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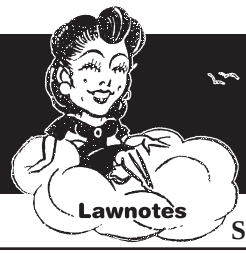
LABOR AND EMPLOYMENT LAWNOTES



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AN OVERVIEW OF THE REVISED FMLA REGULATIONS

Megan P. Norris and James B. Thelen
Miller, Canfield, Paddock and Stone, P.L.C.

On January 16, 2009, long-awaited changes to the federal Family and Medical Leave Act's (FMLA) regulations went into effect. Attorneys who advise employers should understand the changes to workplace policies and practices that are necessary to be in compliance with the new regulations and other changes to the FMLA from 2008.

I. COVERED EMPLOYERS

When two entities are sufficiently related to be considered *integrated* or *joint* employers, both entities have responsibilities under the FMLA. Revised regulations clarify that outsourcing vendors known as "Professional Employer Organizations," which contract with employers merely to perform certain administrative functions such as payroll or benefits, do not enter into joint employment relationships with their clients so long as the outsourcing vendor has no authority to hire, fire, assign, or direct the client's employees. 29 CFR 825.106(b)(2).

II. ELIGIBLE EMPLOYEES

The new regulations make slight changes to the twelve-months and "50 employees within a 75-mile radius" factors set forth at 29 U.S.C. §2611(2). First, the DOL's revised regulations now provide that any work with the employer before a service break of 7 years or more need not be counted in determining whether an employee has been employed for at least twelve months unless that break included time fulfilling National Guard or Reserve military duty (which must be counted as employment service), there is a written agreement (e.g., a CBA) with a right of recall, or uniformly-applied voluntary practice exists to count the service. 29 CFR §825.110(b)(1-2, 4).

An employee's worksite for FMLA purposes is generally the site to which the employee reports or, if none, from which the employee's work is assigned. 29 CFR §825.111(a). The original FMLA regulations stated that, for employees who have no fixed worksite, such as construction workers, transportation workers, and salespersons, "worksite" means the location "to which they are assigned as their home base, from which their work is assigned, or to which they report." 29 CFR §825.111(a)(2). Revisions to the "worksite" rule address confusion in "joint employer" situations, providing that the employee's worksite will be the primary employer's office from which the employee is assigned or reports for one year. After the employee has been assigned for one year, however, the employee's worksite will be the assigned location for the secondary employer. 29 CFR §825.111(a)(3).

III. EMPLOYER POSTINGS AND POLICIES

A. Government Postings

The revised regulations allow employer notices, such as government postings and policies, to be posted electronically so long as they meet the other requirements of the regulation. 29 CFR §825.300(a)(1). However, the new regulations also make it clear that the notices must be posted even if no employee at the site is eligible for FMLA leave and in some circumstances may need to be in languages other than English. 29 CFR §825.300(a)(2).

B. Employee Handbooks

If an employer does not have any written policies, manuals, or handbooks describing employee benefits and leave provisions, then the employer must still provide a general notice of FMLA rights to all employees and must distribute this to all new and existing employees. 29 CFR §825.300(a)(3). This is a change from the previous regulations, which, in the absence of a handbook, only required that notice be given at the point an employee sought FMLA leave. The DOL has developed an optional form for this notice (WH Publication 1420). Again, the notice may need to be in languages other than English and can be distributed electronically. 29 CFR §825.300(a)(3).

IV. CONDITIONS FOR WHICH FMLA LEAVE MAY BE TAKEN

The new FMLA regulations make slight revisions to the definition of "serious health condition" and also provide guidance for the two new forms of leave available for eligible employees who have family members called up for or injured while serving on military duty.

A. Definition of Serious Health Condition

In its long rule-making process, the DOL received numerous comments proposing changes to the definition of "serious health condition" to correct perceived problems with the scope of the definition. Ultimately, the DOL rejected most of these proposals because it determined that changes that could solve a problem in one situation could also, under different circumstances, go against some of the founding tenets of the Act. The revised regulations on this issue reorganize the rule numbering in an effort to make the regulations easier to follow, but do not otherwise substantively change the definition except in the minor ways noted below.

The revised regulations add to the defined list of "health care providers" physician assistants who are licensed and performing within the scope of their practice as defined by state law. 29 CFR §825.125(b)(2). The regulations also now provide that "treatment" requires an in-person visit to the health care provider that must take place within 7 days of the first day of incapacity, 29 CFR §825.115(a)(3), and that under the definition of "serious health condition" requiring two or more treatments, the treatments must now occur within a 30-day period unless extenuating circumstances exist. 29 CFR §825.115(a)(1). Extenuating circumstances are circumstances beyond the employee's control that prevent the follow-up

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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*
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Andrew Nickelhoff, *Managing Editor*

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visit from occurring as planned. For example, if the health care provider states that a second visit is needed within 30 days but the health care provider does not have an available appointment within that time, the test will still be met. 29 CFR §825.115(a)(5).

For purposes of a "serious health condition" under the "chronic health condition" definition, the revised regulation now defines "periodic treatment" as two or more treatments a year. 29 CFR §825.115(c)(1).

The DOL's revised regulations regarding pregnancy clarify that an eligible employee father can take time for to care for his spouse during prenatal care, but that she will otherwise need to meet the "serious health condition" definition. 29 CFR §825.120(a)(5).

B. Family Members with a Serious Health Condition

The DOL has revised its regulations slightly to clarify that the determination of whether an adult child meets the definition of a child incapable of self-care and "disabled" as defined by the Americans With Disabilities Act is to be made at the time the leave would commence. 29 CFR §825.122(c).

C. Birth or Adoption of a Child

When leave is taken for the birth or adoption of a child, spouses who work for the same employer must coordinate their FMLA leave, as the FMLA limits the couple to a combined 12 weeks of leave for the birth or adoption of a child. The revisions to the regulations clarify that each parent may take the full 12 weeks for the serious health condition of their child even if they both work for the same employer. 29 CFR §§825.120(a)(4), 825.121(a)(4).

D. Military Care-Giving Leave

The USERRA and FMLA amendments now provide that, in addition to family leave under the FMLA for care of a "parent, spouse, or child," an employee may take leave to care for a "covered service member" with a "serious injury or illness." This leave differs from previous forms of FMLA leave in several ways.

The leave need not be for a "serious health condition." A "serious injury or illness" is defined as an injury or illness that is incurred in the line of duty on active duty that may render the service member medically unfit to perform the duties of her office, grade, rank or rating. 29 CFR §825.127(a)(1). This is a notably different definition than that for the FMLA's "serious health condition," described above and requires certification through the military, rather than through the individual's personal physician.

The service member need not be a minor child, and may not even be the employee's parent, spouse, or child. Under the 2008 FMLA amendments, an employee can take FMLA leave for the "serious illness or injury" of a service member "child" even if the child is an adult and does not meet the "self-care" and "disabled" tests. 29 CFR §825.122(h). An employee can also take FMLA leave for the serious illness or injury of a covered service member if the employee is that covered service member's "next of kin," defined to mean the employee is the nearest blood relative of the covered service member *other than* the service member's spouse, parent, or child or that the employee has been designated "next of kin" by the service member. 29 CFR §825.122(d).

The leave is not limited to 12 weeks in a "single 12 month period." An employee caring for a covered service member with a serious illness or injury is eligible for up to 26 weeks of FMLA leave within a 12 month period. The 12 month period is not defined by the employer under a calendar or fixed or rolling year, but rather is defined as a rolling year beginning on the first day of leave. 29 C.F.R. §825.127(c)(1). If the individual needs to care for more than one service member or the original service member has a subsequent injury, the individual may be entitled to take more than one period of 26 weeks of leave, but the individual cannot take more than 26 weeks for the same illness or injury for a single service member. 29 C.F.R. §825.127(c)(2).

E. "Qualifying Exigencies" Leave

The 2008 amendments to the FMLA made available to eligible employees a type of leave which has nothing to do with anybody's serious health condition or the birth or adoption of a child, but which instead is for "qualifying exigencies" arising out of a covered family member's call to active military service from the National Guard, the Reserves, or military retirement. 29 CFR §825.126(a). Unlike leave for "serious illness or injury," this leave is limited to 12 weeks in the employer's normal FMLA 12-month counting period.

New regulations define "qualified exigencies" to permit leave in the following situations:

1. *Short-notice deployment*—when the family member is called to active duty with notice of 7 days or less prior to deployment. 29 CFR §825.126(a)(1).
2. *Military and related events*—for attending official military events, family support programs, and informational briefings related to the family member's call to active duty. 29 CFR §825.126(a)(2).
3. *Childcare and school activities*—to make initial or emergency arrangements for child care, attend school meetings to address absences or other issues related to the family member's call-up, etc. 29 CFR §825.126(a)(3).
4. *Financial and legal arrangements*—to make financial or legal arrangements to deal with the family member's absence for military duty or obtain military service benefits (through 90 days following the termination of the family member's active duty). 29 CFR §825.126(a)(4).
5. *Counseling*—to attend counseling, provided the need arises from the family member's call-up to service. 29 CFR 825.126(a)(5).
6. *Rest and recuperation*—to spend time with a covered service member on a short-term rest and recuperation leave during the period of deployment (limited to 5 days for each rest period). 29 CFR 825.126(a)(6).
7. *Post-deployment activities*—to attend post-deployment functions, such as arrival ceremonies or reintegration briefings, that occur within 90 days following the termination of active duty status, or to address issues that arise from the death of the covered service member, such as making funeral arrangements. 29 CFR §126(a)(7).
8. *Other activities*—by agreement between the employer and employee (both as to the reason or "exigency" and the timing and duration of any additional leave). 29 CFR §825.126(a)(8).

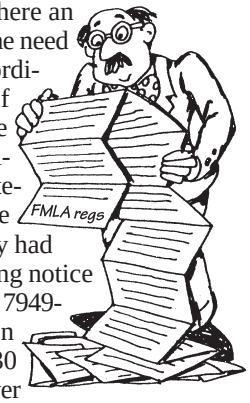
V. FMLA LEAVE REQUESTS, NOTICE, AND CERTIFICATION

A. The Employee's Notice of Leave Requirements and Consequences

The FMLA's requirements are implicated when an employee requests leave for an FMLA purpose. The original regulations stated that, if the employer was not sure whether the FMLA was triggered by an employee's request, the employer had a duty to make further inquiry to obtain the necessary details of the leave and health condition to determine whether the employee qualified for FMLA leave. 29 CFR §825.302(c). The revised regulations require that the employee provide:

> sufficient information that indicates that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee's family member intends to visit a health care provider or has a condition for which the employee or the employee's family member is under the continuing care of a health care provider.

The regulations continue to require the employer to inquire further to determine whether the condition qualifies for FMLA leave. 29 CFR §§825.302(c), 825.303. However, the new revisions specifically state that calling in "sick" without providing more information will not be considered sufficient notice to trigger an employer's obligations. 29 CFR §825.303(b).



The original regulations stated that where an employee could not give 30 days notice of the need for leave, "as soon as practicable" would ordinarily be within one or two business days of when the employee learns of the need for the leave. The new regulations take out the "ordinarily within one or two business days" statement. The comments to the revisions indicate that too many employees believed that they had a two day grace period, rather than providing notice as soon as they could. FR Vo. 73, No. 28, pp. 7949-7951. The new language provides that when an employee does not provide at least 30 days' notice of foreseeable leave, the employer can ask for a reason and the employee must explain it. 29 CFR §825.302(a). The regulations give the example of an employee whose medical appointment has been changed, indicating that notice should be given on the same day as the change unless it is after business hours, in which case notice could be given the following day. 29 CFR §825.302(b).

The original regulations stated that an employer's policies for providing the employer notice regarding leave could not be stricter than the standards established under the FMLA. 29 CFR §825.302(g). A new regulation, 29 CFR §825.302(d), allows an employer to require that an employee comply with the employer's "usual and customary notice and procedural requirements for requesting leave, absent unusual circumstance," so long as the policy does not require notice in a shorter time frame than the regulations allow. The revised regulation also makes it clear that an employee can be disciplined for violating these consistently enforced policies. In addition, the regulation allows for denial of the leave absent proper notice, not just delay. For example, an employee failing to give proper notice for a doctor's appointment

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might have to delay the leave until another day. On the other hand, if an employee missed work without proper notice, leave could be denied for that day and penalties could be issued. *See also* 29 CFR §§825.303(c), 825.304.

B. The Employer's Response to the Employee's Leave Request

The new DOL regulations divide the employer's response to a leave request into two stages—the first to inform the employee of her eligibility for FMLA and of the various rights and obligations she will have vis-à-vis the leave, and the second to inform the employee whether her leave request will be granted and designated as FMLA leave.

1. The "Notice of Eligibility and Rights & Responsibilities" form

First, under the new regulations the employer must advise the employee of her eligibility for FMLA leave generally (i.e., whether the employee has worked for one year, has 1,250 hours, has 50 employees within 75 miles) within 5 business days of the request for FMLA leave, and may use an optional DOL form for this purpose (WH-381). 29 CFR §825.300(b)(1). If the employee is not eligible, the employer must provide additional information regarding the basis for the ineligibility. 29 CFR §825.300(b)(2).

At the same time (and optionally on the same form) an employer must provide the employee with notice detailing the specific expectations and obligations of the employee relative to the leave, including the need for any medical certification, and explaining any consequences of a failure to meet these obligations. 29 CFR §825.300(c); 29 CFR §825.301(b)(1); 29 CFR §825.305(b).

2. The "Designation Notice" form

The second stage occurs when the employer determines whether or not to designate the leave as FMLA-qualifying after receiving appropriate medical information. 29 CFR §825.300(d). The employer must make this designation within 5 business days after the medical certification is received. 29 CFR §825.300(d)(1). This designation form (the DOL's option model form for this purpose is WH-382) must advise the employee of the amount of leave that is being counted against the employee's entitlement. 29 CFR §825.300(d)(6). At the time leave is designated as FMLA, the employer must provide additional information regarding the employee's obligations upon returning to work, such as the need for a fitness-for-duty certification. 29 CFR §825.300(d)(3).

C. General Medical Certification Issues

Much of the medical certification process remains the same under the new regulations as it was under the previous regulations. Notable changes are described below.

The regulations also clarify that an employee is not required to waive his physician-patient privilege and can refuse to provide a medical certification, but that failure to do so can result in denial of the leave so long as the employer has properly explained the consequences of the employee's actions. 29 CFR §825.305(d).

The DOL has abandoned the one prior form offered for medical certifications in favor of 4 new forms, each addressing a different type of FMLA leave: (1) the WH-380-E, for an employee's own serious health condition; (2) the WH-380-F, for an employee to care for a family member with a serious health condition; (3) the WH-384, for "qualifying exigencies" leave; and (4) the WH-385, for to employee to care for a family member/service member with a "serious illness or injury." The newly revised medical certification forms (WH-380-E and WH-380-F) allow the employer to obtain more specific medical facts regarding the need for leave, such as information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, and any referrals for evaluation or treatment. 29 CFR §825.306(a). Consistent with a prior DOL Opinion, the new regulations also allow the employer to get a new medical certification in each subsequent leave year. 29 CFR §825.305(e).

Where an employee is coordinating paid leave with FMLA leave, the employer cannot require any more certification for purposes of approving FMLA but may require additional certification for purposes of the paid leave. For example, if an employer requires proof of illness in order to receive paid sick leave, such a policy does not violate the FMLA so long as it pertains to all employees on such paid leave, not just those invoking the FMLA. However, an employer cannot require such additional certification unless the employee has the ability to opt out of the paid leave and only provide FMLA certification for unpaid leave. The revised regulations clarify that an employer can also seek additional information allowed by the ADA. 29 CFR §825.306(d).

D. Methods for Challenging Certification

The 2nd and 3rd opinion process for challenging FMLA medical certifications has not changed. However, the new FMLA regulations do materially change the process by which employers may seek additional information about medical certifications.

The revised regulations require that an employer finding the certification incomplete or insufficient must state in writing what additional information is necessary to satisfy the certification requirement. The employer must then give the employee 7 calendar days to cure any deficiency. If the employee fails to do so, the employer can deny the leave. 29 CFR §825.305(c).

1. Authentication and clarification

If an employer questions the adequacy of a medical certification provided under the FMLA, it may not request additional information from that health care provider, except for clarification or authentication purposes, which are newly-defined in the regulations. 29 CFR §825.307(a). The new regulations allow an employer representative—*but not the employee's direct supervisor*—to contact the medical provider directly for these purposes, rather than working through its own health care provider. 29 CFR §825.307(a).

"Authentication" refers only to requesting verification that the information on the form was authorized by the health care provider who signed it. No additional medical information can be requested, and the employee's permission is not needed. "Clarification" refers to requests to decipher handwriting or to understand the meaning of a response. Again, no additional medical information can be obtained. An employee can refuse an employer's request for permission to seek clarification, but then the employer can deny the leave if the certification is unclear. 29 CFR §825.307.

2. Recertification

The revised regulations allow an employer to seek recertification at least every 6 months even if the nature of the condition is such that it could last longer than that. 29 CFR §825.308.

E. Certification Issues Unique to FMLA Military Leaves

As discussed above, the DOL has issued new certification forms for FMLA military leaves. For "qualifying exigencies" leave, employers may not seek 2nd or 3rd opinions, demand recertifications, or seek authentication or clarification as they can with traditional medical certifications under 29 CFR §§825.307 and .308. See 29 CFR §825.309(d). For military care-giver leave, employers may seek authentication and/or clarification of the WH-385 form, as provided in 29 CFR §825.307, but may not seek 2nd or 3rd opinions or recertifications. 29 CFR §825.310(d).

Where the employee's "qualifying exigency" involves meeting with a third party, such as for counseling under 29 CFR §825.126(a)(5), the employer may contact the third party without the employee's permission to verify the appointment and the nature of the meeting. The employer may also contact the Department of Defense, again without the employee's permission, to verify the employee's family member's active duty or call to active duty status. 29 CFR §825.309(d).

Finally, for military care-giver leave, even when the employer requires use of the WH-385 form, it must also accept from an eligible employee requesting such leave military forms known as "ITOs" and "ITAs." Known as "invitational travel orders" and "invitational travel authorizations," ITOs and ITAs are issued to permit an injured service member's family members to travel to join the service member at his or her bedside. An employee who submits an ITO or an ITA to support his request for caregiver leave may not be required to provide any additional certification during the time period specified in the ITA/ITO. If the employee seeks leave for the same purpose beyond the time period specified in the ITO/ITA, however, the employer may then require the employee to support such further leave with the WH-385 form. ITOs/ITAs are subject to authentication and clarification under 29 CFR §825.307, but not recertification or 2nd/3rd opinions. When an employee requesting leave submits an ITO/ITA, the employer may also require the employee to confirm his family relationship to the covered service member. See 29 CFR §§825.310(e)(1-3).

VI. THE FMLA LEAVE PERIOD

A. Intermittent Leave

The new regulations allow employers to account for incremental FMLA leave usage in the smallest increment used for any other form of leave tracking (provided it is no greater than one hour), as opposed to the smallest increment of time keeping, which was the test under the original regulations. 29 CFR §825.205(a). The DOL specifically rejected the request from many business groups to require leave to be taken in increments longer than one hour. However, the DOL did provide a new regulation to recognize that, in certain situations, such as where a flight attendant or railroad conductor is scheduled to work aboard an airplane or train, or where a laboratory employee cannot enter or leave a "sealed "room" except at the beginning or end of a work shift, it is physically impossible to begin or end the work day in the middle of a shift to take incremental FMLA leave. In those and similar situations, the entire period of absence can be designated as FMLA leave. 29 CFR §825.205(a)(2).

B. Unpaid or Substitution of Paid Leave

The new regulations allow employers to apply their normal policies and procedures for taking paid leave when such leave is substituted for an otherwise unpaid FMLA leave. In other words, an employee's ability to receive pay for the FMLA leave period will depend on whether she complied with the employer's additional requirements (by policy and procedure, if any) for taking such paid leave. If the employee does not satisfy any additional requirements for the paid leave, the employee will not be paid, but is still otherwise entitled to unpaid FMLA leave. See 29 CFR §825.207(a).

The revised regulations in this area also allow a public employer to coordinate compensatory time off provided to employees like firefighters and police officers and FMLA leave. 29 CFR §825.207(f) allows coordination of compensatory time and FMLA leave.

Finally, several courts have held that while FMLA can be coordinated with paid leave, an employer cannot require an employee to simultaneously use multiple paid leaves with FMLA. The DOL's new regulations now allow a change in this area where the employer and employee agree. 29 CFR §§825.207(d), 825.207(e).

VII. RETURNING FROM FMLA LEAVE

The only material change in the FMLA regulations relating to an employee's return to work relates to whether the employer requires a certification that the employee is fit to return to work.

An employer may have a uniformly applied policy requiring all employees who take leave under the FMLA to present a fitness-for-duty report, consisting of medical evidence that states an employee's ability to return to work relative to the condition for which the employee took the leave. 29 U.S.C. §2614(a)(4); 29 C.F.R §825.310.

The original regulations provided that the fitness-for-duty report may only be a "simple statement of an employee's ability to return to work," that the employer could only seek clarification from the examining physician, and that the employer could not delay the employee's return to work while asking for such clarification. The DOL made several revisions to the "fitness for duty" regulations. First, the DOL removed the "simple statement" language, instead providing that the certification from the health care provider must certify that the employee is able to resume work and can perform the essential functions of the job (information about which the employer may provide). 29 CFR §825.310(c). Second, an employer representative (but not the employee's direct supervisor) is allowed to contact the doctor for clarification or authentication under the same terms as apply for the original certification. 29 CFR §825.310(e). The employee bears the entire cost of obtaining the fitness-for-duty certification, including the travel expenses and time involved. 29 CFR §825.310(d).

While an employer is still not permitted to obtain a fitness-for-duty certification for each return from intermittent or reduced-schedule leave, the employer can now require such a certification up to once every 30 days "if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave." 29 CFR §825.310.

VIII. GENERAL ISSUES

A. Release of Claims OK

Much legal confusion surrounded the question of whether employers could obtain valid release-of-claims agreements from employees that covered possible FMLA claims under the previous regulations. A new regulation specifically validates agreements by which employees release legal claims based on any past employer conduct. 29 CFR §825.220(d).

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B. Perfect Attendance Bonuses May be Denied

The previous rule clearly required that an employer continue to grant attendance bonuses to an employee who has missed work due to FMLA leave, stating:

> Many employers pay bonuses in different forms to employees for job-related performance such as for perfect attendance, safety (absence of injuries or accidents on the job) and exceeding production goals. Bonuses for perfect attendance and safety do not require performance by the employee but rather contemplate the absence of occurrences. To the extent an employee who takes FMLA leave had met all the requirements for either or both of these bonuses before FMLA leave began, the employee is entitled to continue this entitlement upon return from FMLA leave, that is, the employee may not be disqualified for the bonus(es) for the taking of FMLA leave.

The revised regulation states in part,

> [I]f a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify for FMLA leave. 29 CFR §825.215(c)(2).

C. *Ragsdale* and the Failure to Designate Leave as FMLA-Qualifying

A number of court decisions have invalidated the original regulations regarding the consequences for employers for failing to designate the leave as FMLA-qualifying and for failing to notify the employee of her eligibility—most notably *Ragsdale vs. Wolverine World Wide, Inc.*, 535 US 81 (2002). The invalidated regulations conferred eligibility or extended leave for the employer's failure to provide proper notification. If the employer failed to advise the employee of her eligibility status before the commencement of her leave, the employee was deemed eligible. See, *e.g.*, 29 CFR §825.110(d).

The new regulations aim to solve the *Ragsdale* problem by keeping the language requiring that an employer designate leave as FMLA within a certain time frame, but adding a provision requiring that where the allegation is that such a notice requirement was violated, the employee must establish harm. 29 CFR §825.301(e).

D. Documenting Disputes

The new regulations contemplate that there will be increased communication between employers and employees regarding FMLA leave requests, rights and obligations, and possibly disputes as to whether a particular request for leave is FMLA-qualifying. Addressing mostly the final point, the regulations require that an employer and employee attempt to resolve any such disputes through discussions and that such discussions be documented. 29 CFR §825.301(c). ■

THE LEGAL STATUS OF THE TWO-MEMBER NLRB – NEW DEVELOPMENTS

Dennis M. Devaney and Jeffrey D. Wilson
Strobl & Sharp, P.C.

In the Spring 2009 edition of *Lawnotes*, we discussed whether the National Labor Relations Board, composed only of two members, Peter Schaumber and Wilma Liebman, had legal authority to issue decisions in unfair labor practice and representation cases. We argued that the two-member Board did not possess statutory authority to issue decisions and orders. We noted that the D.C. Circuit Court of Appeals was reviewing the issue in a case involving Laurel Baye Healthcare.

On May 1, 2009, the *Laurel Baye* Court issued its decision, ruling that the two-member Board was not properly constituted and did not have the authority to issue decisions. The Court noted that the NLRA's quorum provision provides clearly that "three members of the Board shall, at all times, constitute a quorum of the Board." Thus, the Court held, the "Board's ability to legally transact business exists only when three or more members are on the Board." The Court acknowledged that the Board's position was "undoubtedly born of a desire to avoid the inconvenient result of having the Board's adjudicatory wheels grind to a halt. Nevertheless, we may not convolute a statutory scheme to avoid an inconvenient result." The Court advised that "perhaps a properly constituted Board, or the Congress itself, may also minimize the dislocations engendered by our decision by ratifying or otherwise reinstating the rump panel's previous decisions, including the case before us."

In two other cases in the First and Seventh Circuits, those Courts found that the Board did have authority to issue decisions as a two-member delegation. According to the NLRB, this issue is also pending before seven other Circuits in more than two dozen cases. Certainly, the D.C. Circuit's *Laurel Baye* decision is most troubling for the NLRB, because that Circuit, of course, has jurisdiction over every NLRB case and its agency review is perhaps more respected than in other Circuits.

On May 18, Liebman and Schaumber issued a statement concerning the *Laurel Baye* decision. They announced that, as a quorum of the Board, they will continue to issue decisions and orders in unfair labor practice and representation cases. Additionally, they stated that "[w]ith great respect for the District of Columbia Circuit Court and the panel that decided *Laurel Baye Healthcare*, we believe that the panel decision was incorrect. Accordingly, we intend, by the end of May, to petition the panel, and the full Court, to revisit the panel's ruling." Ultimately, review by the U.S. Supreme Court appears to be a distinct possibility. In fact, the employer in *New Process Steel LP v. NLRB*, the case in which the Seventh Circuit found the two-member Board lawful, has just recently filed its cert petition.

As we argued in our earlier article, we remain convinced that under the plain language of the Act, the permanent two-member Board of Schaumber and Liebman is not empowered by Section 3(b) to issue decisions and orders. The *Laurel Baye* Court's ruling

is the correct interpretation of the statute and relevant authority. Nonetheless, it is not surprising that the Board, consistent with its longstanding nonacquiesence policy, has decided to ignore the decision.

The dilemma now facing the Board, and the uncertainty created by the Circuit split, could have been avoided by the Board long ago. The reality of the appointment process at the Board for the last 30 years has shown that the Board has been operating with recess appointments or vacancies for a substantial period of time. Recognizing this reality, the Board Chairman or the Members could have and should have sought legislative initiatives to correct the vacancy problem from Presidential administrations or from Congress. Most of the regulatory agencies created by Congress subsequent to the 1935 establishment of the NLRB by the Wagner Act are based on statutory language that directly addresses operations of the agencies when there is a vacancy. For example, the Federal Labor Relations Authority, which was initially created by Presidential Executive Order and codified as part of the Civil Service Reform Act of 1979, regulates labor relations in the federal sector. It was patterned after the National Labor Relations Board's enabling statute and requires in Section 7104 (c) and (d) that

> (c) A member of the Authority shall be appointed for a term of 5 years. An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. The term of any member shall not expire before the earlier of —-
>
> (1) the date on which the member's successor takes office, or
>
> (2) the last day of the congress beginning after the date on which the member's term of office would (but for this paragarph) expire.
>
> (d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

Amending the NLRA to provide similar term extensions would have been a straightforward way to address the current vacancy problems at the Board, rather than the strained statutory interpretation proposed by this two-member Board. ■

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THE SUPREME COURT REVISITS FUNDAMENTAL ARBITRATION PRINCIPLES

Noel D. Massie
Kienbaum Opperwall Hardy & Pelton, P.L.C.

After the U.S. Supreme Court's decision in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), many believed the Court had settled that the grievance and arbitration provisions of a collective bargaining agreement could never impair an employee's right to bring suit under federal and state anti-discrimination statutes, even if the employee opted to pursue arbitration first. Then, ten years ago, the Court hinted in *Wright v. Universal Maritime Service*, 525 U.S. 70 (1998), that a CBA *could* waive covered employees' "rights to a judicial forum for federal claims of employment discrimination" *if* the CBA contained a "clear and unmistakable waiver" of those rights. However, *Wright* declined to reach and decide that question. In the term just concluding, the Court ended a decade of post-*Wright* speculation by holding, 5-4, that employees covered by a CBA that forbids discrimination on the basis of race, sex, age, and the like *can* be required to resolve their claims of employment discrimination *exclusively* through the grievance and arbitration procedures of a CBA that "clearly and unmistakably" provides that they must. *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456 (2009).

The *Penn Plaza* case arose when long-service night watchmen in a New York City office building were reassigned to less desirable positions as night porters and light duty cleaners after building management engaged a security contractor to provide the building's security staff. The CBA contained a clause mandating arbitration for claims under all anti-discrimination statutes and declaring such claims "subject to the grievance and arbitration procedures as the sole and exclusive remedy for violations." The Second Circuit, like the district court, held that under *Gardner-Denver* this clause did not require dismissal or stay of the ADEA lawsuit filed by the former watchmen after their union declined to pursue their denied age discrimination grievances in arbitration. *Pyett v Pennsylvania Bldg. Co.*, 498 F.3d 88 (2d Cir. 2007). Because the union had consented to the arrangement that brought in the employees who displaced the plaintiffs, the union believed it could not legitimately argue that the reassignments were discriminatory.

These facts illustrate one leading argument for treating collectively bargained arbitration provisions differently from individual employment contracts. Unions typically retain complete control over whether, and how vigorously, to pursue their members' complaints at both the grievance and arbitration stages. At the same time, unions must often balance the competing interests of employee subgroups within a bargaining unit in making such decisions. The four dissenting Justices in *Penn Plaza*, not to mention the EEOC and other amici including the Solicitor General, cited this backdrop and *Gardner-Denver* in support of the Second Circuit's conclusion that the displaced night watchmen could proceed with their age discrimination lawsuit notwithstanding the exclusive remedy language of the CBA.

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THE SUPREME COURT REVISITS FUNDAMENTAL ARBITRATION PRINCIPLES

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The *Penn Plaza* majority, however, saw the issue differently. Justice Thomas's majority opinion characterized *Gardner-Denver* as resting on "a misconceived view of arbitration" that the Court had since abandoned in *Gilmer* and other cases: the view that an agreement to submit statutory discrimination claims to arbitration amounted to a waiver of those rights rather than a mere change of forum. Furthermore, the competence of arbitrators to decide federal statutory claims of all kinds has since become well established. Neither *Gardner-Denver* nor the point that unions often encounter conflicts of interest could override the plain facts that the plaintiffs' authorized representatives had collectively bargained for final and binding arbitration of their workplace discrimination claims, and that the text of the ADEA did not preclude binding arbitration of age discrimination claims. Furthermore, the majority regarded the threat of suits against a union for breach of the duty of fair representation as a meaningful curb on discriminatory conduct by unions in negotiating and acting under CBAs. Union members are also free to file age discrimination claims with the EEOC or the NLRB, and those agencies can seek judicial intervention on the individuals' behalf.

In a concluding passage, the majority somewhat ambiguously reserved the question of whether its analysis would hold if a union blocked arbitration of a member's discrimination claims, effectively turning the CBA into a substantive waiver of the statutory right. Penn Plaza insisted this was not the situation in the case at hand, and that the plaintiffs were able to pursue arbitration even if the union declined to participate.

* * *

The Supreme Court was also active on the arbitration front in its 2007-2008 term. *Preston v. Ferrer*, 128 S.Ct. 978 (2008), is another decision in the now extensive line emphasizing the force of the federal policy favoring arbitration. The California Court of Appeals had stayed Preston from arbitrating his claim that Ferrer, a television personality, owed him management fees under a contract containing a broad arbitration clause because Ferrer's challenge to the contract's enforceability under California law was pending before the California Labor Commissioner. The Supreme Court reversed, rejecting the notion that arbitration was inappropriate if a specialized, state administrative agency would otherwise have jurisdiction over the dispute or over a threshold issue.

A more significant decision from the 2007-2008 term is *Hall Street Associates, LLC v. Mattel, Inc.*, 128 S.Ct. 1396 (2008), holding that a court asked to vacate or modify an arbitration award pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. §1 *et seq.*, may do so only on the limited grounds enumerated in the FAA. Many courts had not read the FAA so inflexibly, instead finding a "manifest disregard of the law" ground for vacatur outside of, or between the lines of, section 10(a) of the Act — though this was always defined in terms limited to extreme cases.

Hall Street has several practical consequences for parties entering into arbitration agreements. First, the decision invalidates "customized" standards of review. Many employers and businesses, wishing to build in an escape route from an arbitral award built on a flawed understanding of the law, have incorporated some form of judicial review for "clear legal error" into their arbitration agreements (whether pre-dispute or post-dispute). Second, the continued viability of the "manifest disregard" ground is highly doubtful. *Hall Street* says, in essence, that neither courts nor parties have any business expanding the narrow grounds for judicial intervention (*i.e.*, corruption, partiality, misconduct, lack of jurisdiction) specified by Congress in a law intended to promote quick dispute resolution outside of the courts. At a minimum, employers who went beyond the express FAA grounds for vacating or modifying awards in drafting arbitration agreements can no longer assume that those provisions will be reflexively enforced. (A circuit split, thoughtfully reviewed in *Citigroup Global Markets, Inc. v Bacon*, 562 F.3d 349 (5th Cir. 2009), has developed on the question of whether "manifest disregard" still survives in some diminished form. Currently only the Sixth Circuit, in an unpublished opinion, has suggested that it survived virtually intact. *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed.Appx. 415 (6th Cir. 2008).)

Finally, *Hall Street* may encourage less dependence on the FAA and increased reliance on state laws that permit closer judicial scrutiny of arbitration awards for errors of law. For example, a court may vacate an arbitration award under the Michigan Arbitration Act that contains an error of law "so material or so substantial as to have governed the award, and but for which the award would have been substantially otherwise." *DAIIE v. Gavin*, 416 Mich. 407 (1982). Of course, before foregoing reliance on the FAA an employer desiring arbitration of claims should consider the strength of the forum state's policy favoring arbitration should challenges to an agreement's scope or enforceability be brought. ■

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MEDICAL MARIJUANA: IS THERE A DUTY TO ACCOMMODATE?

David R. Deromedi and Tiffany A. Buckley-Norwood
Dickinson Wright PLLC

On November 4, 2008, Michigan voters approved Proposal 08-1 to permit the use of marijuana for specified medical conditions, and Michigan became the 13th state to enact such a law. The "Medical Marihuana Act", M.C.L. 333.26421 *et seq*. (the "MMA") is intended to allow for the medical use of marijuana to alleviate the pain, nausea, and other symptoms arising from specific medical conditions without the threat of criminal prosecution. However, the Act also has repercussions in the workplace. Unfortunately for employers, the MMA does not provide clear guidance on how to address these repercussions. This article will provide an overview of the Act and explore the questions raised by application of the MMA to the workplace.

"A medical marijuana break."

I. OVERVIEW OF MICHIGAN'S MEDICAL MARIJUANA ACT

The MMA creates certain immunities for the medical use and possession of marijuana by qualifying patients and primary caregivers. These immunities include protection from arrest and prosecution, as well as from disciplinary action by a licensing board. The MMA *does not*, however, confer on marijuana the same status as legal prescription drugs. Indeed, the MMA cannot completely legalize marijuana or authorize physicians to provide prescriptions for it because marijuana remains an illegal substance under the federal Controlled Substances Act, 21 U.S.C. 801 *et seq*.

Under the MMA, a qualifying patient, who has been issued a registry identification card, may possess a limited amount of marijuana for medical use. "Medical use" is defined in part to mean the "acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marijuana . . . to alleviate a registered qualifying patient's debilitating medical condition or symptoms associated with the debilitating medical condition."[1] The Michigan Department of Community Health's Bureau of Health Professions began accepting applications for registry identification cards on April 4, 2009.[2] Michigan will also recognize a registry identification card, or its equivalent, issued by another state that allows medical marijuana.

To receive a registry identification card, the patient must have a written certification from a physician that the patient (i) has a serious or debilitating medical condition and (ii) is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the medical condition or its symptoms. The MMA designates the following as debilitating conditions: cancer, glaucoma, HIV, AIDS, Hepatitis C, amyotrophic lateral sclerosis (Lou Gehrig's disease), Crohn's disease, agitation of Alzheimer's or nail patella. Other qualifying conditions are those that produce one or more of the following symptoms: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures; or severe and persistent muscle spasms. The Department also has the authority to add to the list of debilitating medical conditions in the future. On the application for a registry identification card, a qualifying patient has the option of possessing their own medical marijuana or obtaining it from a primary caregiver.

Physicians will not be prosecuted under Michigan law, subject to disciplinary action by the Michigan board of discipline, or denied any right or privilege for providing written certifications for qualifying patients. Similarly, an assistant will not be prosecuted or denied any right or privilege for assisting a registered qualifying patient with using or administering marijuana.

The MMA opens up several questions for employers. For example, to what extent must an employer accommodate an employee who notifies that they use medical marijuana pursuant to the MMA? May an employer with a zero tolerance or other substance abuse policy enforce that policy against a covered employee who tests positive for marijuana? Or must it disregard the test results? Do employers have to allow a covered employee to possess marijuana in the workplace? Will the discharge of an MMA covered employee pursuant to the employer's drug-free workplace policy violate Michigan public policy? These questions which will need to be filled by either the Michigan courts or possibly the Department of Community Health. The Department of Community Health's administrative rules issued on April 4, 2009, however, make no reference to employment.

II. THE DUTY TO ACCOMMODATE

In order to be classified as a qualifying patient under the MMA a person must have been diagnosed with one of the specific medical conditions or symptoms referenced in the Act. Given the conditions identified in the Act, an employer may need to presume that any employee classified as a qualifying patient will meet the definition of a qualified person with a disability under the Americans with Disabilities Act ("ADA") and a person with a disability under the Michigan Persons with Disabilities Civil Rights Act ("PDCRA"). The question then becomes how far does an employer's duty to accommodate extend in this situation?

A. The ADA Does Not Require an Employer to Accommodate Marijuana Use Because It Is Illegal Under Federal Law

The ADA poses no obligation on an employer to accommodate an employee's MMA protected marijuana use. An employee that engages in illegal drug use is not protected under the ADA where the employer acts because of the employee's illegal drug use.[3] "Illegal drug use" means the use of drugs that are unlawful under the Controlled Substances Act. Marijuana is a Schedule I controlled substance under the Controlled Substances Act. Therefore, subject to limited exceptions, the use, possession or dispensation of marijuana is illegal under federal law.[4]

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Employee marijuana use is not protected under federal law because marijuana remains subject to the Controlled Substances Act. The Supremacy Clause in Article VI of the U.S. Constitution effectively precludes the MMA from overriding federal law.[5] Therefore, there is no requirement under the ADA for employers to accommodate employees for the medical use of marijuana and there is no federal protection for an employee who tests positive for marijuana.

B. The Interplay Between the PDCRA and the MMA

Under section 211(a) of the PDCRA employers may establish policies and work rules regarding the use of alcohol or the "illegal use of drugs." Many employers have implemented substance abuse or drug-free workplace policies under which employees who test positive for illegal drugs may be disciplined, including being terminated from employment.

The MMA essentially allows for the legal use of marijuana under specific circumstances. Yet, nothing in the MMA undermines an employer's ability to establish or continue to apply its substance abuse or drug-free workplace policies. However, neither does the MMA state that it's provisions have no application or effect in the workplace.

Section 7 of the MMA defines its scope and limitations.[6] Section 7(c)(2) explicitly states that nothing in the Act requires "an employer to accommodate the ingestion of marijuana in the workplace or any employee working while under the influence of marijuana." Furthermore, the MMA does not permit an individual to (1) undertake any task, while under the influence of marijuana, if doing so would constitute negligence or professional malpractice; (2) smoke marijuana in any public place or (3) operate a motor vehicle while under the influence of marijuana.

Section 7(c)(2) does not go so far as to exclude the need to accommodate an employee's "medical use" of marijuana as that term is defined by the Act, and which "medical use" includes the possession, use, and internal possession of marijuana. Nor does it expressly prohibit an employee from possessing medical marijuana in the workplace.

Neither the MMA, nor the administrative rules, define the term "under the influence of marijuana." Breath or blood alcohol tests which measure the level of alcohol in a person's blood has been effectively correlated to levels of impairment, and state and federal laws provide for precise thresholds to determine if someone is impaired or under the influence. However, because of marijuana's ability to stay in the body for lengthy periods of time, testing for marijuana levels may not be precise enough to allow for the same type of determination. There is reportedly little published data correlating blood levels for drugs such as marijuana and impairment with the same degree of certainty as with alcohol.[7] Therefore, drug testing may *not* necessarily determine impairment or even current drug use.

According to the National Institute on Drug Abuse ("NIDA"), during intoxication, marijuana impairs short-term memory, attention, judgment, coordination, balance and other cognitive functions. These acute effects may last for one to four hours.[8] Under the MMA an employee experiencing acute affects of marijuana at work would most likely be deemed "under the influence" and therefore not eligible for an accommodation. In that case, the employee should be subject to the same discipline as with any other employee who exhibits the similar behavior. As a result, a determination of whether an employee is "under the influence" of marijuana may end up being fact specific and heavily dependent on the observation of the employee's behavior.

The issue is further complicated because an employee may test positive for marijuana though not experiencing any acute effects. As the Michigan Supreme Court noted in *People v. Derror*, marijuana may be detectable in a drug test for several weeks after ingestion, long after its use and after any possible impairment has worn off. It also recognized that the effects of marijuana may remain even after it is no longer detectible in the blood. The adverse impact on cognitive functions may last for weeks after the acute effects wear off, however. As a result, someone who smokes marijuana daily may function at a reduced intellectual level all the time.[9]

This creates an additional twist because under the PDCRA, a person with a determinable physical or mental characteristic caused by current illegal use of a controlled substance is deemed not to be a covered person with a disability. Thus, another question raised is even if the MMA poses some obligation on an employer to accommodate an employee who tests positive for medical marijuana, whether an employer may still discharge or discipline an employee who demonstrates reduced cognitive abilities and tests positive for marijuana, though not suffering the acute effects.

C. Other States Have Not Required Accommodation In The Workplace

Courts in other states have addressed whether an employee using medical marijuana under their statutes may be discharged for a positive drug test.

In *Ross v. Ragingwire Telecommunications, Inc.*,[10] an employee was notified after he had started working that he had tested positive for marijuana in his pre-employment drug test. Prior to taking the drug test, however, the employee gave the testing facility his written certification from his physician for the use of medical marijuana. Additionally, when notified that he was going to be suspended for failing his drug test, he gave his employer the certification. After being discharged the employee filed suit alleging disability discrimination in violation of California's fair employment statute and wrongful discharge in violation of public policy.

The California Supreme Court in *Ross* ultimately affirmed the trial court's dismissal of the employee's claims. The court noted that nothing in California's medical marijuana statute suggested that the voters intended the statute to address employee rights. According to the court, the purpose of the statute was to create a narrow exception to California criminal law for the medical use of mari-

juana; it did not "speak" to employment law. The court further noted that the statute did not state that marijuana possessed the same status as any legal prescription drug in California and therefore it remained illegal under federal law. In addition, the California fair employment act did not require employers to accommodate the use of illegal drugs. The court also rejected the employee's reliance on a provision added later to the California Act stating that it did not require the accommodation of any medical use on the premises of any place of employment or during working hours. The court concluded that the failure to infer a broader accommodation requirement, even with this added language, would not render the purpose of the statute – to prevent criminal prosecution of patients who are prescribed and use medical marijuana – meaningless.

In *Washburn v. Columbia Forest Products*,[11] the employee was a registered marijuana user that smoked marijuana every night to sleep to alleviate muscle spasms in his legs that limited his ability to sleep. Although the employee had previously used prescription medications to alleviate his spasms, he claimed that marijuana was more effective. His employer's drug test returned a positive result if marijuana was used within the previous two to three weeks. The test used was admittedly incapable of determining if a person was drug-impaired at testing. After testing positive for marijuana, the employee requested that he be allowed to take a test that would show only whether he was impaired at work. The employer refused and, instead, conditioned the employee's return to work on the employee testing negative. The employee continued to use marijuana every night and the employer discharged him. He subsequently filed a lawsuit under Oregon's disability statute for failure to accommodate his disability.

The trial court in *Washburn* dismissed the employee's claim finding that: (1) he was not a qualified individual with a disability and (2) the Oregon medical marijuana statute did not require employers to accommodate employees who test positive for marijuana use. The court of appeals reversed, ruling that the provision in the OMMA stating that nothing in the Act "shall be construed to require an employer to accommodate the 'medical use of marijuana' in the workplace" did not mean that an employer had no duty to accommodate at all when the Act was read as a whole. The Oregon Supreme Court reversed and ultimately affirmed the trial court's decision, but solely on the grounds that the employee was not disabled and therefore did not reach the accommodation issue. However, in a concurring opinion one justice felt that the federal Controlled Substances Act preempted the Oregon employment discrimination statute to the extent Oregon law may require the employer to accommodate medical marijuana use, observing that while Oregon could exempt medical marijuana users from state criminal law, the state cannot require employers to accommodate what federal law specifically prohibits.[12]

Recently, the Supreme Court of Montana also upheld the discharge of an employee that tested positive for marijuana use.[13] The employee began using marijuana for medical purposes after a workplace injury. When he tested positive, the employer suspended him and offered to let him return on a last chance waiver. When the employee refused, the employer discharged him. The employee then filed suit against the employer alleging several claims including negligence, violation of Montana's disability discrimination statute, and the ADA. The Montana Supreme Court upheld the trial court's dismissal of the employee's claims on the pleadings. The court dismissed the negligence claims because they arose out of the medical marijuana statute, and that statute did not expressly or implicitly provide for a private cause of action against an employer. The court dismissed the failure to accommodate claims, with minimal analysis, ruling that Montana's medical marijuana act expressly provided that nothing in the Act "required an employer to accommodate the medical use of marijuana in any workplace."

With respect to the MMA, section 4(a) provides that "[a] qualifying patient who has been issued and possesses a registry identification card shall not be . . . denied any right or privilege, including but not limited to . . . disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with this act." Although it might be argued that this provision should apply to an employer as a business and employment as a privilege, the text of this provision appears to protect only individuals from a adverse action taken by a professional or other state licensing board.

Similar to the California, Oregon and Montana medical marijuana statutes, the MMA contains no express indication that it was intended to address the rights of employees in the workplace. Furthermore, it has no provision for a private cause of action. The MMA's primary goal appears to be protecting individuals, in limited medical circumstances, from state prosecution under the marijuana possession and use laws. In its findings and declaration section, the MMA recognizes that federal law prohibits any use of marijuana; but, it asserts that states are not required to enforce or prosecute individuals under federal law. The MMA further notes that 99 of every 100 marijuana arrests are made under state law, rather than federal law. Finally, the MMA declares that "changing state law will have the practical effect of *protecting from arrest* the vast majority of seriously ill people who have a medical need to use marijuana." Therefore, it is similar in many respects to the California, Oregon, and Montana statutes.

In contrast, however, the MMA expressly provides that an employer has no duty to accommodate the use of marijuana in the workplace or any employee working while under the influence of marijuana. This language differs from the "no accommodation" provisions in the California, Oregon, and Montana acts in that they all excuse an employer from accommodating the "medical use" of marijuana in the workplace as that term is defined by those acts. The focus of Michigan's "no accommodation" provisions is arguably narrower insofar as it does not excuse accommodation of an employee's "medical use" of marijuana, but rather the ingestion in any workplace or being under the influence while working.

In short, it is clear from the MMA that an employer need not accommodate an employee's use medical marijuana while working or work while under the influence of marijuana. What constitutes being under the influence of marijuana will need to be determined on a case-by-case basis. Moreover, it is not clear and has to be determined to what extent an employer may take disciplinary

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action or discharge an employee who tests positive for marijuana regardless of whether they are a qualifying patient under the MMA and regardless of whether there is any evidence of being under the influence in the workplace.

III. EMPLOYER DRUG FREE WORKPLACE POLICIES

Notwithstanding the MMA's passage, employers who have not already done so should consider implementing a drug-free workplace policy. Employers who already have them in place should carefully review their existing drug-free workplace policies.

The interaction between the PDCRA and MMA would not require an employer to eliminate its drug-free workplace policy. As previously stated, the PDCRA provides that an employer may "[e]stablish employment policies, programs, procedures, or work rules regarding the use of alcoholic liquor or the illegal use of drugs." In addition, recipients of federal grants and federal contractors with a federal contract of $100,000 or more are under the federal Drug-Free Workplace Act of 1988, 41 U.S.C. 701(a) *et seq.*, to implement a drug-free workplace program. Additionally, federal regulations require employers, in certain safety-sensitive transportation industries, to drug test their employees.[14] Furthermore, there is potential liability for an employer whose employee injures a third-party, while under the influence of drugs. Therefore, employers should consider doing the following:

- Require that employees who are taking prescription or nonprescription drugs, which could affect their ability to perform their job in a safe and efficient manner, notify their manager when they report to work.
- Continue to make clear in communications to employees that the use or possession of illegal drugs is prohibited in the workplace and employees may not work while under the influence of illegal drugs.
- Do not allow employees to drive company vehicles, operate heavy equipment or otherwise perform tasks that are made more dangerous by being under the influence of marijuana, if the employee tests positive for marijuana.
- Make sure job descriptions spell out essential job functions.
- Never take disciplinary action against a worker or accuse a worker of a policy violation simply because that employee is acting impaired. Many of the physical symptoms that are commonly associated with intoxication—such as slurred speech, disorientation, or a lack of coordination—can also be the result of a serious physical disability (e.g., low blood sugar, mental illness).
- Prior to altering a drug-free workplace policy, obtain legal counseling regarding potential obligations to bargain with the union under the National Labor Relations Act.

To the extent an employer's drug-free workplace policy includes drug testing, the employer should be prepared to address drug testing issues both pre and post hire where the applicant or employee claims that a positive drug test for marijuana was solely due to proper medical use. If the employer intends to excuse registered users from discipline, it should make clear to employees that only employees who present a valid registry identification card may be excused from discipline if they test positive for marijuana.

Regardless of the drug test outcome, all test results and other medical information should remain confidential to comply with the requirements of Michigan's Public Health Code, the ADA and the Health Insurance Portability and Accountability Act ("HIPAA"). Thus, access to the results should be limited to those who need to the information to make safety and personnel decisions. Drug-testing information, including results, should also be kept in a file separate from the employee's general personnel file.

IV. CONCLUSION

At this early stage, MMA's full impact on the workplace is unclear. Employers do not have a duty to accommodate an employee's desire to ingest medical marijuana in the workplace or to work while under the influence of marijuana. To the extent the employer's drug-free workplace program includes drug testing, employers must be prepared to deal with medical marijuana users that test positive for marijuana. However, it still needs to be determined whether the MMA requires an employer to accommodate an employee who tests positive for medical marijuana, or if the Act poses other limitations in the workplace.

— END NOTES —

[1]M.C.L. 333.26423(e).

[2]The Department's Administrative Rules regarding the MMA, Michigan Administrative Code R. 333.101 *et seq.*, may be found at http://www.michigan.gov/mmp.

[3]42 U.S.C. § 104(c).

[4]21 U.S.C. 841(a)(1). *See Gonzales v. Raich*, 545 U.S. 1, 14, 29 (2005) ("The CSA designates marijuana as contraband for *any* purpose; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has no acceptable medical uses."); *U.S. v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001) (holding there is no medical necessity exception for the CSA's prohibitions regarding marijuana); *see also* FDA, Inter-Agency Advisory Regarding Claims That Smoked Marijuana Is Medicine (2006) (stating that no scientific studies support medical use of marijuana because there are alternative, FDA-approved medications). For this reason, Michigan physicians still cannot prescribe marijuana. *Raich*, 545 U.S. at 28 ("[T]he dispensing of new drugs, even when doctors approve their use, must await federal approval."); *Ross v. Ragingwire Telecomms., Inc.*, 174 P.3d 200, 204 (Cal. 2008) ("No state law can completely legalize marijuana because the drug remains illegal under federal law.").

[5]*See* M.C.L. § 333.26422(c); *Raich*, 545 U.S. 1, 27 (2005) (referencing the Supremacy Clause to find federal prohibition of marijuana prevails over state authorization).

[6]M.C.L. § 333.26427.

[7]*See* Office of the Assistant Sec'y for Policy, U.S. Dep't of Labor, Workplace Drug Testing, http://www.dol.gov/asp/programs/drugs/workingpartners/ dfworkplace/dt.asp (last visited April 30, 2009).

[8]475 Mich. 316, 336, 338-39 (2006). *See also* Office of the Assistant Sec'y for Policy, U.S. Dep't of Labor, Workplace Drug Testing.

[9]NIDA, U.S. Dep't of Health & Human Servs., NIH Publication No. 05-3859, *Research Report Series: Marijuana Abuse* 3, 5 (2005).

[10]174 P.3d 200, 202-06 (Cal. 2008).

[11]104 P.3d 609, 611, 614-616 (Or. Ct. App 2005) *rev'd* 134 P.3d 161, 166-68 (Or. 2006).

[12]134 P.3d 167.

[13]*Johnson v. Columbia Falls Aluminum Company*, 2009 WL 865308 (March 31, 2009).

[14]*See* 49 U.S.C. 5331; 49 C.F.R. 40.85(a) (U.S. Dep't of Transportation requirements that all public transportation employers test employees for controlled substances, including marijuana); 49 U.S.C. 20140 (same for railroad carriers); 49 U.S.C. § 31306 (same for commercial motor carriers); 49 U.S.C. 45102 (same for air carriers, per Federal Aviation Administration regulations). ■

UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long

The Supreme Court issued its opinion in *Ysursa v. Pocatello Education Ass'n*, 129 S. Ct. 1093 (2009) on February 24. The issue in *Ysursa* was whether the First Amendment to the United States Constitution prohibited a state legislature from removing the authority of a state political subdivision to make employee payroll deductions for political activities under a statute that is valid as applied to state government employers.

In 2003, the Idaho legislature amended the state Right to Work Act (RTWA) with the Voluntary Contributions Act (VCA). The VCA deleted a provision from the RTWA allowing employers to make payroll deductions for employee-authorized donations to political committees. The VCA also contained several restrictions on a union's use of dues for political activities. Upon challenge by a group of unions, the defendant conceded that the amendments restricting unions' use of dues for political activities was unconstitutional. The defendant would not make the same concession, however, as it related to the VCA's prohibition against payroll deductions for employee-authorized donations to political committees.

On cross-motions for summary judgment, the district court held that the payroll deduction prohibition violated the First Amendment as it applied to local government employers, but not as it applied to employees of the State of Idaho. The Ninth Circuit affirmed the district court, finding that the amendment violated the First Amendment as it related to local government employers, because it was a content-based law with no compelling justification.

The Supreme Court reversed the Ninth Circuit and held that the ban on payroll deductions did not violate the United States Constitution. While the Court recognized that the First Amendment prohibits governments from "abridging the freedom of speech," it concluded that the First Amendment did not "confer an affirmative right to use government payroll mechanisms for the purpose of obtaining funds for expression." *Id.* at 1096. The State's decision declining to promote political speech by allowing public employees to use payroll deductions for political activities was reasonable, the Court found, in light of the State's interest in "avoiding the appearance that carrying out the public's business is tainted by partisan political activity."

On April 1, the Court issued its decision in *Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009). The Court held that "a provision in a collective bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law." *Id.* at 1457. Justice Thomas delivered the opinion of the Court in which Justices Roberts, Scalia, Kennedy and Alito joined. Justices Stevens, Souter, Ginsburg and Breyer dissented.

In *Penn Plaza*, three SEIU Local 32BJ employees, all over the age of 50, were covered by a collective bargaining agreement that provided that the sole and exclusive remedy of employment discrimination claims was the grievance and arbitration procedure in the contract. When the employer transferred these employees to less desirable positions, the union filed grievances alleging, among other things, age discrimination. The union ultimately declined to take the age discrimination claims to arbitration, and the three employees filed an age discrimination lawsuit. The employer moved to dismiss the suit based on the contract provision providing grievance and arbitration as the employees' exclusive remedy. The district court denied the motion and the Second Circuit affirmed holding that a collective bargaining agreement provision waiving an employee's right to a federal forum with respect to a statutory claim was unenforceable. The employer petitioned for certiorari.

In reversing the Second Circuit's decision, the Supreme Court reasoned that the collective bargaining agreement provision requiring arbitration of discrimination claims was a freely negotiated term and condition of employment with which the courts should not interfere. Noting that parties generally enter into arbitration agreements "precisely because of the economics of dispute resolution," the Court rejected the employees' argument that the mandatory arbitration clause was outside the permissible scope of bargaining since it affected the employees' non-economic statutory rights. In further support of its opinion, the Court also cited to *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which held that nothing in the ADEA prohibited arbitration of federal age discrimination claims. The Court found that nothing in the statutory framework of the ADEA precluded applying *Gilmer* to the collective bargaining context.

The dissents' objection to the Court's opinion was that an earlier decision, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), had answered the question posed in the instant case, and answered it in favor of the employees. Specifically, the dissent concluded that *Gardner-Denver* and its progeny established that a clause in a collective bargaining agreement requiring arbitration of discrimination claims could not waive an employee's right to a judicial forum. The Court disagreed with the dissent and held that *Gardner-Denver* and its progeny were not applicable to the facts in the case at bar. Specifically, the Court found that the *Gardner-Denver* decision was limited solely to cases where "arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims," and the decision did not apply to the question of enforceability of agreements to arbitrate statutory claims. ■

MICHIGAN SUPREME COURT UPDATE

Richard A. Hooker
Varnum, LLP

***Sazima v Shepherd Bar & Restaurant*, No. 136940 (Mich Slip Op, 4/3/09), *rev'g* 482 Mich 1110 (2008).**

On employer Shepherd's prior Application for Leave to Appeal, the Supreme Court, in a 4 to 3 ruling, had summarily reversed both the Court of Appeals and Workers' Compensation Appellate Commission, finding that claimant Sazima's admitted injury had not occurred "in the course of her employment." She had been walking to her employer's place of business from her car, which she had parked "down the street" from the Bar and Restaurant, when she apparently feel and sustained the injury. 482 Mich at 1112. The Court's Order was issued December 17, 2008.

Plaintiff-Appellee then sought reconsideration and by Order dated April 3, 2009, the former Dissenters, now joined by Justice Hathaway, vacated the Court's earlier Order and denied leave to appeal, thereby leaving intact the rulings of the Court of Appeals and the WCAC. Justice Markman, joined by Justices Corrigan and Young, dissented, demonstrating the political polarity of the Court by dredging up the new majority's own previous words from their previous dissenting opinions: "…[t]here is but one answer, the makeup of the Court. The law has not changed. Only the individuals wearing the robes have changed." *Slip Op at 2.*

Regardless, practitioners will, for the time being at least, likely treat all injuries sustained by an employee walking to the employer's premises from their vehicles as having occurred "in the course of employment." Query, however, what if the employee takes public transportation to work?

SIXTH CIRCUIT UPDATE

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

Management's Heightened Scrutiny of Employee May Establish the Requisite Causal Nexus to Prove Retaliation

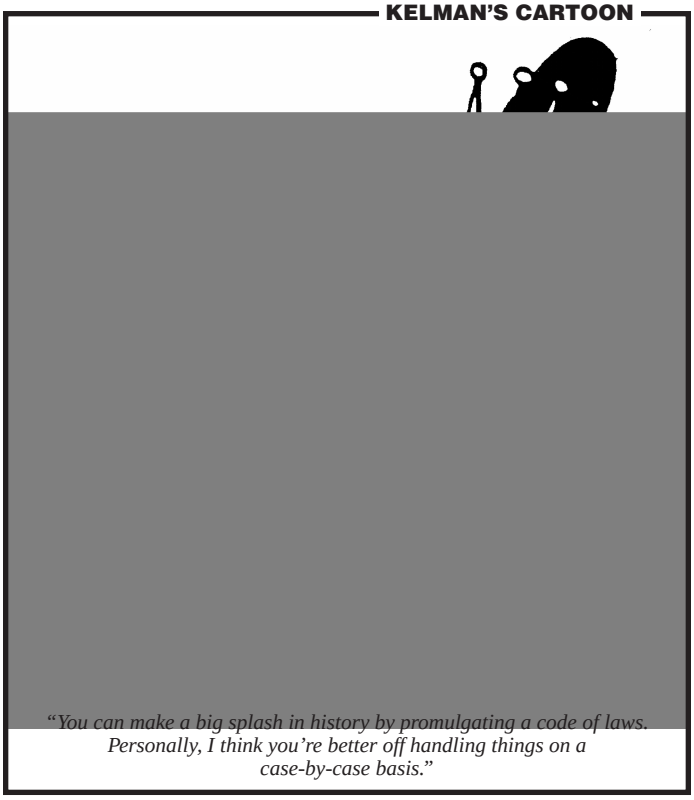
In *Hamilton v General Electric Co*, Docket No 08-5023 (February 12, 2009), GE terminated Jarrett Hamilton after he had a number of heated confrontations with his plant managers and supervisors regarding his absences, medical restrictions, and work assignments. The Union intervened, and GE reinstated Hamilton with a 30-day suspension. During his suspension, Hamilton filed an EEOC charge against GE alleging age discrimination. GE terminated Hamilton three months later for allegedly refusing another work assignment. Hamilton sued for retaliation for having filed his EEOC charge. The district court granted summary judgment. On appeal, Hamilton argued that the close temporal proximity between his EEOC charge and his termination, coupled with evidence showing his bosses' heightened scrutiny of his work after he filed the EEOC charge, was enough to establish a prima facie case of retaliation. The Sixth Circuit agreed, stating that "[t]he fact that the scrutiny *increased* is critical." It concluded further that, because the record showed that GE increased its surveillance of Hamilton's work immediately after he filed his charge and "then waited for him to make a mistake" as a way to cover up its true motivations, Hamilton satisfied "the very definition of pretext." Accordingly, the Court remanded the matter to district court for further proceedings.

A Jury May Be Precluded from Awarding Lost Wages in a Hostile Environment Case

The Sixth Circuit recently held that, in certain circumstances, a jury may not award lost wages to a plaintiff despite finding that the employer created a hostile work environment in violation of Michigan's Civil Rights Act. *Betts v Costco Wholesale Corp*, Docket Nos 07-2103 and 07-2217 (March 5, 2009). There, six former employees sued Costco alleging that they were terminated because they are black and that they were subjected to a racially hostile work environment in violation of Michigan law. The jury returned a verdict in favor of their hostile environment claims, but against their claims of discriminatory termination. It awarded lost wages and emotional distress damages. On appeal, the Sixth Circuit addressed, among other things, the plaintiffs' entitlement to lost wage damages. Noting that Michigan's Civil Rights Act permits the recovery for lost wages that flow from the statutory violation, the Court agreed with the district court that "[lost wages] do not naturally flow from a hostile work environment claim." Because the jury determined that Costco did not terminate the plaintiffs for improper reasons and because none of the plaintiffs missed work as a result of the alleged hostile environment, "it would be erroneous for the court to permit [the plaintiffs] to recover lost wages when their termination was deemed lawful."

Sixth Circuit Sets Standard for Alleging Viable "Association" Discrimination Claim

In *Barrett v Whirlpool Corp*, Docket No 08-5307 (Feb. 23, 2009), the plaintiffs, a number of Caucasian employees at Whirlpool's LaVergne, Tennessee manufacturing plant, had befriended many of their African-American co-workers and often stood up for them against racially-charged conduct to which they had been subjected. The plaintiffs sued based on theories of hostile work environment and retaliation, alleging that management and other Caucasian workers gave them "the cold shoulder" and called them "nigger lovers" because of their friendships with their African-American co-workers. According to the plaintiffs, the hostility towards them, because of their association with and advocacy for their African-American co-workers, was "pervasive all over the plant." They also alleged that they were given less desirable jobs and tasks and denied promotions for the same reasons. The district court granted summary judgment against all of the plaintiffs' because there was an "insufficient degree of association" between the plaintiffs and the African-American workers for the plaintiffs to be protected by Title VII. On Appeal, noting that "Title VII forbids discrimination on the basis of association with or advocacy for a protected party," the Sixth Circuit reversed in part. In doing so, it rejected Whirlpool's argument that the necessary degree of association had to be such that it extended outside of the workplace, and it set forth the requirements for bringing a viable "association claim": if a plaintiff shows that "(1) she was discriminated against at work (2) because she associated with members of a protected class, then the degree of the association is irrelevant." According to the Court, "the absence of a relationship outside of work should not immunize the conduct of harassers who target an employee because she associates with African-American co-workers." Thus, the Court concluded, the degree of association is only relevant to whether the plaintiff has established a hostile work environment, "not whether he is eligible for protections of Title VII in the first place." ■



"You can make a big splash in history by promulgating a code of laws. Personally, I think you're better off handling things on a case-by-case basis."

Editor's Note: This Kelman Cartoon originally appeared in *Legal Times* and is reprinted with permission.

MERC UPDATE

James T. Feeny
Dena Lampinen Lorenz
White, Schneider, Young & Chiodini, P.C.

A summary of recent decisions issued by the Michigan Employment Relations Commission follows. Other recent decisions of the Commission may be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/cis.

UNFAIR LABOR PRACTICES

Taylor School District -and- Taylor Federation of Teachers, AFT-AFL CIO
Case No. C07 I-218 (March 2, 2009)

On November 20, 2008, the ALJ issued a Decision and Recommended Order finding that Respondent Taylor School District had engaged in an unfair labor practice by failing to execute, and be repudiating, a mutually ratified collective bargaining agreement in August of 2008. No Exceptions were filed and the Commission adopted the ALJ's Decision.

In 2007, representatives of the union and the employer met and negotiated a tentative agreement establishing the terms of a successor collective bargaining agreement. That agreement was subsequently rejected by the Taylor Public Schools Board on the basis that its representatives had not been given actual authority to negotiate the agreement reached with the union. The parties renewed negotiations in 2008 and a tentative agreement was again reached and ratified by the union and then ratified by vote of the Taylor Public Schools Board on June 21, 2008. Despite the ratification of the agreement, the employer failed to execute the collective bargaining agreement and refused to implement its terms.

The ALJ recognized that once a tentative agreement has been ratified, the parties have satisfied their duty to bargain with each other. Moreover, relying on the holding in *Command Officers Assn of Michigan*, 20 MPER 50 (2007), the ALJ determined that a failure to execute or implement a ratified agreement violates PERA even where a party asserts a post-ratification realization of some unanticipated adverse consequence arising from the contractual terms to which it had agreed. Accordingly, the ALJ held that the Taylor Public Schools repudiated a mutually ratified collective bargaining agreement, and in doing so violated its duty to bargain in good faith under Section 10(1)(e) of PERA.

Mundy Twp -and- Michigan Assn of Police
Case No. C05 L-308 (March 17, 2009)

On October 8, 2007, the ALJ issued his Decision and Recommended Order finding that Respondent, Mundy Township did not violate its duty to bargain when it refused to comply with the information request of Charging Party, Michigan Association of Police, seeking a copy of the "officer complaint log." The ALJ held that the Michigan Association of Police failed to prove that the information sought was not a confidential internal affairs investigation record that was exempt from disclosure under PERA. Charging Party filed timely Exceptions. The Commission affirmed the findings and conclusions of the ALJ.

In its Exceptions, the Charging Party alleged that the ALJ erred in finding that Respondent did not violate its duty to bargain by failing to provide an unredacted complaint log to Charging Party. Charging Party further contends that it sought to use the log in the grievance procedure of the discipline of a bargaining unit member. In that matter, Charging Party took the position that there was disparate treatment in the discipline of road patrol officers, and it claimed that the redacted log provided by Respondent was useless in that effort and argued that the complaint log was a business record maintained in the ordinary course of business. Further, Charging Party asserted that the complaint log did not fall within the confines of documents exempt from disclosure as part of an internal investigation, and therefore the complaint log must be disclosed as part of Respondent's duty to bargain.

The Commission recognized the general rule that in order to satisfy the duty to bargain in good faith under Section 10(1)(e) of PERA, an employer must supply, in a timely manner, requested information that permits the union to engage in collective bargaining and police administration of the contract. However, the Commission acknowledged exceptions to the employer's disclosure requirement citing *Kent County -and- Kent County Sheriff*, 1991 MERC Lab Op 374, and the more recent Commission decision of *City of Battle Creek (Police Dept.)*, 1998 MERC Lab Op 684. IN those decisions, the Commission held that internal investigatory reports are exempt as a matter of law, and when there is no dispute concerning whether the information sought to be disclosed pertains to an internal investigatory file, the party in possession of the reports has no duty to disclose the materials.

In its Exceptions, Charging Party argued that the confidentiality exception did not apply because the officer complaint log was not part of an internal investigatory file. However, the Commission determined that witness testimony in the instant case described the log as an instrument used to establish an internal complaint number in response to a citizen complaint. Additionally, the log itself contained information that disclosed the existence of internal affairs investigations, including the names of the officers against whom citizen complaints have been filed. Accordingly, under those circumstances, the Commission agreed with the ALJ that the officer complaint long pertained to an internal investigatory file and therefore was not required to be disclosed by the employer.

Innovative Teaching Solutions, Inc and Old Redford Academy -and- Kelli Childs, et al
Case Nos C05 L-306 and C06 E-124

On December 13, 2005, Kelli Childs filed an unfair labor practice charge against Innovative Teaching Solutions, Inc. (ITS). At approximately the same time Ms. Childs filed her charge with the Commission, Melanie Cain filed an unfair labor practice charge against ITS with the National Labor Relations Board (NLRB). ITS is a for-profit Michigan corporation started by Melvin Smith in 1998. Under Smith's direction, ITS established the Old Redford Academy (ORA), which currently operates an elementary, middle, and high school. ORA has a management agreement with ITS to run all of these schools. ORA is also a public school academy chartered by Central Michigan University pursuant to the Revised School Code. MCL 380.501, *et seq.*

Due to the relationship between ORA and ITS, and the dual filing of an unfair labor practice charge with both the NLRB and the Commission, the Commission suspended its unfair labor practice charge to permit the NLRB to determine whether it lacked or

(Continued on page 16)

MERC UPDATE

(Continued from page 15)

refuses to exercise jurisdiction. The NLRB General Counsel's Advice Division issued a memo advising the Regional Director to dismiss Ms. Cain's charge for lack of jurisdiction after determining ITS was not an employer within the meaning of the National Labor Relations Act (NLRA).

On November 5, 2008, the Commission received a notice of withdrawal from charging parties. Therefore, the Commission was denied an opportunity to answer whether for-profit corporations contracted out to run public school academies chartered under the Revised School Code have proper jurisdiction with the Commission.

Innovative Teaching Solutions, Inc and Advanced Educational Staffing, Inc and Old Redford Academy -and- Lynette C. DePrez and Todd Doughty
Case No. C06 J-235

Innovative Teaching Solutions, Inc. (ITS) hired Todd Doughty as a Title I teacher in the fall of 2004. Mr. Doughty signed a contract with ITS[1] to teach again for the 2005-06 school year, and at the end of the 2005-06 school year, applied for the upcoming school year. Lynette DePrez also received a packet to apply for the 2006-07 school year. On July 13, 2006, while both Mr. Doughty's and Ms. DePrez's applications were still pending, they testified at an unfair labor practice hearing against ITS and Old Redford Academy (ORA).

In the present matter, the employer challenged the employees' standing, arguing that neither charging party was an employee in the summer of 2006 and therefore not "public employees" within the meaning of PERA.

The ALJ noted the Commission had not squarely addressed the issue of whether applicants qualify under the PERA, but that both the LMRA and PERA state job applicants may be "employees." The ALJ also noted the NLRB has long held that the NLRA extends to job applicants, quoting *General Services, Inc*, 290 NLRB 940, 943 (1977) and *Stationary Engineers Local 39*, 346 NLRB No. 34 (2006).

The ALJ noted *General Services* sought to construe the NLRA liberally to ensure the process remains open to individuals to start proceedings that will allow the NLRB to perform its mandated responsibilities. Therefore, the ALJ concluded the same reasoning applies to PERA and the LMRA, and adopted the NLRB's rule that protections are extended to job applicants and that PERA also protects job applicants.

Kent County -and- UAW Local 2600
Case No. C05 H-193

On August 9, 2005, the employer required an employee, Nancy Wilson, to meet with two supervisory employees. The meeting was called as a result of a complaint against Ms. Wilson and was deemed an investigatory interview. The meeting lasted approximately 30 minutes, and Ms. Wilson requested union representation as well as asking if she would need union representation. Ms. Wilson was told the meeting was merely a "fact-finding" meeting, thereby not requiring a union representative.

At the conclusion of the meeting, one of the supervisors indicated Ms. Wilson's answers "raise[d] a red flag," and that discipline would not be discussed until another occasion.

At the next meeting three days later, Ms. Wilson (who this time was permitted to have a union representative present) was discharged. Ms. Wilson's discharge was based on information obtained during her interview three days earlier.

The Commission proceeded with an analysis of *Weingarten* rights, and reviewed the employer's argument that Ms. Wilson had no reasonable belief that the meeting could result in discipline because she was informed at the onset of the meeting that "she had done nothing wrong." The Commission rejected the employer's argument, and held that interrogation by two supervisors related to a complaint would result in the average, reasonable employee fearing discipline could potentially result from the information obtained during the interview. Therefore, the ALJ reinstated Ms. Wilson due to the employer's *Weingarten* violation.

The Employer filed exceptions to Ms. Wilson's reinstatement, and urged the Commission to adopt the NLRB's decision in *Taracorp, Inc*, 273 NLRB 221 (1984), where the Board concluded it would no longer grant make-whole relief for *Weingarten* violations. The Commission reviewed the NLRB's various positions concerning make-whole remedies, including the burden-shifting method and the Board's discontinuance of make-whole relief for *Weingarten* violations. The Commission, also noted several instances where it had deviated from NLRB precedent. Ultimately, the Commission rejected the employer's request and found the make-whole remedy for certain *Weingarten* violations permissible under PERA, and such make-whole remedies reasonable to maintain the status quo and remedy unfair labor practices.

TEACHER TENURE DECISION

Steven J. Conn and Margaret H. Miller v. Detroit Public Schools
Case No. 08-44

In June of 2007, the superintendent of the Detroit Public Schools placed Steven Conn and Margaret Miller on administrative leave due to their attendance at a May 2007 protest of a school closing. In response to this action, Mr. Conn and Ms. Miller filed an unfair labor practice charge with the Commission alleging retaliation for protected activity under PERA. At the same time, the District proceeded with tenure changes against both Mr. Conn and Ms. Miller. In June of 2008, the ALJ issued a decision in the MERC case, finding the District's discipline was without merit and in retaliation for Mr. Conn and Ms. Miller's participation in PERA-Protected activity.

On June 19, 2008, the District again sought to proceed on tenure charges against Mr. Conn and Ms. Miller based on the participation at the same rally discussed in the MERC decision. After review of the doctrines of res judicata and collateral estoppel, the Tenure Commission ALJ found that a preliminary decision issued by a MERC ALJ while exceptions could still be timely filed had the preclusive effect of collateral estoppel, thereby preventing the District from proceeding on tenure charges and dismissing the case. This is the first time a decision by an ALJ which was still pending before the Commission was deemed to collaterally estop another agency matter. ■

MERC REVERSES "HUNTINGTON WOODS RETROACTIVITY RULE"

Robert Strassberg, *MERC Mediator*

In *Wayne Co & Wayne Co Sheriff*, 22 MPER ___ (Case No. R08 E-077, issued April 10, 2009) the Michigan Employment Relations Commission re-examined its "*Huntington Woods* retroactivity rule" at the urging of the petitioner, the Police Officers Association of Michigan (POAM). In *Huntington Woods*, 1992 MERC Lab Op 389, a divided Commission held that a newly certified bargaining representative was not permitted to seek retroactive wages and benefits for the period preceding the date of the union's certification.

In *Wayne Co & Wayne Co Sheriff*, POAM objected to the request by the incumbent union, Service Employees International Union (SEIU), to adjourn the initial hearing date on SEIU's objections to a representation election. POAM raised a concern that, as petitioner and as the potential future exclusive bargaining representative, any delay would disadvantage it and unit employees if the "*Huntington Woods* retroactivity rule" were to apply. Addressing this concern, MERC reconsidered and rejected the holding in *Huntington Woods*.

The Commission re-examined the *Huntington Woods* case in light of the Michigan Supreme Court's more recent ruling in *Quinn vs POLC*, 456 Mich 478 (1998). In a footnote in *Quinn*, the Court recognized the premise that a newly certified union that had supplanted an incumbent union was entitled to reach back in time to voluntarily assume representation of bargaining unit members regarding individual grievances arising prior to the certification of the new bargaining agent. Considering the ruling in *Huntington Woods* in light of the *Quinn* decision, the Commission stated that it did not see any "conceptual distinction" between a newly certified union representing some members of the bargaining unit on issues arising before the new agent's certification and the union representing the entire unit on such issues. MERC concluded that the rationale in *Huntington Woods* did not survive the superseding Supreme Court decision in *Quinn*. Clarifying its holding, however, the Commission stated that this does not mean that an employer must agree to retroactive application of issues such as wages or benefits in any particular situation; nor must an Act 312 panel grant a union's request for the retroactive application of any awarded change in conditions of employment.

MERC noted that continued application of the former rule would preclude any new bargaining representative from demanding retroactivity during bargaining and would preclude an Act 312 panel from considering retroactivity in its award. This outcome, the Commission noted, is contrary to the express language of the Act 312 statute providing that wages and benefits "may be awarded retroactively to the commencement of any period(s) in dispute, any other statute or charter provision to the contrary notwithstanding." MCL 432.240.

The Commission found that the majority rationale in *Huntington Woods* was not persuasive, largely because the decision gave too little weight to the primary protection set forth in the statute — the right of employees to freely choose their exclusive bargaining representative. MERC concluded:

> It would be inappropriate for the Commission to fail to recognize, and fail to rectify, the fact that when a petitioning union is competing with an incumbent union, particularly over a bargaining unit subject to Act 312, the *Huntington Woods* rule denying retroactive wage increases unless the incumbent wins, has the Commission placing a heavy and inappropriate thumb on the scales. . . Where PERA places a primary value upon employee free choice in selecting a bargaining representative, it would be inappropriate for the Commission to continue to enforce a rule that so unreasonably and irrationally favors incumbency, especially in the absence of any express statutory mandate. For that reason, and for the reasons discussed above, we decline to follow the decision in *Huntington Woods*, and hereby overturn that decision, finding instead that a newly certified union possesses the same right to negotiate over any otherwise bargainable subject, including retroactivity, as would have the incumbent union. ■

BER/MERC 2008 STATISTICS

Ruthanne Okun
Bureau Director, Bureau of Employment Relations, Michigan Department of Labor and Economic Growth

From time to time, we are asked by our constituents, or others who are simply curious, for performance data for the Bureau of Employment Relations/MERC. As you might imagine, we frequently are required to prepare such data to support our legislative allocation and even our existence – our *raison d'etre.*

Following is information relative to our Bureau's performance during the 2008 fiscal year (from 10/1/07 to 9/30/08). The fact that we have successfully handled this number of filings is frankly remarkable in light of the reduction in the number of Bureau positions by 60% in the past 30 years - from 49 positions in 1979 to 21 positions today, two of which are vacant.

In fiscal year 2008, with reduced staff and limited budget, BER handled the following filings:

516	Unfair labor practice charges and/or representation petitions processed
63	Commission Decisions and Orders issued
140	Union representation elections conducted
85%	Certifications of elections issued within 15 days of the election
2210	Notices of open contracts received and processed
1123	Mediation conferences held
151	Act 312 and Fact Finding petitions filed and processed

APPELLATE REVIEW OF MERC CASES

(March 2008–February 2009)

D. Lynn Morison[1]
Staff Attorney,
Bureau of Employment Relations, Michigan Department of Labor and Economic Growth

Oakland County -and- Oakland County Sheriff's Department v Oakland County Deputy Sheriffs Association, Court of Appeals No. 280075, issued February 3, 2009 affirming MERC decision issued August 7, 2007, 20 MPER 63 (2007). In a published opinion, the Court of Appeals majority affirmed MERC's decision severing the bargaining unit represented by the Oakland County Deputy Sheriffs Association (the union) into two separate units - one consisting of employees eligible for Act 312 binding arbitration, and the other consisting of employees ineligible for Act 312 arbitration. The Court majority also affirmed MERC's dismissal of the union's petition for Act 312 arbitration with respect to the part of the bargaining unit ineligible for Act 312 arbitration.

The union serves as the collective bargaining representative for approximately 750 uniformed employees of Oakland County and the Oakland County Sheriff's Department (the employer). The union filed an unfair labor practice charge in August 2006 against the employer along with a petition seeking Act 312 compulsory arbitration for its bargaining unit of "all sworn sheriff's department employees below the rank of sergeant." The employer filed a motion to dismiss the petition for arbitration, alleging that a substantial part of the bargaining unit is ineligible for Act 312 arbitration. In the alternative, the employer sought clarification of the existing bargaining unit and a declaration that certain employee classifications therein were ineligible for Act 312 arbitration. The Commission granted the employer's motion to dismiss in part and severed the bargaining unit into two groups based on Act 312 eligibility, both of which continued to be represented by the union.

On appeal, the union made the following contentions: (1) that MERC's severance of the preexisting bargaining unit was intended to punish the union for filing unfair labor practice charges; (2) that the proceedings below were procedurally flawed in that the administrative law judge (ALJ) abused his discretion by refusing to hold an evidentiary hearing; (3) that the ALJ exceeded his authority by directing the filing of briefs, turning an Act 312 issue into a unit clarification action, and entering an order of dismissal; (4) that the ALJ mischaracterized the facts; and (5) that the Commission erroneously construed MCL 423.232(1) by concluding that the statutory language "or subject to the hazards thereof" modifies only the phrase "engaged . . . in firefighting," and does not modify the phrase "engaged as policemen."

The Court began its analysis of this matter by acknowledging that the Commission did not err in its legal determination that an employer is permitted to unilaterally seek severance of a mixed bargaining unit in the absence of a request by an employee. The Court noted that MERC has a general policy against disturbing existing bargaining units and despite the fact that severance by request of an employer was an occurrence of first impression for the Commission. The Court recognized that MERC is permitted to reexamine prior decisions, depart from precedents, promulgate law through rulemaking, or reconsider previously established rules.

The Court further acknowledged that the Commission properly observed that Act 312 is intended to protect both employees and employers, and that, absent some law to the contrary, there is no basis under PERA or under Act 312 to hold that a covered employer may never seek severance of a mixed bargaining unit, where the circumstances make severance appropriate. The Commission is charged with deciding the unit appropriate for the purpose of collective bargaining that will best secure the employees' protected rights. The Court determined that in this case, MERC provided sufficient factual support for its conclusion that severance was appropriate because the continued existence of the mixed unit interfered with the normal and healthy give and take of bargaining anticipated under PERA and Act 312.

In addressing the union's argument that MERC's severance of the preexisting bargaining unit was intended to punish the union for filing unfair labor practice charges, the Court found that there was no support in the record for this contention. Rather, the Court determined that MERC's decision was intended to foster more productive bargaining for all affected employees in light of the obstructive effect that the parties' continued disagreement over Act 312 eligibility had on their ability to reach a collective bargaining agreement. The Court held that the Commission's ruling was neither arbitrary nor capricious, and it was supported by competent, material, and substantial evidence on the whole record.

The Court also found no merit in the union's contention that the ALJ abused his discretion by refusing to hold an evidentiary hearing. It observed that the ALJ gave the union several opportunities to show the existence of disputed factual issues, but the union repeatedly failed to do so, thereby eliminating the need to hold an evidentiary hearing. The union also argued that the ALJ exceeded his authority by directing the filing of briefs, turning an Act 312 issue into a unit clarification action, and entering an order of dismissal. The Court held that the ALJ's execution of these functions was clearly within the scope of authority granted him under the Commission's General Rules.

The Court also rejected the union's assertion that the ALJ mischaracterized the facts. Since the union advised the ALJ that there were no significant issues of fact, and failed to present offers of proof or identify disputed issues of fact below, the Court held that the union was precluded from raising factual issues on appeal.

The Court found that it was unnecessary to address the union's final argument (that the Commission erroneously construed MCL 423.232(1) by concluding that the statutory language "or subject to the hazards thereof" modifies only the phrase "engaged . . . in firefighting," and does not modify the phrase "engaged as policemen") because it was not necessary to the outcome of the case. However, the Court majority concluded that even if the language "subject to the hazards thereof" could be construed to modify the phrase "engaged as policemen" in the statute, it is well settled that county corrections officers and other employees who are not police officers are not subject to the hazards of police work. Moreover, the Court resolved that the union failed to take advantage of the opportunity to demonstrate why its corrections officers and other non-police-officer employees were factually unique such that they may be entitled to coverage under the "subject to the hazards thereof" language.

The dissenting opinion concluded that MERC improperly denied the union its opportunity to have an evidentiary hearing on the issue of whether corrections officers are eligible for Act 312 arbitration. In arriving at this conclusion, the dissenting opinion reviewed the historical treatment of the issue of Act 312 eligibility for corrections officers.

The dissent explained that in Metropolitan Council No 23, AFSCME v Oakland Co Prosecutor, 409 Mich 299; 294 NW2d 578 (1980), the Supreme Court set forth the following two conditions that a union must establish before it is eligible for Act 312 arbitration: (1) the employee in question must be subject to the hazards of police work and (2) the employer of such employees must have as its principal function the promotion of the public safety, order, and welfare such that a work stoppage by those employees

would threaten community safety. The dissent observed that before, and for a few years after, the Supreme Court decision in Metropolitan Council No 23, MERC held that corrections officers were indeed eligible for Act 312 arbitration based on the two conditions above.

The dissent concluded that more recently, the Commission has erroneously relied on Capitol City Lodge No 141, Fraternal Order of Police v Ingham Co Bd of Comm'rs, 155 Mich App 116, 119; 399 NW2d 463 (1986), in finding that corrections officers are not eligible for Act 312 arbitration. The dissent recognized that in Capitol City Lodge No 14 the Court of Appeals challenged the Commission's findings that corrections officers could be eligible for Act 312 arbitration. In that case, the Court determined that the corrections officers at the Ingham County jail could not be considered eligible for Act 312 arbitration because there was insufficient evidence to support a finding that a work stoppage in the jail would threaten community safety because the officers were readily replaceable. The dissent noted that although this determination by the Court was purely factual (and therefore, inappropriate for an appellate decision), MERC panels have interpreted this ruling as a legal determination supporting the proposition that if employees can be replaced, then a work stoppage does not present a threat to community safety. The dissent opined that MERC has expanded upon the original two-part test for Act 312 eligibility established in Metropolitan Council No 23, by adding the requirement that in the event of a work stoppage, the striking employees could not be adequately replaced.

The dissent concluded that the Commission has misinterpreted the extent of the Court's holding in Capitol City Lodge by expanding its meaning to preclude employees from Act 312 arbitration when they can be adequately replaced in the event of a strike. Furthermore, the dissent concluded that Capitol City Lodge does not support the conclusion that corrections officers must meet the three-part test developed and perpetuated by MERC panels to be eligible for Act 312 arbitration. The dissent suggested that while the degree to which an employee is replaceable is a factor that should be considered when determining whether a strike by corrections officers would threaten community safety, it is not a dispositive factor. Rather, the dissent recommended that the Commission employ "a totality-of-the-circumstances test," considering, at a minimum, the following factors:

> (1) the size and safety of the inmate population; (2) whether the transfer of inmates to another facility is feasible; (3) whether inmates would be released early in the event of a strike; (4) the impact that moving road patrol officers to the jail would have on public safety; (5) the number of corrections officers needed to staff a jail in the event of a strike and whether it exceeds the number of police officers available; (6) whether police officers and corrections officers are on strike at the same time; (7) whether a corrections officer could be replaced with untrained personnel; (8) whether untrained replacements would create a risk to the public; and (9) the effect that replacing union employees with unqualified, non-union members would have on the morale and efficiency of the department.

Accordingly, the dissent concluded that the Commission's decision should be vacated and the matter remanded for an evidentiary hearing to obtain evidence that would enable the Commission to decide, based upon the totality of the circumstances, whether a strike by the corrections officers would threaten the community.

Wayne County Community College v Wayne County Community College Professional & Administrative Association, MFT Local 4467, Court of Appeals No. 279679, issued December 16, 2008, affirming MERC's decision issued July 10, 2007, 20 MPER 59 (2007). In an unpublished opinion, the Court of Appeals affirmed MERC's decision that the respondent committed an unfair labor practice when it unilaterally altered the collective bargaining agreement by removing the Blue Cross Blue Shield (BCBS) traditional insurance plan from the medical insurance options available to employees. The respondent maintained that under the collective bargaining agreement, it may offer a comparable plan, and further that this issue is one of contract interpretation that should be resolved pursuant to the collective bargaining agreement's grievance procedure.

Under Michigan labor law, a breach of a collective bargaining agreement may constitute an unfair labor practice if there is no bona fide dispute over the interpretation of the agreement, and the breach of the agreement was substantial and had significant impact on the bargaining unit. The Court of Appeals found that, in this case, MERC correctly concluded that there was no bona fide dispute over the meaning of the collective bargaining agreement's medical insurance provision. The Court of Appeals agreed with MERC's determination that the removal of the BCBS traditional insurance plan constituted an unfair labor practice, because given the grammatical structure of the specific provision dealing with insurance plans, the BCBS plan was guaranteed by the collective bargaining agreement.

The specific language of the provision provides as follows:

> The Employer agrees to pay the necessary premiums to provide at the employee's option *either* the [HAP] or the [BCBS traditional plan], or [BCBS PPO] or any other comparable plan. (Emphasis added.)

The Court stated that the word *either*, which precedes the BCBS traditional plan and HAP plan, was construed to mean that the respondent must provide the two specific plans outlined in the collective bargaining agreement. Further, since the language "or any other comparable plan" came after a comma which separated the two plans mentioned first, and immediately followed the BCBS PPO plan, this meant that the respondent could change the BCBS PPO plan to a plan that is comparable, but not the other two.

Moreover, since the change affected at least one-third of the employees in the bargaining unit, it was deemed substantial and significant. Accordingly, the Court of Appeals found that the record supported MERC's factual findings and that MERC made no material error of law.

The Court of Appeals also granted the charging party's order for enforcement. The Court refused to accept an affidavit from the respondent's benefits administrator, attesting to its "good faith effort" to comply with MERC's order stating, "[b]ecause [R]espondent has not demonstrated reasonable grounds for submitting additional evidence in the appeal, we decline to consider the affidavit."

Michigan State University Administrative-Professional Association, MEA/NEA v John Moralez, Court of Appeals No. 278415, issued December 16, 2008, affirming MERC's decision issued May 25, 2007, 20 MPER 45 (2007). In an unpublished opinion, the Court of Appeals affirmed MERC's summary dismissal of charging party John Moralez's unfair labor practice charge alleging that the union, MSU Administrative Professional Association, MEA/NEA, violated its duty of fair representation by refusing to pursue to arbitration Moralez's grievance against his employer, Michigan State University (MSU). Moralez worked as a television producer and host on a public television station operated by MSU. Due to budget cuts, Moralez was laid off in July 2003, thereafter filing an unsuccessful grievance against his employer in February 2005. The union advised Moralez that it would not pursue his grievance to arbitration because it was untimely and unlikely to suc-

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APPELATE REVIEW OF MERC CASES

(Continued from page 19)

ceed on the merits. After exhausting all internal appeal procedures to abrogate the union's decision, Moralez filed a charge with MERC alleging that the union's inaction constituted a violation of its duty of fair representation under PERA. The Commission found that while the charge was timely filed, summary dismissal was appropriate because the union did not breach its duty of fair representation against Moralez by not pursuing his grievance to arbitration.

On appeal, Moralez first contended that the Commission erred in finding that the union did not breach its duty of fair representation. In establishing a claim of unfair representation, the Court acknowledged that the charging party bears the burden of first demonstrating that the employer breached the collective bargaining agreement. Moralez asserted that he had mandatory recall rights pursuant to the agreement, and that MSU's hiring of outside contractors to perform tasks previously assigned to Moralez violated those rights. However, the Court concluded that the language of the agreement does not expressly prohibit MSU's outsourcing activity, nor does it mandate that Moralez be recalled under the circumstances of this case. The Court held that because Moralez failed to establish that MSU breached the collective bargaining agreement, it was unnecessary for the Court to consider his argument that the union breached its duty.

Moralez next argued that MERC erred in denying his motions to reopen the record. Upon review of the documents proffered by Moralez for inclusion in the record, the Court affirmed the Commission's conclusion that the information therein was irrelevant to his case and would not have changed the outcome of the proceedings. The Court also disagreed with Moralez's contention that MERC's denial of his motions to amend to the charges was an abuse of its discretion. The Court found that Moralez's proposed amendments were cumulative in nature and provided no additional information upon which a different outcome was warranted. Furthermore, the Court held that the Commission's denial of the motions was neither unjust nor inconsistent with due process.

Finally, Moralez asserted that because the union's pleadings did not support its motion for summary disposition, the Commission erred in denying his motion to strike those pleadings. Notwithstanding Moralez's argument that MERC denied his motion without any justification, the Court observed that MERC's decision was based on its conclusion that the union's motion was sufficient to support judgment in the union's favor as a matter of law. In acknowledging that the Commission's findings are conclusive to the extent that they are supported by competent, material, and substantial evidence on the record, the Court deferred to MERC's reasoning on this matter and held that it did not abuse its discretion in denying Moralez's motion to strike.

Mr. Moralez is currently seeking leave to appeal to the Michigan Supreme Court.

City of Grand Rapids v Grand Rapids Employees Independent Union, Court of Appeals No. 274188, issued July 1, 2008, affirming MERC's decision issued October 19, 2006, 19 MPER 69 (2006). In an unpublished opinion, the Court of Appeals affirmed MERC's decision holding that the employer violated its duty to bargain in good faith under Section 10(1)(e) of PERA by removing two positions from a nonsupervisory bargaining unit without first obtaining consent from the union or an order from MERC. The Court also affirmed MERC's holding that the evidence was insufficient to find that either of the employees in the contested positions possessed supervisory authority under MERC precedent. On appeal, the employer argued that: (1) it did not commit an unfair labor practice by unilaterally removing from the nonsupervisory bargaining unit individuals whom it determined were supervisory; (2) MERC committed reversible error by abandoning the disjunctive test for the existence of supervisory authority, incorrectly applying definitions of supervisor that were inconsistent with *Oakwood Healthcare, Inc*, 348 NLRB No 37 (2006); and (3) the record as a whole did not contain competent, material, and substantial evidence to support MERC's finding that the employees in the contested positions were not supervisors.

First, the employer claimed that its unilateral removal of the positions from the nonsupervisory bargaining unit was justified because in 2003, both positions had been delegated supervisory authority. Thus, the employer contended that it had three options: (1) bargain with the union to remove the positions based on their supervisory status; (2) petition for clarification of the nonsupervisory unit through MERC to obtain an order allowing removal; or (3) take unilateral action to remedy the alleged discrepancy. According to the employer, option (1) was impractical given what the employer considered to be the union's reluctance to cooperate productively in 2003. The employer also contended that option (2) was impractical in light of the amount of time consumed in pursuing an order from MERC. Therefore, the employer argued that option (3) as the only viable alternative. Noting that the employer cited no legal authority in support of this line of reasoning, the Court found its argument to be without merit. The Court also rejected the employer's argument that it was only prohibited from transferring positions between two nonsupervisory units, but could unilaterally remove a supervisory position from a nonsupervisory unit. The Court acknowledged that it would be problematic to have supervisors within a nonsupervisory bargaining unit, but emphasized that such a situation did not justify unilateral action by the employer.

The employer's next contention addressed the phrasing used by MERC in its Decision and Order to outline the requirements for a position to be considered supervisory under PERA. Specifically, the employer took issue with MERC's statements that a supervisor must possess "the power to evaluate *and* recommend discipline" as well as the requirement that a supervisor participate in "discipline *and* personnel matters." (Emphasis added.) According to the employer, MERC's use of the term "and" in these phrases led to a misstatement of the law, creating a conjunctive test for the existence of supervisory authority while the proper test, outlined in the *Oakwood Healthcare* case, calls for a disjunctive analysis. The Court disagreed with and rejected this argument, finding that MERC's explanation of the supervisory requirements was not only consistent with the federal statutory definition of supervisor (as stated in 29 USC 152(11)), but it was also accordant with the *Oakwood Healthcare* decision and other cases dealing with this subject matter. The Court held that regardless of its use of a conjunctive term in its recitation of principles, MERC appropriately applied the disjunctive test in assessing the degree of supervisory authority vested in both individuals within the positions.

In its final contention, the employer argued that the record lacks competent, material, or substantial evidence to support MERC's finding that the employees within the contested positions did not possess supervisory authority. However, after reviewing the responsibilities and authority of each position, the Court agreed with MERC's determination that the positions at issue do not possess sufficient indicia of supervisory authority to justify their removal from the union's non-supervisory bargaining unit. The Court held that MERC's analysis of each employee's tasks, responsibilities, and relative degrees of authority was supported by competent, material, and substantial evidence from the record considered as a whole.

— END NOTE —

[1]Appreciation is extended to Lee A. Powell, Jr. and Matthew Bedikian for their assistance with the preparation of these case summaries. ■

"ME, TOO" EVIDENCE IN MICHIGAN

C. John Holmquist, Jr.
Foley & Mansfield

In 2008, both the U.S. and Michigan Supreme Courts had cases pending before them which would provide the opportunity to address the admissibility of "me, too" evidence of non party witnesses offered in support of claims of discrimination[1]. After oral arguments in both cases, the courts did not directly address the issue but disposed of the cases on procedural grounds. A common element in both cases was the fact the once the courts had the opportunity to review the facts and merits of the cases, they determined that the cases were not appropriate forum for the determination of the issue.

The court of appeals in *Sciotti v. 36th District Court* affirmed the judgment and award of attorney's fees in a reverse discrimination lawsuit brought by a white court employee who alleged that he had been unlawfully denied promotion on a number of occasions[2]. The plaintiff had previously filed a reverse discrimination lawsuit in 1993 which was settled and which resulted in a promotion.

His suit challenged the denial of promotions beginning in 1998. A jury found that one of the motives or reasons for the failure to promote plaintiff was his race and awarded damages and attorney's fees. The circuit court had denied the motions of the 36th District Court for directed verdict, JNOV, and new trial.

With respect to the issue of the admissibility of "me, too" evidence, the trial court had allowed the testimony of a former court employee who worked in the HR department. The witness testified about what she witnessed in terms of plaintiff's treatment by the HR department managers and her opinion that the HR department would predetermine the person who would receive the promotion and her belief that race played a role in the decision. The witness also testified that she did not receive a promotion which went to a lesser qualified black employee.

On appeal, the district court argued that the "me, too" evidence about the witness' denial of a promotion should have been excluded. The appeals court noted that the testimony was in response to a question by counsel for a specific example of a case where an individual who was not qualified for the position nonetheless got it. The appeals court stated that a party cannot obtain relief on appeal for an error at trial to which the party contributed.

The appeals court stated without significant explanation that the court did not err in refusing to exclude the testimony under MRE 402 and 403. The testimony was relevant to a fact at issue that the failure to promote plaintiff was because of his race.

The Michigan Supreme Court granted the application for leave to appeal and directed the parties to brief the following issues:

Were plaintiff's claims supported by viable statistical evidence?

Was it error below to treat distinct claims of discrimination in hiring/promotion as a single course of conduct?

What was the evidence concerning qualifications of all the applicants and was the evidence sufficient to establish that the failure to promote had an element of purposeful discrimination?

Did the defendant provide a race neutral reason for each decision?

Was there sufficient evidentiary basis to conclude that each decision was more likely than not a pretext for racial discrimination?[3]

Following oral argument, the court vacated its order granting leave and denied the petition on the basis that the court is no longer persuaded that the questions presented should be reviewed by the court. Justice Young filed a concurrence which was joined by Justices Taylor and Corrigan. With respect to the "me, too" evidence, he stated that the trial court did not abuse its discretion in allowing the lay testimony of the former human resources employee and noted that the defendant had not requested any limiting instruction concerning her testimony[4]. Justice Kelly flied a concurring opinion, and Justice Markman filed a dissenting opinion. Justice Markman referred to the testimony of the HR employee as wholly irrelevant since she did not work for the court when any of the promotion decisions were made, and her beliefs about discrimination were nothing more than speculation.[5]

The court of appeals' unreported decision in *Ross v. General Motors* remains the lead case on the issue of "me, too" admissibility.[6] The issue in *Ross* was the admissibility of testimony of non party GM employees addressing their opinions about whether they had been discriminated against. The court stated that since the case did not involve a claim of hostile work environment or a pattern or practice of discrimination where such testimony might, in some circumstances, be relevant, it is inadmissible under MRE 401, 402, and 403 and is so prejudicial that it should not have been admitted. Any testimony not relating to the discrimination suffered by the plaintiffs is irrelevant and prejudicial.

The lesson from *Sciotti* is similar to that of *Sprint v. Mendelsohn*; the decision on admissibility is one left to the sound discretion of the trial court. Obviously, counsel for the defendant in a discrimination case does not want to first learn of "me, too" evidence at trial. The issue should be fully explored during discovery and especially in the depositions of the "me, too" witnesses to establish the factual basis to exclude or to admit the evidence.

From the defendant's perspective, once discovery ends, and in accordance with any pretrial scheduling order, the issue of admissibility should be addressed by a motion *in limine* to exclude it.[7] The appeals court will not rescue a party from the failure to develop a record supporting or opposing the admission of "me, too" evidence on which the trial court bases its decision with respect to admissibility.

— END NOTE —

[1]*Sprint/United Management Co. v. Mendelsohn*, -U.S.-, 128 S. Ct., 1140 (2008); *Sciotti v. 36th District Court*, 482 Mich. 1143, 758 N.W. 2d 289 (2008)

[2]*Sciotti v. 36th District Court*, Mich. App, N.W. 2d, 2007 WL 1491809 (Mich. App. 2007)

[3]*Sciotti v. 36th District Court*, 480 Mich. 1192, 747 N.W. 2d 546 (2008)

[4]*Sciotti*, 747 N.W. 2d at 293

[5]*Sciotti*, 747 N.W. 2d at 296

[6]*Ross v. General Motors*, Mich. App., N.W. 2d, 2005 WL 3556109 (2005)

[7]*Lesniak v. Millar Elevator Service Co.*, Mich. App., N.W. 2d, 2002 WL 31928603 (2002) ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

So this Jewish guy is stranded on a desert island for 30 years. When he is finally rescued he leads a tour around his compound. He has built an impressive house and a garden, a barn and so on. And two synagogues. The rescuers ask why he needed two synagogues, and the old guy explains, "This one I go to, and in that one I wouldn't be caught dead!"

We seem to have a deep-seated need to do this, to separate the world into the right-minded, virtuous people like us and the benighted or deluded evil-doers like them. The same is true whether your allegiance is to a particular brand of politics or theology, a computer operating system or a college basketball team. It is also true in the field of dispute resolution. A sufficiently masochistic person could go from one conference to another continuously and do nothing but discuss whether this or that practice is *real* mediation.

The No Caucus people believe that true mediation takes place with everyone in the room. You might settle a case in caucus, they say, but you will never resolve a dispute. The Caucus Only people believe that having all the parties in the same room just raises the emotional temperature and confuses the issues. Far better to keep the parties separated so the lawyers can do their work. Retired judges believe in the judicial settlement conference model, which consists primarily of arm-twisting and head-banging. Transformative mediators believe in a process that looks more like psychoanalysis. Lawyers tend to value "client control." Facilitative mediators believe in a process that respects party autonomy and self-determination in a way that makes those lawyers queasy.

The left side of the spectrum views the right as hidebound, self-protective, and greedy. The right side views the left as touchy-feely, unrealistic and silly. I won't rehearse the arguments here, they are likely to be familiar to anyone reading this. What I want to point out is that no one on any side of the controversy has any data to support his position.

What we have instead are prejudice and anecdote. People who were trained as facilitative mediators are familiar with facilitative mediation. They tried it, and they like it. If you ask them to explain how it works or why it is preferable to the other kinds, they will provide an explanation. People who grew up on a more evaluative, directive approach are familiar with that, and they like that. If you ask them for an explanation, they will provide one too. Mediators who used to be litigators will claim to have special insight. But no one will be able to point to a careful study that controlled for the variables and produced statistically significant, replicable results. They will make something up, or they will repeat what they learned in training. And they will argue for it vigorously.

Pete Lunn calls this the *endian* instinct, after the war between the Little Endians and the Big Endians in Jonathan Swift. Lunn has written a very good new book called *Basic Instincts: Human Nature and the New Economics.* It's published by Marshall Cavendish in the UK and it's hard to find in the US, but worth the effort.

I have my own views on this subject. That is, like everyone else I came to dispute resolution by one route rather than another. I have my own mediation history and my own psychological tendency to give myself and my like-minded colleagues the benefit of the doubt. In other words, I am subject to the endian instinct too. But that's not the point I want to emphasize here.

What I want to emphasize is that arguments based on prejudice and anecdote - arguments based on the endian instinct - get us nowhere. The only way knowledge advances is through careful scientific investigation. Anecdote, intuition and introspection can suggest questions for science to examine, but only the scientific method can produce real knowledge. Until the terms in the field are unambiguously defined, hypotheses are clearly stated, and rigorous experiments are conducted under controlled conditions to test the claims of the various schools of mediation, all we have is arm waving and name calling.

For a brilliant, moving and funny talk on the subject of testing our intuitions, see Dan Ariely's TED Talk at: **http://tinyurl.com/cfyu2e**

LELS ANNUAL MEETING

Please attend the Annual Labor and Employment Law Section Meeting at 2:00 p.m. on Thursday, September 17 at the Dearborn Hyatt Regency. The program will be NAVIGATING TREACHEROUS LABOR AND EMPLOYMENT WATERS IN THE ECONOMIC DOWNTURN including (A) Parting Can Be Such Sweet Sorrow – Advising The Employer When The Bottom Falls Out; (B) Show Me The Money – Assisting The RIF'ed Employee; (C) Keeping Your Head When All About You Are Losing Theirs – Negotiating Collective Bargaining Agreements In Today's Hard Times; (D) Keeping The Bargain – Protecting Retiree Benefits In These Turbulant Times; and (E) Confronting Unprecedented Challenges – A Panel's Perspective On The Practice Of Labor and Employment Law In An Economic Downturn.

IN DEFENSE OF THE SERIAL COMMA

Stuart M. Israel
Martens, Ice, Klass, Legghio & Israel, P.C.

Just read your paper
And you'll see,
Just exactly what keeps worryin' me.
Yeah, you'll see the world is in an uproar,
The danger zone is everywhere.
Ray Charles

Things have not improved since Ray Charles sang those words in 1961. The danger zone is still everywhere: Iran, Ahmadinejad, Al Qaeda, the Taliban, Hamas, Hezbollah, Hugo Chavez, Daniel Ortega, Kim Jong-il, Jimmy Carter, Darfur, Putin's new Russia, Mexican drug gangs, Somali pirates, the electromagnetic pulse bomb, the ill economy, the diminution of the Big Three, dependence on foreign oil, and more. In addition, it is now much harder to follow Ray Charles' directive to "read your paper," particularly if your paper is the *Detroit News* or the *Detroit Free Press*.

We can't solve all these world problems in these pages, so we'll focus on one: the serial comma. The serial comma remains the object of passionate disagreement among members of our Learned Profession. It is time to settle this disagreement for the betterment of humankind.

I resolved the issue for myself some years ago, concluding that the serial comma ought to be embraced in most instances. When one is young and pressing the boundaries of societal conventions, casting out the serial comma seems the road into the brave, new future. But life experience teaches otherwise. For many who do not yet have the experience of years, however, the serial comma debate still rages.

I learned this by reading the replies to a recent *ABA Journal* on-line question of the week: "What persistent grammar or style conventions do you regularly see [in] others' writing and strongly disagree with?" There were 122 replies, more than the usual number of responses to the question of the week. It seems that many lawyers are moved to share their grammar and style "pet peeves" with the world.

The offenses addressed include: ending sentences with prepositions (like asking about conventions that readers "strongly disagree with"); the misused apostrophe (for example, confusing "it's" with "its"); "legal lard" ("pursuant to, wherefore, heretofore, etc."); the passive voice; utilizing a "$10 word" where a "25¢ word" will do ("utilize" rather than "use"); the substitution of adjectives and adverbs for substantive argument ("clearly"); rigidly applying style rules to the point of obsession; and recklessly disregarding style rules to the point of chaos. There is debate, too, on the merits and demerits of Strunk and White, *The Elements of Style*.

I thought: "Wow, this discussion proves that there are too many control-freak, nitpicky, rule-obsessed lawyers with way too much time on their hands." I thought this as I spent hours poring over the 122 postings and ruminating over their arguments.

I thought, too, that it is good that the discussion took place on-line. If it had been in an auditorium, say, and anti-passive voice activists were in physical proximity to those who disagree, fistfights would have ensued, noses would have been punched, and little light would have been shed.


". . . red, white, and blue."

Anyway, for me, the interesting discussion was the disagreement about the serial comma, also known as the Harvard comma and the Oxford comma. This is the comma that appears after the penultimate item, before the "and" or "or," in a list of three or more items, as does the comma after "white" in "red, white, and blue." Indeed, "red, white, and blue" versus "red, white and blue" seems to be a frequent battleground in the war between the pro- and anti- serial comma forces.

It is time to end the war and declare a rebuttable presumption in favor of the serial comma. Serial commas promote clarity and precision. They cost almost nothing (although, unfortunately, they are now exclusively manufactured in places like Malaysia). And they don't add to the word count in Sixth Circuit briefs. Even if a serial comma doesn't always clarify, using one is like eating chicken soup when you are sick: it may not help, but it can't hurt.

If you need more to persuade you, consider the example posted on the *ABA Journal* website by one Andrej Starkis. He quoted a book dedication which, almost assuredly, would have profited from a serial comma: "To my parents, God and the Virgin Mary."

A caveat: use commas wherever appropriate, but put them in the right place. Misplaced commas can cause disaster. This is illustrated by the story behind the title of the curiously popular *Eats, Shoots & Leaves* (2003) by Lynne Truss.

> A panda walks into a café. He orders a sandwich, eats it, then draws a gun and fires two shots in the air.
>
> "Why?" asks the confused waiter, as the panda makes towards the exit. The panda produces a badly punctuated wildlife manual and tosses it over his shoulder.
>
> "I'm a panda," he says, at the door. "Look it up."
>
> The waiter turns to the relevant entry and, sure enough, finds an explanation. "Panda. Large black-and-white bear-like mammal, native to China. Eats, shoots and leaves."

So be careful out there. Using commas for other than their intended purposes can be perilous. The danger zone is everywhere. ■

Labor and Employment Law Section
State Bar of Michigan
The Michael Franck Building
306 Townsend Street
Lansing, Michigan 48933

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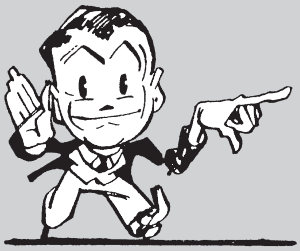

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- Megan Norris and Jim Thelen address the revised FMLA regulations.
- Regan Dahle and Noel Massie report on developments in the Supreme Court and Scott Eldridge does the same for the Sixth Circuit.
- Dennis Devaney and Jeff Wilson note new developments in the legal status of the two-person NLRB.
- Ruthanne Okun, Bob Strassberg, Jim Feeny, Dena Lampinen Lorenz, and Lynn Morison report on MERC developments in the courts and the agency.
- David Deromedi and Tiffany Buckley-Norwood address medical marijuana in the workplace.
- Barry Goldman prefers the scientific method to arm waiving and name calling in the debate over "real mediation," Stuart Israel tries to settle the debate on the serial comma.
- 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, MIOSHA, MDCR and EEOC news, websites to visit, a cartoon by Maurice Kelman, and more.
- Authors Tiffany A. Buckley-Norwood, Regan K. Dahle, David R. Deromedi, Dennis M. Devaney, Scott R. Eldridge, James T. Feeny, Barry Goldman, Richard A. Hooker, C. John Holmquist, Jr., Stuart M. Israel, Maurice Kelman, Dena Lampinen Lorenz, Noel D. Massie, D. Lynn Morison, Megan P. Norris, Ruthanne Okun, Robert Strassberg, Jr., James B. Thelen, Jeffrey D. Wilson, and more.