came within the 45 day limitations was an allegation of denial of her request for vacation and leave time. Because this timely act was wholly distinct from an allegation of disparate work assignments and there was no evidence of discriminatory assignments during the relevant limitations period, the District Court refused to apply the continuing violations doctrine. Accordingly, the Court granted the defendant's motion for summary judgment. ■

MICHIGAN SUPREME COURT UPDATE

Kurt M. Graham
Varnum, Riddering, Schmidt & HowlettLLP

Robertson v. DaimlerChrysler Corp., 465 Mich. 732; 641 N.W.2d 567 (2002). The Supreme Court held that courts must analyze a workers' compensation claimant's perception of the actual events that took place in the course of employment when reviewing a claim for mental disability pursuant to MCL 418.301(2). This statutory provision provides that "[m]ental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof." In finding that the Legislature's intent was to limit the situations in which a claimant could receive benefits where the event causing the mental disturbance had little or no basis in fact, the Court determined that a claimant must establish "(a) that there has been an actual employment event leading to his disability . . . and (b) that the claimant's perception of such actual employment event was not unfounded, that is, that such perception or apprehension was grounded in fact or reality, not in the delusion or the imagination of an impaired mind" to establish a mental disability. *Id.* at 752-53. The Court remanded this case to the magistrate for further analysis under this standard.

Hesse v. Ashland Oil, Inc., 642 N.W.2d 330 (2002) (*per curiam*). The Supreme Court reversed the Court of Appeals by holding that the parents of a teenage employee who died in an accidental explosion at his place of work were barred by the Workers' Disability Compensation Act (WDCA) from recovering in a negligent infliction of emotional distress claim. The Court found that the exclusive remedy provision of the WDCA precluded the parents from bringing the claim because parents are included in the term "employee," defined as "any other person to whom a claim accrues by reason of the injury to, or death of, the employee." MCL 418.131(1)–(2). The Court held that the parents' claim accrued out of their child's death and, therefore, was barred.

The Court reasoned that the plain language of the WDCA barred the parents' claim and that the purpose of its exclusive remedy provision was to limit employer liability. Additionally, the Court distinguished *Barnes v. Double Seal Glass Co., Inc.*, 129 Mich. App. 66; 341 N.W.2d 812, 818 (1983) which held that a teenage employee's parents may bring a claim against the employer, because that action involved a claim for *intentional* infliction of emotional distress, as opposed to a claim arising out of the employer's negligent act. (emphasis added).

Perkoviq v. Delcor Homes-Lake Shore Pointe LTD, 2002 Mich LEXIS 551 (Apr. 24, 2002) (*per curiam).* The Supreme Court granted summary judgment for the Defendant, holding that, as owner of the premises, Defendant (a general contractor) was not liable for injuries sustained by an employee who failed to take necessary precautions to protect himself from the open and obvious danger of an icy roof. The Court found that the employee was an invitee on the property, and although Defendant had a duty to protect an invitee from foreseeably dangerous, albeit obvious, conditions, the owner's liability may be cut off where the invitee should have realized the danger of the condition and taken appropriate precautions.

In this case, Plaintiff was employed by Defendant to paint a house on Defendant's property. Defendant owned the subdivision containing the house on which Plaintiff was working. While working on the roof, Plaintiff slipped on ice and fell to the ground, sustaining serious injuries. There was no dispute that the roof was obviously icy. The Court found that it was reasonable for a property

owner to expect employees on a construction site to take suitable safety precautions upon discovery of an obvious danger, such as an icy roof. The fact that the property owner was also the general contractor was irrelevant.

This case did not address Defendant's liability as an employer, as opposed to a property owner, because Plaintiff did not challenge the Court of Appeals' dismissal of his claims that Defendant failed to provide a safe workplace and appropriate safety equipment. However, this case establishes that an employer who also owns the premises on which the employee works may be subject to claims and resulting liability under both theories. ■

MICHIGAN COURT OF APPEALS UPDATE

John W. Smith
Dykema Gossett PLLC

Discretionary Statutory Attorney Fees Can Be Awarded Based Upon Many Different Factors, But Consideration Of The Case Evaluation Is Not A Factor: *O'Neill v. Home IV Care, Inc.* (Murphy, J.) No. 222890 (February 5, 2002)

The Court of Appeals has weighed in on an issue which stands to have a large impact on plaintiffs' verdicts obtained under Elliott-Larsen and the Whistleblower Protection Act.

Plaintiff Mary O'Neill obtained a jury verdict of $20,245 against her former employer under the Whistleblower Protection Act. The WPA, like the Elliott-Larsen Civil Rights Act, provides for attorney fee awards to successful plaintiffs. Pursuant to the attorney fees provisions of the WPA, O'Neill sought to have $48,869 added to the jury's verdict in the final judgment.

Prior to trial, O'Neill obtained a case evaluation, previously known as mediation evaluation, of $30,000.00. O'Neill had rejected the evaluation and the defendants had accepted it. Concurrently with O'Neill seeking entry of the judgment upon the jury verdict and the imposition of attorney fees, the defendants filed a motion for taxation of costs and attorney fees on the basis that they were entitled to mediation sanctions under MCR 2.403.

At the combined hearing on O'Neill's motion to settle the judgment and the defendants' motion for costs and attorney fees, O'Neill asserted that the trial court could not consider the case evaluation until the final judgment, including her attorney fees under the WPA, was entered. The defendants countered that it was entirely reasonable for the court to consider the case evaluation in exercising its discretion to award attorney fees under the WPA. Further, the defendants contended, allowing an attorney fee award to bolster O'Neill's insufficient jury verdict under the court rules, and thereby avoid case evaluation sanctions, would defeat the policy behind mandatory case mediation.

The trial court agreed with the defendants. The Court awarded $9,063 in costs and attorney fees to O'Neill's verdict under the attorney fees provisions of the WPA. This judgment was $1200.00 short of exceeding the case evaluation amount by ten percent, as required to avoid sanctions under the court rules. Then, after an evidentiary hearing, the court awarded $48,766 in case evaluation sanctions to the defendants. O'Neill appealed.

Reviewing on an abuse of discretion standard, the Court of Appeals found the trial court's approach improper. First the appeals court outlined the proper considerations for awarding attorney fees, not only under the WPA, but also under Elliott-Larsen, including: (1) the skill, time, and labor involved, (2) the likelihood, if apparent to the client, that the acceptance of the employment will preclude other employment by the lawyer, (3) the fee customarily charged in that locality for similar services, (4) the amount in question and the results achieved, (5) the expense incurred, (6) the time limitations imposed by the client or circumstances, (7) the nature and length of the professional relationship with the client, (8) the professional standing and experience of the attorney, and (9) whether the fee is fixed or contingent.

Secondly, the court looked to the policies supporting the case evaluation rules. The court noted that a judge is precluded from reviewing a case evaluation in a non-jury trial until the judge has rendered judgment. Relying on the policies supporting this rule, the court held that "[a]lthough no court rule or statute specifically prohibits a judge from considering a mediation evaluation, after a jury trial, in determining whether to assess costs and award attorney fees, and in determining the amounts to be awarded, we believe that such a prohibition is implicit from various provisions found in MCR 2.403." The court reasoned that the danger is the same: "the mediation evaluation and potential sanctions could influence a judge's decision and result in a judgment based not on the facts of the case, but on the amount of the evaluation."

In closing, the court urged the Supreme Court to consider adoption of specific rules to address this scenario. The court speculated that perhaps mediation evaluations should remain sealed in all cases until a final judgment is entered, and not just in cases where a bench trial is involved, in order to avoid consideration, or the appearance of consideration, of improper factors. Minimally, the court suggested, it would be prudent to establish a rule that specifically prohibits a judge from considering a mediation evaluation before a final judgment is entered after a jury trial.

The Court of Appeals reversed and remanded the action to the trial court for proceedings consistent with its opinion.

Trial Court Fails To Properly Defer To Arbitral Authority In Discharge Case: *Police Officers Ass'n of Michigan v. County of Manistee,* No. 226909 (per curiam), March 8, 2002

In keeping with the law's general high regard for the findings of arbitrators in labor disputes, the Court of Appeals affirmed an arbitrator's reinstatement of a discharged employee, in the process reversing a trial court's finding that the arbitrator exceeded his authority.

Gordon Best, a Manistee County Sheriff's Corrections Officer assigned to work at the Manistee County Jail, was fired on June 4, 1998, for three alleged violations of department rules and regulations. The terms and conditions of Best's employment were governed by a collective bargaining agreement ("the Agreement") between the County and the Police Officers Association of Michi-

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MICHIGAN COURT OF APPEALS UPDATE

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gan (POAM), of which Best is a member. On Best's behalf, POAM sought reinstatement of Best through the three-step grievance procedure set forth in the agreement. Not satisfied with the outcome of the first two steps, on April 8, 1999, POAM submitted the matter to arbitration, which is the third and final step of the grievance procedure.

In his findings, the arbitrator found that Best had violated department rules and regulations in the ways alleged. However, while concluding that Best's conduct "constituted just cause for severe disciplinary action," the arbitrator concluded that "persuasive mitigating factors" warranted a reduction in the penalty from termination to a long-term suspension. The arbitrator ordered that Best be reinstated without back pay or benefits, and with his seniority in tact.

Best was not reinstated, and on January 3, 2000, the POAM filed their complaint in the Manistee Circuit Court to enforce the arbitration award. The County filed a counter-complaint seeking to vacate the arbitration award, followed by a motion for summary disposition. The trial court rejected the Union's position, and reversed the arbitrator's award, reasoning the arbitrator had exceeded his authority. According to the trial court, the arbitrator found that Best had committed the violations in question and that the violations constituted just cause for severe disciplinary action. The trial court found that, under the agreement, discretion to discipline was reserved to the sheriff once just cause was established. As a result, the trial court found the reduction of the discharge penalty into a suspension was outside the arbitrator's authority.

The Court of Appeals' review began with the recognition that, when considering the enforcement of an arbitration award, the courts' review is narrowly circumscribed. Expounding upon this standard, the court explained that:

> The arbitrator's authority to resolve a dispute arising out of the appropriate interpretation of a collective bargaining agreement is derived exclusively from the contractual agreement of the parties. It is well settled that judicial review of an arbitrator's decision is limited. A court may not review an arbitrator's factual findings or decision on the merits. Rather, a court may only decide whether the arbitrator's award "draws its essence" from the contract. If the arbitrator in granting the award did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the contract, judicial review effectively ceases.

In evaluating the present case under this strict standard, the court found that the arbitrator's decision must be enforced.

First, the court held there was no language in the agreement that "clearly and unambiguously" removes proper discipline from the arbitrator's authority. While the court agreed that the contract did leave with the sheriff "the right to make reasonable rules and regulations," none of these rules mandated discharge under these circumstances.

Secondly, the court found that the "just cause requirement" related to all of the potential forms of discipline under the agreement. As a result, the court reasoned there is not just one "just cause" analysis that the arbitrator is empowered to make. Rather, he is given the authority to determine if the violations amount to "just cause for discharge," or "just cause for demotion," or "just cause for suspension," or "just cause for any other form of discipline." In other words, the court found the agreement gives the arbitrator the authority to determine if there exists a "just cause for discipline," and if so the level of discipline appropriate.

In reversing the trial court, the Court of Appeals stated that it mistakenly equated a finding of "just cause for discipline" with a finding of "just cause for discharge." This interpretation of the agreement, or any interpretation at all for that matter, was not within the proper scope of the court's review, but rather was within the arbitrator's sole authority.

Gender Discrimination Claim Based On Conduct Allegedly Aimed Toward Predominately Female Department Was Properly Dismissed: *Duranceau v. Alpena General Power Co.*, No. 226825 (per curiam), February 26, 2002

The Court of Appeals once again addressed the dichotomy between disparate impact and disparate treatment discrimination claims, but the topic remains hazy as to when consideration of similarly situated individuals comes into play.

Plaintiff Deedre Duranceau filed a gender discrimination claim under Elliott-Larsen and the federal Equal Pay Act against Alpena Power Company. Alpena Power hired Duranceau into the general labor/meter reader classification where she started at $7.50 an hour and received regular increases until she reached the $10.50 maximum for her classification. Duranceau's department was unionized and, when defendant and the union could not agree on a new contract in 1992, Alpena Power instituted the terms of its last best offer and union members worked without a contract. This last best offer was similar to existing conditions insofar as it maintained the maximum wage for the general labor/meter reader classifications. The last best offer, however, provided increases for other classifications. The effect of these terms was to freeze the wages of the three female union members, all of whom were in the general labor/meter reader classification, while granting increases for the remaining classifications, which were populated by male union members. However, the trial court took note, non-union female employees also received pay increases during this period.

In 1993, Duranceau, together with two other female employees who were employed as meter readers at the time the initial contract was ratified, filed suit against Alpena Power alleging sex discrimination in violation of the Civil Rights Act and Equal Pay Act. The trial court granted summary disposition of the discrimination claims. In an earlier appeal, the Court of Appeals had reversed the trial court's order awarding summary disposition to defendant and dismissing with prejudice Duranceau and the other plaintiff's claims. See *Donajkowski v. Alpena Power Co.*, 219 Mich App 441 (1996), *aff'd on other grounds* 460 Mich 243 (1999) (reversing trial court's granting of summary disposition of the then-plaintiffs' discrimination claim for failing to establish a prima facie case of discrimination under either the disparate treatment or disparate impact theories.)

On remand, Alpena Power conducted additional discovery and again moved for summary disposition. Following a hearing on the utility company's motion, the trial court again granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(10).

With the benefit of more discovery, the Court of Appeals reviewed for a second time the trial court's entry of summary disposition. First, the court explained the distinction between disparate treatment and disparate impact claims:

> Disparate treatment requires a showing of either intentional discrimination against protected employees or against an individual plaintiff. Disparate impact requires a showing that an otherwise facially-neutral employment policy has a discriminatory effect on members of a protected class.

Duranceau and the other plaintiffs alleged that Alpena Power's act of freezing the wages of the one job classification in which all of the female union employees were employed resulted in discrimination toward female employees.

The Court of Appeals found that two comments allegedly made by Alpena Power's president did not establish a motive to discriminate based on gender, which is necessary to prevail on a disparate treatment theory. One of the comments occurred three to four years before the pay scale modification and four to five years before plaintiff accepted employment with defendant, which, the court held, was too vague and remote in time to raise a triable issue of fact. The second comment was made five months after Duranceau was hired and recognized that those employees in the general labor classification were all women at the time the statement was made. This statement, the court held, was irrelevant because *after* the wage freeze many more males had been hired into the classification, all of who were subject to the same pay scale as were the plaintiffs. The court held that the existence of similarly situated people outside the protected class who were paid the same wages defeated her disparate treatment claim.

To avoid summary disposition under the disparate impact theory, the court held, plaintiffs had to show that female employees were burdened on account of their gender by some facially neutral practice. The pay scale modifications, observed the court, applied equally to employees in the classification, regardless of gender. The court discounted plaintiff's allegation that Alpena Power intentionally eliminated male employees from the general labor classification in order to reduce the compensation paid to female employees, because six of the seven employees hired into the classification following the reduction in pay were male. Because Duranceau failed to show that a facially neutral policy, that is, the pay range modification, resulted in similarly situated male employees being paid a higher wage than female employees, the court found that she failed to establish any disparate treatment based upon sex.

The court also quickly disposed of the plaintiffs' Equal Pay Act claim based on the admissions that no comparable male employee hired into their job classification and was paid more than Duranceau was. ■

MERC UPDATE

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Since the previous issue of *Lawnotes*, the Michigan Employment Relations Commission has issued 13 decisions and orders in a variety of cases. A brief summary of five of those cases follows. Of those 13 cases, nine were unfair labor practice hearings and four were representation hearings and/or unit clarification hearings. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations' website at *www.cis.state.mi.us/ber.*

UNFAIR LABOR PRACTICES.

Branch County Board of Commissioners, Branch County Clerk, Branch County Register of Deeds and Branch County Treasurer

Case No. C00 A-10 (April 18, 2002).

Charging Party, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, filed unfair labor practice charges against Respondents, Branch County Board of Commissioners (Commissioners), Branch County Clerk, Branch County Register of Deeds, and Branch County Treasurer (Elected Officials), claiming violations of Section 10 of PERA. The ALJ agreed with Charging Party and issued her recommended Decision and Order, finding that Respondents violated Section 10(1)(e) of PERA by attempting to require Charging Party to bargain with the Elected Officials over all the employees in their office, rather than just their respective chief deputies.

The ALJ also found Respondent Commissioners violated its duty to bargain in good faith when two of the Commissioners who had participated in negotiations and signed a tentative agreement, voted against its ratification. The ALJ recommended that the Respondent Commissioners be ordered to execute the agreement found to have been accepted by the negotiators for both parties. As no exceptions were filed with respect to this finding, the ALJ's recommended Order was adopted by the Commission.

Respondent Elected Officials filed exceptions, objecting to the ALJ's findings that they are not co-employers with Branch County of all of the deputies working in their respective offices and that their insistence on negotiating as co-employers was an unfair labor practice.

The Commission first noted that each of the Elected Officials are required by statute to appoint a deputy or deputies. The County Clerk statute references the power to appoint multiple deputies. As for the County Treasurer statute, the authorizing language is replete with references to multiple deputies. Finally, as to the Register of Deeds, relying on *Lockwood* and *Stoll*, 264 Mich 598 (1933), the Commission rejected the ALJ's finding that the statute limited the Register of Deeds to appointing one single deputy. Therefore, the Commission concluded that the Elected Officials are co-employers of all of their respective deputies and therefore did not violate Section 10(1)(e) of PERA. Thus, the unfair labor practice charges were dismissed as to the Elected Officials.

Southfield Public Schools

Case No. C99 A-11 (February 26, 2002).

Charging Parties, Southfield Education Association, Southfield Public Schools Michigan Educational Support Personnel Association, and the Educational Secretaries of Southfield, filed unfair labor practice charges, alleging that Respondent, Southfield Public Schools, violated its duty to bargain under Section 10(1)(e) of PERA. The ALJ recommended that the charges be dismissed, and the Charging Parties filed timely exceptions to the ALJ's recommended Decision.

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MERC UPDATE

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The collective bargaining agreements between the parties have contained provisions for unpaid leaves of absence. In 1990, the parties entered into a "letter of understanding" interpreting the contract language regarding unpaid leaves of absence. The letter of understanding provided that Respondent had the discretion to grant or deny leave requests based on individual circumstances and district needs. The letter of understanding was referenced in successive collective bargaining agreements.

From about 1982 until 1998, Respondent granted all leave requests and requests for extensions. On July 27, 1998, Respondent issued a memo to the members of Charging Parties announcing its intention to discontinue its "permissive" bargaining unit policy with respect to leaves. Charging Parties maintained that by changing its policy, Respondent made unilateral changes in established practices regarding mandatory subjects of bargaining. Second, Charging Parties also alleged that Respondent violated its duty to bargain exclusively with Charging Parties, as it sent the July 27, 1998 memo directly to bargaining unit members.

A past practice which contradicts a collective bargaining agreement may rise to the level of an agreement to modify the terms of the contract if evidence establishes that the parties had a meeting of the minds and both intended to amend the contract. The Commission found in this case that the Respondent's practice did not contradict the language of the collective bargaining agreement and the 1990 letter of understanding. Respondent merely exercised its discretion by granting all requests for leaves for a period of time. The evidence did establish that Respondent knowingly and intentionally refrained from enforcing certain contractual provisions. As to this issue, the Commission noted "[t]he mere fact that Respondent refrained from denying leaves and enforcing restrictions on leaves in the past does not establish that there was a 'past practice' prohibiting Respondent from doing so in the future."

After finding that Respondent had no duty to bargain over the issues contained in the July 27, 1998 memo, the Commission held that sending the memo directly to bargaining unit members could not be direct dealing. The Charges were dismissed in their entirety.

Wayne County Community College District
Case No. C00 C-51 (February 1, 2002).

Charging Party, Professional and Administrative Association, MFT/Local 4467, alleged that Respondent Wayne County Community College District violated its duty to bargain pursuant to Section 10 of PERA. The ALJ recommended that the charges be dismissed, and the Charging Party filed timely exceptions to the ALJ's recommended Decision.

After the expiration of the contract between the parties, Respondent filled several vacancies without posting the vacancy notice and without offering the position to qualified bargaining unit members as Charging Party alleged was required. Charging Party also alleged that Respondent violated PERA by appointing a bargaining unit member to a non-bargaining unit position while he continued to perform the duties of the bargaining unit position. Finally, Charging Party also alleged that Respondent hired a bargaining unit member at Step 5 of the salary scale instead of Step 1 which resulted in a unilateral change of longstanding employment conditions.

The Commission noted that it will not exercise jurisdiction over an unfair labor practice charge intertwined with a contract dispute unless the Respondent violated PERA. The question as posed by the Commission was whether Respondent took unilateral action on mandatory subjects of bargaining before reaching impasse. The Commission found that Respondent continued to apply the same interpretation of the collective bargaining agreement after expiration in each of the circumstances. Therefore, the Commission found no unilateral changes in mandatory subjects of bargaining. The charges were dismissed in their entirety.

UNIT CLARIFICATION/REPRESENTATION HEARINGS.

City of Holland
Case No. R00 G-78 (February 4, 2002).

A petition for representation election was filed by the Governmental Employees Labor Council. Petitioner sought to represent a bargaining unit consisting of non-supervisory, non-police employees of the police department of the City of Holland. The issue before the Commission was the appropriateness of including the position of maintenance supervisor in the proposed unit. The Employer asserted that this position is supervisory and should not be included. The Union maintained that the maintenance supervisor only had limited discretion over routine matters and possessed no real authority over the other bargaining unit members.

The maintenance supervisor is a salaried position responsible for assigning the custodial work in the police department building. The maintenance employees report directly to the maintenance supervisor. The maintenance supervisor provides permission regarding time off, and has authority to recommend discipline of maintenance employees.

The Commission found that the maintenance supervisor has real as opposed to routine supervisory authority. The position controls assignment of work, grants time off, recommends discipline, and is involved in the hiring process. Therefore, the maintenance supervisor was excluded from the proposed unit.

Lapeer County Community Mental Health Agency -and- Lapeer County Board of Commissioners
Case No. UC00 K-45 (January 31, 2002).

In a petition for unit clarification, the Employer sought to exclude the position of recipient rights director from the bargaining unit represented by Teamsters Local 214. The Employer maintained that the recipient rights director is an executive and shared no community of interest with the other employees in the bargaining unit. The bargaining unit includes all full-time and regular part-time employees of Lapeer County Community Mental Health, including professional, paraprofessional, technical, and clerical employees.

The position of recipient rights director receives reports of and investigates alleged violations of the rights of patients and insures that appropriate remedial action is taken. The position reports directly to the executive director.

The Employer argued that the position has investigative power which may result in discipline against fellow bargaining unit members. However, the position has been in the bargaining unit since its inception. The Commission noted that it will not exclude from bargaining units employees who investigate activities of their co-workers. In this case, the recipient rights director had insufficient authority to function as an executive. Further, the position shared a community of interest comparable to other professionals in the unit such as psychologists, RNs, and therapists. Therefore, the petition for unit clarification by the Employer was dismissed. ■

THE JOY OF LABOR LAW

Convicted Killers Win More than NLRB. The NLRB's record at the Supreme Court this season was worse than Carolina's against the Red Wings, and even worse than convicted killers. Indeed, hundreds of killers will have their death sentences set aside because they either have, or will claim, low IQs or because judges imposed the death sentences. It is not certain the Court will execute killers merely because their attorneys were mentally retarded. Anyway, the NLRB lost two out of two cases before the Court.

In *Hoffman Plastic Compounds, Inc. v. NLRB*, 122 S.Ct. 1275 (2002), the Court held, 5/4 Bush v. Gore, that an award of back pay to an illegal alien ULP victim for years of work "not performed" would be contrary to the policies underlying the Immigration Reform and Control Act of 1986. As for the deterrence that backpay provides, Chief Justice Rehnquist had an brilliant retort: "Lack of authority to award backpay does not mean that the employer gets off scot-free. The Board here has already imposed other significant sanctions against Hoffman—sanctions Hoffman does not challenge. These include orders that Hoffman cease and desist its violations of the NLRA, and that it conspicuously post a notice to employees setting forth their rights under the NLRA and detailing its prior unfair practices." 122 S.Ct. 1275, 1285.

The Scottish Anti-Defamation League may require the Chief Justice to post a notice. Actually "scot free" has no connection with Scotsmen, frugal or otherwise. "Scot" is a 16th century Scandinavian word meaning "payment."

Scot free or not, notices are a real deterrent according to the Chief Justice! Maybe the message from the Supreme Court is that rather than the death sentence, convicted killers must wear a "Notice to the Public" around their neck for 60 days agreeing to cease and desist from murdering people. Hear that Harris Berman! The notices would be even more effective if the NLRB adopts a page from Homeland Security Chief Tom Ridge's color-coded warnings for terrorist alerts. Notices must be Red for really bad employers. Pink for minor offenders.

Despite my alleged assurance to John Canzano (see his article on pages 3-5), the Supreme Court did not wait for *Lawnotes* summer edition before it decided the issue in *BE&K Constr. Co. v. NLRB*, 536 U.S. ___ (June 24, 2002). The Court ruled that the first prong of the NLRB's two-part standard for imposing ULP liability for filing a lawsuit under *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983) was wrong and that mere dismissal of the employer's lawsuit is not sufficient to meet the first prong, that is, the lawsuit lacked merit. According to Canzano: "without sayng so, the Court obviously did overrule *Bill Johnson's*, despite what the Court says (in dicta) about dicta. The Court in *BE & K* has now held that the NLRB's standard for imposing liability is overbroad and invalid because it allows the Board to penalize 'all reasonably based but unsuccessful suits filed with a retaliatory purpose.' Whether the Board can still penalize any such reasonable but unsuccessful suits depends on the meaning of 'retaliatory,' a question expressly left open. Stay tuned."

In short, convicted killers and convicted ULP violators are the big winners this season at the Court.

"Who the hell is that damn clown?" In a new book by former White House counsel John Dean, *The Rehnquist Choice* (Free Press, 2001), on the history of Nixon's 1972 appointment of William Rehnquist. Dean wrote about Nixon's first encounter with the future Chief Justice on July 1, 1971. It was not auspicious. Nixon said: "John, who the hell is that damn clown?" referring to then-assistant attorney general Rehnquist, who was wearing a "pink shirt," a "psychedelic tie," black horn rim glasses and Hush-Puppies. (Pages 85-6) Nixon also asked Dean: "Is he Jewish? He looks it?" (Page 86) Dean told the president that he thought Rehnquist was of "Scandinavian background," (page 86) which probably is why the Chief Justice knew "scot-free" was not a slur. "Later that month" the president asked Dean about that "group of clowns we had around here. Renchberg and that group. What's his name." (Page 86) The Chief Justice's judicial wardrobe now includes stripes on his sleeves. Not that there is anything wrong with pink shirts or stripes on a robe!

Watching the Chief Justice make his case for a "living wage" during his "2001 year-end Report on the Federal Judiciary," I imaged him in pink shirt and psychedelic tie circa 1971. The Chief Justice thundered: "On behalf of the Judiciary, I ask Congress to raise the salaries of federal judges." Judges of the World, Unite! Lay down your robes and gavels! Don't let the government off "scot-free!"

MERC Rules. Get rid of your faded, yellow copy of your MERC rules. Effective February 1, 2002, MERC has new administrative rules that you should read before you file your exceptions or pleading. There are new rules about motion and procedural practices (Rules 161, 162, 163, 164, 165, 166, 167, 184), compliance (Rule 177), unit clarification (Rule 143) and the window period for filing election petitions (Rule 141(3)(a-c)). The new rules are at MERC's web site, www.cis.state.mi.us/ber/.

Numerology? MERC chose to have 194 rules, cited as R 423.101 to 194. Why just 194 rules? Why not 200 or 100, with 94 new subparts? Is there a hidden message? "Numerology is the study of numbers, and the occult manner in which they reflect certain aptitudes and character tendencies, as an integral part of the cosmic plan." Does MERC have a "cosmic plan?"

John G. Adam

BATTISTA GOES TO WASHINGTON

On May 1, 2002, the White House announced the nomination of LEL section member Robert J. Battista to be chairman of the NLRB:

> The President intends to nominate Robert J. Battista to be a Member of the National Labor Relations Board for the remainder of a five-year term expiring August 27, 2006 and upon confirmation, designate Chairman. Battista is currently an Attorney and Shareholder with Butzel Long where he has practiced law since 1965. He has practiced exclusively in the field of employment and labor relations and has represented clients before the National Labor Relations Board and the Michigan Employment Relations Commission. He has served as a member of the Advisory Committee to the Michigan Employment Relations Commission since 1999 and is a Fellow with the College of Labor and Employment Lawyers. Battista is a graduate of the University of Notre Dame and University of Michigan Law School.

This is not the first time that Bob Battista has been a "Chairman." Bob was "chairman" of Labor and Employment Law Section (when it was the Labor Relations Section) in 1980-81.

INSIDE *LAWNOTES*

- NLRB Deputy Regional Attorney Joe Barker reviews the law on union observers at "neutral" gates.
- John Canzano considers the future of *Bill Johnson's* unfair labor practices charges (and the Supreme Court decides that future is limited).
- Shel Stark is the voice of experience on why the burden of proof matters.
- Adam Forman surveys the law of webs, nets, spam and privacy in the work place.
- Barry Goldman opines that too many arguments can be redundant, superfluous, extraneous, duplicative, supererogatory, pleonastic, prolix, otiose, and other things tantamount to shooting yourself in the - - uh - - foot.
- Andy Mudryk writes his last U.S. Supreme Court Update column for *Lawnotes*, on the eve of his move to his new position at the Arizona Center For Disability Law. (Thanks for the hard work and informative columns, Andy.)
- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, websites to visit, and more.
- Authors John G. Adam, Joseph A. Barker, John T. Below, John R. Canzano, Gary S. Fealk, Adam S. Forman, Barry Goldman, Kurt M. Graham, Andrew M. Mudryk, Heather Gelfand Ptasznik, Roy Roulhac, William C. Schaub, Jr., Michael M. Shoudy, John W. Smith, Sheldon J. Stark, Jeffrey A. Steele, and more.

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