



## LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

# LABOR AND EMPLOYMENT LAWNOTES



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## MICHIGAN ARBITRATION, CASE EVALUATION, AND MEDIATION 2010-2011 CASE LAW UPDATE

Lee Hornberger

*Arbitration and Mediation Office of Lee Hornberger*

### I. INTRODUCTION

This article supplements "Michigan Arbitration, Case Evaluation, and Mediation Case Law Update," Vol. 20, No. 1 *Labor and Employment Lawnotes* (Spring 2010), <http://www.leehornberger.com/UserFiles/File/ADR-Update-LEL-Lawnotes-Spring2010.pdf>, by reviewing significant case law developments concerning Michigan arbitration, case evaluation, and mediation since early 2010. For the sake of brevity, this article uses a shortened citation style rather than the official style for Court of Appeals unpublished decisions.

### II. ARBITRATION

#### A. Supreme Court Decisions

##### 1. Parental pre-injury waivers and arbitration

*Woodman ex rel Woodman v Kera LLC*, 486 Mich 228 (2010), was a five (Justices Young, Hathaway, Kelly, Weaver, and Cavanaugh) to two (Justices Markman and Corrigan) decision authored by Justice Young, which held that a parental pre-injury waiver is unenforceable under Michigan common law because, absent special circumstances, a parent does not have authority to contractually bind his or her child. In reaching this conclusion, Justice Young cited *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167 (1987). In *McKinstry*, a pregnant mother signed a medical waiver requiring arbitration of any claim on behalf of her unborn child. The mother contested the validity of the waiver after her child was injured during delivery. The Court considered the effect of the Medical Malpractice Arbitration Act, MCL 600.5046(2) (since repealed by 1993 PA 78), which provided:

“A minor child shall be bound by a written agreement to arbitrate disputes, controversies, or issues upon the execution of an agreement on his behalf by a parent or legal guardian. The minor child may not subsequently disaffirm the agreement.”

In *McKinstry*, the Court held that the statute required that the arbitration agreement signed by the mother bound her child. According to Justice Young, *McKinstry* acknowledged that the arbitration agreement would not have been binding under the common law. He indicated that *McKinstry's* interpretation of MCL 600.5046(2) was a departure from the common law rule that a par-

ent has no authority to release or compromise claims by or against a child. He indicated that the common law can be modified or abrogated by statute. A child can be bound by a parent's act when a statute grants that authority to a parent. Justice Young believed that MCL 600.5046(2) changed the common law to permit a parent to bind a child to an arbitration agreement.

##### 2. Supreme Court reopens issue of how many correction motions allowed

*Vyletel-Rivard v Rivard*, 486 Mich 938 (2010), granted the application for leave to appeal the Court of Appeals' judgment in *Vyletel-Rivard v Rivard*, 286 Mich App 13 (2009). The Supreme Court ordered the parties to address whether the Court of Appeals correctly held that: (1) MCL 600.5078(1) and (3) contemplate no more than two arbitration awards (the initial written award and any modified award following a motion to correct errors and omissions); (2) MCL 600.5078(3) does not permit the filing of more than one motion to correct; and (3) defendant's motion to vacate the award was untimely. In *Vyletel-Rivard*, 286 Mich App 13, defendant had challenged the trial court's order denying his motion to vacate the arbitration award concerning tort damages in a Domestic Relations Arbitration Act (DRAA), MCL 600.5070 et seq, case. The Court of Appeals affirmed the Circuit Court's denial because the Court concluded that defendant's motion to vacate was not timely filed.

The Supreme Court's order renews the issue of whether there can be more than one motion to modify or correct an arbitration award.

#### B. Court of Appeals Published Decisions

##### 1. Court of Appeals affirms denial of motion to modify award

*Nordlund & Assoc, Inc v Village of Hesperia*, 288 Mich App 222 (2010) (Owens, Sawyer, and O'Connell), affirmed the Circuit Court's denial of a motion to modify an arbitration award. The Court of Appeals indicated that it must carefully evaluate claims of arbitrator error to ensure that such claims are not being used as a ruse to induce the Court to review the merits of the arbitrator's decision. MCR 3.602(K)(2)(a) allows for modification or correction of an award only when it is based on a mathematical miscalculation, such as addition errors, or an evident mistake in a description. Because plaintiff's alleged error concerned the interpretation of the underlying contract, and not descriptions or mathematical calculations, there was not an evident mistake for MCR 3.602(K)(2)(a) purposes.

#### C. Court of Appeals Unpublished Decisions

##### 1. Arbitration remedy may preclude MERC order

*Flint v Police Officers Labor Council*, 295913 (April 14, 2011)(O'Connell, MF Kelly, and Krause), reversed the order of the Michigan Employment Relations Commission (MERC) in

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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.

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## MICHIGAN ARBITRATION, CASE EVALUATION, AND MEDIATION

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favor of charging parties. Respondent argued that MERC should have dismissed the unfair labor practices charges on the basis of the arbitration provisions in the collective bargaining agreements. The Supreme Court agreed with respondent that the matter was covered by the arbitration provisions of the CBAs. The Court of Appeals vacated MERC's order and remanded for further proceedings consistent with its opinion. On remand, it is MERC's responsibility to determine if the alleged unfair labor practices should be dismissed.

### 2. Court of Appeals reverses vacation of award

*WHRJ, LLC v Taylor*, 295299 (March 29, 2011) (Wilder, Saad, and Donofrio), reversed the Circuit Court's vacation of an arbitration award. The Court of Appeals held that the letter of credit issue was subject to arbitration and the Circuit Court improperly engaged in contract interpretation.

### 3. Michigan Constitution trumps collective bargaining agreement

*AFSCME Council 25 v Wayne Co*, 298655 (March 24, 2011) (Murphy, Stephans, and MJ Kelly), held that under the judicial branch's inherent constitutional authority the Third Circuit Court's judges have the exclusive authority to determine the assignment or selection of a particular court clerk to serve in a judge's courtroom. Promulgation of Local Administrative Order No 2005-06 was a proper exercise of the Circuit Court's authority, and the Circuit Court was not bound by the collective bargaining agreement, or the arbitrator's ruling, on the narrow issue of courtroom assignments. The Court of Appeals ruled that a Public Employment Relations Act, MCL 423.201 *et seq*, *aegis* CBA and arbitration award that encroach on the judicial branch's inherent constitutional powers cannot be enforced to the extent of the encroachment.

### 4. Court of Appeals affirms ruling that case is subject to arbitration

*Wilson Motors Inc v Credit Acceptance Corp*, 295409 (March 22, 2011) (KF Kelly, Borrello, and Krause), affirmed the Circuit Court order dismissing the court case because the subject-matter of the lawsuit was subject to arbitration. The Court of Appeals held that the Circuit Court did not err when it concluded that plaintiff's claims were subject to arbitration.

### 5. Federal Arbitration Act does not allow appeal of order to state court

*Midwest Memorial Group LLC v Citigroup Global Markets, Inc*, 301867 (March 18, 2011) (Whitbeck, Owens, and Borrello), a Federal Arbitration Act, 9 USC 1 *et seq*, case, held that 9 USC 16(a)(1)(B) does not create a right to appeal a state court order denying arbitration to a state appellate court. 9 USC 16(a)(1)(B) only provides for an appeal from an order denying a petition to order arbitration under 9 USC 4. 9 USC 4 only allows for petitions for arbitration to a United States District Court.



## 6. Court of Appeals affirms orders declining to vacate awards

*Schroeder v Muller Weingarten Corp*, 296420 (April 26, 2011) (Servitto, Hoekstra, and Owens); *Smaza v ARS Investments*, 293933 (March 15, 2011) (Sawyer, Markey, and Fort Hood); *Sharonann v WHIC-USA, Inc*, 295800 (March 10, 2011) (Sawyer, Markey, and Fort Hood); *Detroit Police Officers Ass'n v Detroit*, 293510 (February 15, 2011) (Talbot, Sawyer, and MJ Kelly); *Nat'l Environmental Group, LLC v Landfill Avoidance Sys, LLC*, 292454 (January 20, 2011) (Zahra, Talbot, and Meter); *Kulongowski v Brower*, 293996 (November 9, 2010) (Servitto, Zahra, and Donofrio); *Select Construction Co, Inc v LaSalle Group, Inc*, 293143 (November 2, 2010) (Fort Hood, Jansen, and Whitbeck); *Merkel v Lincoln Consolidated Schools*, 292795 (October 19, 2010) (Sawyer, Fitzgerald, and Saad); *Cipriano v Cipriano*, 291377, 292806 (August 10, 2010) (Sawyer, Bandstra, and Whitbeck); *Putruss v Mary A & Edward P O'halloran Trust*, 291160 (August 5, 2010) (Sawyer, Bandstra, and Whitbeck); *En-Genius, Inc v Ford Motor Co*, 290682 (July 29, 2010) (Shapiro, Jansen, and Donofrio); *lv gtd, \_\_\_ Mich \_\_\_*, 141977 (March 9, 2011); *Realty v MLP Enterprises, Inc*, 289598 (June 17, 2010) (Zahra, Cavanagh, and Fitzgerald); *Gonzalez v Ecopro Recycling, Inc*, 285376 (April 22, 2010) (Bandstra, Borrello, and Shapiro); *Rubenfaer v PHC of Mich, Inc*, 289044 (April 20, 2010) (Jansen, Cavanagh, and KF Kelly); *Crowley v Crowley*, 288888 (April 15, 2010) (Markey, Zahrat, and Gleicher); *Pontiac v Pontiac Firefighters Local 376*, 289866 (March 18, 2010) (Servitto, Bandstra, and Fort Hood); and *Center Line v Police Officers Ass'n*, 289248 (February 9, 2010) (Beckering, Markey, and Borrello), affirmed Circuit Court orders denying motions to vacate arbitration awards.

## 7. Court of Appeals supports award concerning tenure and promotion

*Central Mich Univ Faculty Ass'n v Central Mich Univ*, 293003 (February 10, 2010) (Borrello, Jansen, and Fort Hood), is a very interesting case involving tenure and promotion. Defendant University appealed the Circuit Court's order that vacated an award denying a grievance regarding grievant's application for promotion and remanding the matter to the arbitrator to consider grievant's application without consideration of the quality of the works submitted for publication. Defendant University argued that the Circuit Court erred in vacating the award denying the promotion grievance and remanding the matter to the arbitrator. The Court of Appeals held that because the promotion award drew its essence from the CBA, the Circuit Court's review of the award ceased, and the Circuit Court erred in vacating and remanding the promotion award.

The Court of Appeals indicated that it was noteworthy that the Circuit Court did not articulate the scope of judicial review of an arbitration award and did not make any statements indicating that it understood its limited role in reviewing the award. According to the Court of Appeals, the Circuit Court did not grasp the concept of judicial deference in the context of labor arbitration.

Plaintiff Association cross-appealed the portion of the Circuit Court order confirming the arbitrator's denial of the grievance regarding tenure. The Court of Appeals affirmed the Circuit Court order confirming the award denying the tenure grievance.

## 8. Arbitrator to determine timeliness issue

*AFSCME, Council 25 v Hamtramck Housing Comm*, 293505 (November 18, 2010) (Murphy, Meter, and Shapiro), held that the determination of timeliness and the defense of laches must be made by the arbitrator in assessing whether a claim is arbitrable.

## 9. Complaint must be filed to obtain award confirmation

*Jaguar Trading Limited Partnership v Presler*, 290972 (August 3, 2010) (Swayer, Bandstra, and Whitbeck), held that a complaint must be filed in order to obtain confirmation of an award. Having failed to invoke Circuit Court jurisdiction under the Michigan Arbitration Act by properly initiating a civil action by filing a complaint, plaintiff was not entitled to confirmation of the award. The issue was whether plaintiff, as a party seeking confirmation of an award under MCR 3.602(I) and the Michigan Arbitration Act (MAA), MCL 600.5001 et seq, was required to file a complaint in order to invoke Circuit Court jurisdiction. The Court of Appeals held that, because no action was pending between the parties, plaintiff was required to file a complaint to initiate a civil action under the MAA. The Court further held that, pursuant to MCR 3.602(I), since plaintiff had timely filed the arbitration award with the court clerk, the matter was remanded so that plaintiff could file a complaint in the Circuit Court.

## 10. Court of Appeals reverses vacation of attorney fee arbitration award

*Joseph Chevrolet, Inc v Hunt*, 290882 (June 8, 2010) (Hoekstra, Markey, and Davis), reversed the Circuit Court's order vacating an arbitrator's award of attorney fee to plaintiff in a statutory discrimination case. According to the Court of Appeals, although the Circuit Court claimed the arbitrator "exceeded his power," it was apparent that the Circuit Court simply disagreed with the arbitrator's conclusion that \$270,000 was a reasonable attorney fee. Whether the Circuit Court would have decided the issue differently was irrelevant because courts may not substitute their judgment for that of the arbitrators. According to the Court of Appeals, since the award contained no evident facial error and was within the powers given to the arbitrator, the Circuit Court improperly vacated the award.

## 11. Individual supervisor not covered by arbitration agreement

In *Riley v Ennis*, 290510 (February 25, 2010) (Fitzgerald, Cavanagh, and Davis), plaintiff brought an employment discrimination case against only his individual supervisor. Defendant moved to dismiss the case because of an arbitration agreement between plaintiff and the non-party corporate employer. The Circuit Court granted defendant's motion and dismissed the action. The Court of Appeals reversed, indicating that although defendant signed the employment contract, the contract specified that he did so "For the Agency." According to the Court of Appeals, a corporation can only act through its officers and agents. Therefore, the arbitration agreement was applicable to the corporate employer but not to the individual supervisor.

## 12. Arbitration agreement may benefit non-signatory

*Lyddy v Dow Chemical Co*, 290052 (January 19, 2010) (Kelly, Hoekstra, and Whitbeck), found that the terms of the arbitration agreement, incorporating claims against any entity for whom or with whom GSI had done or might be doing work dur-

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ing the time of employment, precluded plaintiff's suit against Dow. The issue on appeal was whether plaintiff's agreement with GSI required plaintiff to arbitrate his claims against Dow. The Court of Appeals held that, in certain instances, an arbitration agreement may extend to persons who were not parties to the agreement.

### III. CASE EVALUATION

#### A. Supreme Court Decisions

##### 1. Supreme Court rules "all other persons" does not always mean "all other persons"

*Shay v Aldrich*, 487 Mich 648 (2010), was a four (Justices Weaver, Kelly, Cavanaugh, and Hathaway) to three (Justices Markman, Corrigan, and Young) decision. In *Shay*, case evaluation resulted in a resolution against Allen Park police officers but not against Melvindale police officers. The release document with the Allen Park officers also released "all other persons." Based on this language, the nonsettling Melvindale officers argued that they were covered by the release with the settling Allen Park officers. The Melvindale officers had rejected case evaluation awards against them; a trial date was set for them; and the Circuit Court had entered a consent order indicating that plaintiff's case was dismissed against the Allen Park officers only. The Melvindale officers remained parties to plaintiff's lawsuit after the Allen Park officers were released. The Circuit Court denied the Melvindale officers' motion. The Court of Appeals reversed and held that the Melvindale officers were third-party beneficiaries because on its face, the release unambiguously released "all other persons." The Court of Appeals order was an example of how no good deed goes unpunished.

The Supreme Court reversed the Court of Appeals. According to the Supreme Court majority, considering the language of the releases and the extrinsic evidence, it was clear that the settling parties did not include the term "persons" in the releases in order to release the Melvindale officers from liability.

*Shay* overruled *Romska v Opper*, 234 Mich App 512 (1999), to the extent *Romska* precluded the use of parol evidence when an unnamed party asserts third-party-beneficiary rights based on broad language included in a release and an ambiguity exists with respect to the intended scope of the release.

*Shay* is briefly discussed at *Pitsch v Citizens Ins Co*, 295485 (March 1, 2011) (Owens, Markey, and Meter).

#### B. Court of Appeals Published Decisions

##### 1. Information of case evaluation in prior case can be introduced

In *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589 (2010) (Gleicher, Fitzgerald, and Wilder), plaintiff-appellant ar-

gued that the Circuit Court improperly allowed defendants to elicit testimony concerning the settlement of a prior Circuit Court litigation, in violation of MRE 408, and making other "prejudicial" references to the merits of the other litigation. Plaintiff had unsuccessfully moved *in limine* to exclude references to case evaluation settlements in the prior case. Unfortunately for plaintiff, plaintiff first raised the topic of the prior case evaluation award in its complaint in the case at bar. The Court of Appeals held that since plaintiff had injected the prior case evaluation situation into the present case, its objection to evidence being introduced on that topic was correctly overruled.

#### C. Court of Appeals Unpublished Decisions

##### 1. Summary disposition reconsideration order extends time period

In *Meemic Ins Co v DTE Energy Co*, 295232, 296102 (April 7, 2011) (O'Connell, KF Kelly, and Krause), defendants filed their motion for case evaluation sanctions on November 19, 2009, 37 days after the entry of summary disposition, but only 16 days after the Circuit Court denied plaintiff's reconsideration motion. The Court of Appeals held that when a trial court has entered a summary disposition order that fully adjudicates the entire action, MCR 2.403(O)(8) requires a party to file and serve a case evaluation sanctions motion within 28 days after entry of a ruling on a motion for reconsideration of the order. The Court of Appeals reversed the Circuit Court's finding that defendants' case evaluation sanctions motions were untimely. The same outcome was reached in *Meemic Ins Co v Detroit Edison Co*, 295294 (March 17, 2011) (O'Connell, KF Kelly, and Krause).

##### 2. Case evaluation sanctions properly ordered

*Hall v Bartlett*, 288293, 290147 (March 29, 2011) (Sawyer, Fitzgerald, and Saad), held that, because plaintiff was without fault, Oaklawn and Dr Bartlett were jointly and severally liable. MCL 600.6304(6)(a). Thus, MCR 2.403(O)(4)(b) applied. Because the verdict was more favorable to plaintiff than the total case evaluation against Oaklawn and Dr Bartlett, plaintiff was entitled to sanctions. MCR 2.403(O)(4)(b). Even assuming arguendo that the non-economic damages cap should have been applied to the jury verdict, the verdict would still be more favorable to plaintiff than the total case evaluation against Oakland and Dr Bartlett. The non-economic damages cap was applied to the judgment. That number was more than ten percent higher than Oaklawn and Dr Bartlett's combined case evaluation figure. The Circuit Court properly awarded plaintiff case evaluation sanctions against Oaklawn.

##### 3. Summary disposition order does not stay or stop response period

In *Estate Development Co v Oakland Co Rd Comm*, 291989, 292159, 295968 (March 24, 2011) (Murphy, Stephens, and MJ Kelly), plaintiff appealed the Circuit Court's denial of its motion seeking case evaluation sanctions. The situation was complicated by the history of the case concerning the dates associated with case evaluation, the date of the order granting defendant's summary disposition motion, and the later reversal of that ruling by the Court of Appeals. The issue was whether entry of the order granting defendant's summary disposition motion during the 28 day case evaluation response period excused Defendant from further participation in the case evaluation process and from having to make an acceptance-rejection decision before the response pe-





riod expired, such that defendant could not be sanctioned after plaintiff's claim was reinstated by the Court of Appeals and plaintiff obtained a more favorable verdict than the case evaluation. Defendant argued it did not have to respond to the case evaluation figure once the Circuit Court granted defendant's summary disposition motion. The Court of Appeals ruled that defendant's obligation to the case evaluation process still existed and that case evaluation sanctions could be awarded against defendant after there was an unfavorable verdict to defendant.

This case raises the question of why did the Circuit Court issue an order granting summary disposition in the middle of the case evaluation response period? Was it done with the hope or intent of negating the pending case evaluation process?

#### **4. Court of Appeals says panels operate with limited information and time**

Although *Jones v Beacon Harbor Homes, Inc*, 293789, 294550 (March 1, 2011) (Hoekstra, Fitzgerald, and Beckering), did not directly concern case evaluation, the Court of Appeals made the interesting statement that:

"Both the trial court and plaintiff cite to the case evaluation award in favor of plaintiff as evidence that plaintiff's claims were meritorious. However, case evaluation panels operate with limited information and time; therefore, evidence of a case evaluation award does not persuasively establish that a claim was not frivolous."

#### **5. Appeal filing does not stay period for filing sanctions motion**

*Winston v Wayne State Univ*, 292287 (December 21, 2010), held that the filing of an appeal does not stay the 28 day period for filing a case evaluation sanctions motion.

#### **6. Denial of sanctions within Circuit Court authority**

*McDonnell v Colburn*, 292601 (October 21, 2010) (Murphy, Beckering, and MJ Kelly), held that the case evaluation rule, MCR 2.403, does not provide that sanctions must be awarded if the monetary relief, apart from the equitable relief, does not result in a more favorable verdict for the rejecting party. Rather, it permits the trial court to award sanctions if (1) the monetary and equitable relief together is not more favorable to the rejecting party and (2) it is "fair" to award the costs "under all the circumstances." MCR 2.403(O)(5). According to the Court of Appeals, MCR 2.403(O)(5) provides that sanctions may be denied even where the relief is not more favorable to the rejecting party if the trial court determines that the award would be unfair under the totality of the circumstances. The trial court had the discretion to refuse to award sanctions, even if the award met or exceeded the threshold, if it also determined that it would be unfair to award the sanctions. The Circuit Court repeatedly stated that sanctions were not appropriate because both parties overreached and attempted to gain more than they reasonably deserved. The Circuit Court stated that plaintiff's damages expert inflated the damages estimate far in excess of the evidence. The Circuit Court also stated that the parties would have been able to resolve their differences without litigation if they had not allowed their mutual antagonism to overrule reason. Given the facts of this case, the Court of Appeals concluded that the Circuit Court's denial of sanctions did not fall outside the range of principled outcomes.

#### **7. Interest of justice does not exempt Detroit Symphony**

#### **Orchestra from sanctions**

*Fowler v Detroit Symphony Orchestra, Inc*, 293237 (September 28, 2010) (Murphy, Hoekstra, and Stephens), held that the fact that the Detroit Symphony Orchestra is supported by donations and provides a public service were not unusual circumstances to warrant application of the "interest of justice" exception. MCR 2.403(O)(1). A conclusion that the exception applies because of the philanthropic or beneficial nature of the services provided by a party would eliminate the incentive to settle for many litigants.

### **IV. MEDIATION**

#### **A. Supreme Court Decisions**

There does not appear to have been any Supreme Court decisions concerning facilitative mediation.

#### **B. Court of Appeals Published Decisions**

There does not appear to have been any Court of Appeals published decisions concerning facilitative mediation.

#### **C. Court of Appeals Unpublished Decisions**

##### **1. Circuit Court cannot always order mediation**

In *Baker v Holloway*, 288606 (January 26, 2010) (Murphy, Jansen, and Zahra), respondent appealed the trial court's order denying her motion to terminate petitioner's ex parte personal protection order (PPO). Instead of receiving a hearing on the merits of whether the PPO should have been terminated, respondent was ordered to mediate her dispute with petitioner. Respondent claimed the Circuit Court erred by requiring her to enter mediation because she was entitled to a prompt hearing on the merits of the PPO. The Court of Appeals held that mediation may not be required as a condition to having a hearing on the merits of a PPO. The Court of Appeals vacated the order denying respondent's motion to terminate the PPO and remanded for an evidentiary hearing to determine whether the PPO should be terminated.

### **V. CONCLUSION**

Michigan appellate courts have issued several potentially important decisions concerning alternative dispute resolution since early 2010. These decisions included:

1. *Vyletel-Rivard, id*, implied that the issue of how many motions to correct errors or omissions can be timely filed is not clear.
2. *Riley, id, and Lyddy, id*, emphasized that the precise wording of the arbitration agreement and its signature blocks can impact on who is bound by the agreement.
3. *Shay, id*, signified that the wording of the release in a multi-party case evaluation acceptance is important and can be a trap in an environment where documents might be interpreted literally rather than holistically.
4. *Baker, id*, clarified that not all cases can be ordered to mediation. ■





# ADAAA REGULATIONS ANNOUNCED: ARE EMPLOYERS READY FOR THE IMPACT?

**Robert C. Ludolph**  
*Pepper Hamilton LLP*

**Amanda J. Shelton**  
*Shelton & Deon Law Group*

The Americans with Disabilities Act Amendments Act (ADAAA) was enacted as a clear mandate for reinstating a broad scope of protections originally envisioned in the ADA. The Equal Employment Opportunity Compensation (EEOC)'s long-awaited Final Regulations implementing the ADAAA became effective on May 24, 2011. Their impact will be felt in employers' workplaces and in courtrooms throughout the country because the regulations under the ADAAA significantly change the standards for determining who is disabled.

The EEOC reports that disability discrimination charges have increased by nearly 30 percent since the passage of the ADAAA in 2008. This spike in Americans with Disabilities Act (ADA) claims, in turn, will lead to a surge in lawsuits. Virtually all observers have predicted that summary judgment will be more difficult for employers to obtain under the new rules of construction mandated for the ADA, leading to more jury trials. Indeed, the regulations are expressly designed to streamline the litigation process to refocus the courts on the central issue of discrimination, not whether the individual has a disability.

## I. DEFINITIONS OF KEY TERMS UNCHANGED

In the past, the analysis of disability claims focused on the threshold issue of whether a claimant was a qualified individual with a disability. As a result of a series of decisions of the Supreme Court<sup>1</sup>, the claims of disabled workers were regularly rejected by the lower courts, often based on a determination that the individual did not have a disability.

### WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for *Lawnotes*. But the muse is elusive. And you just can't find the perfect topic. You make the excuse that it's the press of other business but in your heart you know it's just writer's block. We can help. On request, we will help you with ideas for article topics, no strings attached, free consultation. Also, we will give you our expert assessment of your ideas, at no charge. No idea is too ridiculous to get assessed. This is how Larry Flynt got started. You have been unpublished too long. Contact *Lawnotes* editor Stuart M. Israel at Legghio & Israel, P.C., 306 South Washington, Suite 600, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@legghioisrael.com.



Under the ADAAA and its regulations, an individual still must prove that he or she is an individual with a disability who is qualified to perform, with or without reasonable accommodation, the essential functions of the specific employment position without creating undue hardship for the employer or a direct threat to oneself or others. The burdens of proof and the definitions of the terms "qualified," "reasonable accommodation," "undue hardship," and "direct threat" were not changed.

The three-part definition of "disability" also remains unchanged. Under the ADA, a "disability" is still defined as: (i) a physical or mental impairment that substantially limits one or more of the major life activities of an individual, (ii) a record of such an impairment, or (iii) being regarded as having such an impairment.

The new regulations retain the requirement of individualized assessment to determine whether an individual's impairment qualifies as a disability. Thus, factors such as condition, manner and duration of time that the individual is able to perform a major life activity still are considered on a case-by-case basis in assessing whether an individual is disabled.

## II. THE GAME CHANGING ADAAA RULES OF CONSTRUCTION

The ADAAA has profoundly changed the standards for determining whether an individual qualifies as disabled under the ADA. The new regulations announce nine rules of construction to implement the ADAAA's mandate of broad coverage for persons with disabilities.

### A. Broad Construction of "Substantially Limited"

While the regulations do not provide a definition of the term "substantially limits" as urged by disability groups, the rules of construction inform the courts and employers how to interpret whether an impairment "substantially limits" an individual's ability to perform a major life activity. The new analysis:

- Requires that the term "substantially limited," is to be construed broadly in favor of expansive coverage.
- Compares the individual's limitations to the abilities of most people of the general population, with the understanding that an impairment need not prevent, or severely or significantly restrict, a major life activity in order to be substantially limiting.
- Focuses on the employer's compliance with reasonable accommodation and anti-discrimination obligations, not the individual's "substantial limitation."
- Demands that individualized assessment of one's functional limitation be a lower standard than the prior judicial standards.
- Eliminates the requirement of scientific or medical evidence to prove whether the individual is disabled, although such evidence is not prohibited to confirm the medical need for an accommodation.
- Prohibits consideration of mitigating measures, except



for ordinary glasses and contacts, to determine whether the employee is disabled. This is a major change in the analysis of determining whether an impairment “substantially limits” an individual’s ability to perform a major life activity. In the past, courts found that individuals who corrected their impairment through medication or medical devices, such as hearing aids, were not disabled.

- Recognizes that an impairment only has to “substantially limit” one major life activity.

The new rules of construction also state that a disability may include an impairment that is:

- In remission or episodic, such as epilepsy;
- Transitory, lasting less than six months, such as a back impairment resulting in a lifting restriction.

Temporary, non-chronic impairment of short duration with little or no residual effects, however, are not disabilities under the ADAAA. Examples of temporary impairments that are generally not disabilities are: common cold, seasonal or common influenza, sprained joint, minor or non-chronic gastrointestinal disorders, and broken bones that are expected to completely heal.

Based on these new rules of construction, commentators have suggested that the majority of all workers may qualify for protections under the ADA.

### **B. Focus on an Employer’s Conduct, Not on an Employee’s Condition**

The central issue in any disability lawsuit now will be whether discrimination is the cause of an adverse employment action, not whether the individual has a disability. As noted in the *Interpretive Guidance*<sup>2</sup>, the new regulations are “an important signal to both lawyers and courts to spend less time and energy on the minutia of an individual’s impairment, and more time on the merits of the case — including whether discrimination occurred because of a disability, whether an individual was qualified for a job..., and whether a reasonable accommodation...was called for.”

The ADAAA and its regulations may virtually eliminate the possibility of any successful legal challenge to an individual’s impairment as a disability. The intent of the regulations are to put disability claimants in the same position as plaintiffs in a race and sex discrimination cases whose claims are seldom dismissed based on challenges to their protected classifications. The new regulations incorporate the major life activities listed in prior EEOC regulations including caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing and learning; working was moved from the prior listing of major life activities and placed in the *Interpretive Guidance*. The ADAAA also includes a nonexclusive list of other activities such as standing, lifting, bending, eating, sleeping, reading, concentrating, thinking, communicating and the operation of any major bodily function. An impairment that substantially limits any of these major life activities is deemed

a disability. In addition, the regulations list a series of impairments, “Predictable Assessments,” that should easily be concluded as substantially limiting a major life activity, such as bipolar disorder and HIV infection.

### **C. Expanded Definition of “Regarded as” Prong**

The expansion of the definition of the “regarded as” prong of the disability definition is perhaps the most significant change made by the ADAAA and the new Regulations. In an effort to prohibit stereotyping based on misperceptions of impairments or condition, the new regulations attempt to clarify the rules governing persons who are discriminated against on the basis of perceptions by employers and others that they are regarded as having an impairment. Under the Regulations, an individual is “regarded as” having a disability if the individual has been subjected to an action prohibited by the ADA as amended, because of an actual or perceived impairment that is not “transitory or minor.” For example, an individual may be “regarded as” disabled if a prohibited employment action is based on a symptom of an impairment, or based on medication or any other mitigating measure used for an impairment. In the *Interpretive guidance*, the EEOC explains, for example, that an employer may regard an employee with angina (chest pains) as having a disability and, therefore, may treat the employee as a safety risk. Based on these perceptions the employer and may treat him or her unfavorably, thus qualifying the individual as disabled under the ADAAA. Whether the employee is, in fact, a direct threat to himself and his coworkers is a separate analysis.

As with actual disabilities, coverage under the “regarded as” standard will not be difficult to establish. An individual only needs to show that the employer believed the individual had a mental or physical impairment. The individual does not need to establish that the perceived impairment “substantially limits” a “major life activity.” Proof that the individual was subjected to an adverse employment action because of a perceived impairment or by a symptom of an impairment is sufficient to qualify under the “regarded as” prong of the disability standard. Individuals who claim that they suffered an adverse employment action because they have been “regarded as” disabled, however, are not entitled to a reasonable accommodation.

Employers should be aware that there is significant potential for an increased number of claims under the “regarded as” prong of the ADA. If an individual is not challenging an employer’s failure to provide a reasonable accommodation, the individual can file a claim pursuant to the “regarded as” prong of the disability definition. In light of this low evidentiary threshold for establishing a disability claim under the “regarded as” prong, employers can expect a sharp uptick in the number of “regarded as” disabled claims they are forced to defend.

## **III. PRACTICAL IMPLICATIONS**

The clear intent of the ADAAA is to expand the coverage of the Act to include more persons whose impairments impact their performance of major life activities. The ADAAA regula-

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## ADAAA REGULATIONS ANNOUNCED: ARE EMPLOYERS READY FOR THE IMPACT?

(Continued from page 7)

tions, in turn, provide guidance for employers and the courts in responding to disability claims.

In light of these new regulations, employers should review:

- Job descriptions to insure that essential functions of a position are fully detailed;
- Procedures for engaging in the interactive process of dialogue with applicants and employees about possible accommodations;
- Required documentation of the communications with employees to show the employer's good-faith efforts to accommodate disabled workers; and
- Training programs for supervisors and managers on responding to the increasing number of requires for accommodation.

In response to strong criticism from both employers and the representatives of disability groups, the EEOC abandoned many of the proposed regulations from its *Preliminary Rules* issued in September 2009, returning to the prior regulations. The EEOC, however, has moved a number of examples and interpretations of the ADA from the *Preliminary Rules* to the *Interpretative Guidance*. The EEOC also issued two valuable resources in addressing accommodation requests: a Fact Sheet and Question and Answers on the Final Rule Implementing the ADA Amendments of 2008<sup>3</sup>. Each of these documents provides valuable insights into the EEOC's position on critical issues and employers should become familiar with these materials.

The ADAAA and its regulations will present serious challenges to employers who are not prepared for the changes that are coming. Employers must now focus on the central issues of providing reasonable accommodation for disabled workers and eliminating intentional discrimination in the workplace.

### —END NOTES—

<sup>1</sup> The ADAAA specifically reject the reasoning in *Sutton v. United Airlines, Inc.* 527 U.S. 471 (1999) and its companion cases and *Toyota Motor Mfg., Ky, Inc. v. Williams* 534 U.S. 184 (2002)

<sup>2</sup> Appendix to Part 1630-Interpretative Guidance on Title I of the Americans with Disabilities Act Federal Register Vol. 76 No. 58 at 17003

<sup>3</sup> These documents can be found at the EEOC website, <http://www.eeoc.gov/laws/regulations/index.cfm> ■

## PRE-TRIAL DISCOVERY OF NONPARTY PATIENT INFORMATION DISALLOWED UNDER MICHIGAN LAW

Marlo Johnson Roebuck  
Jackson Lewis LLP

When considering the proper disclosure of patient data, most health care providers look to the Health Insurance Portability and Accountability Act ("HIPAA") privacy rules for guidance. As the plaintiff in *Isidore Steiner, DPM, PC dba Family Foot Center v. Marc Bonanni*, No. 294016, 2011 Mich. App. LEXIS 618 (Apr. 7, 2011), learned, Michigan's state law must also be considered.

In the *Bonanni* case, the Family Foot Center sued a former physician-employee, seeking to enforce a non-compete agreement. Among other things, the Family Foot Center claimed that he stole its patients, in violation of the agreement. The Family Foot Center sought his patient list as part of pre-trial discovery. The physician-employee objected on the grounds that HIPAA and Michigan's law regarding the physician-patient privilege protected information of non-party patients from disclosure without their consent. The Family Foot Center filed a motion to compel the disclosure of the information.

The trial court denied the motion, reasoning that the names, addresses, and phone numbers of non-party patients were privileged under Michigan law. The Family Foot Center appealed.

HIPAA provides, except in limited circumstances, that a covered entity may not use or disclose protected health information without a written authorization from the individual or providing the opportunity for the individual to agree or object. A covered entity may do so, however, when responding to a subpoena or discovery request and upon satisfying certain conditions. 45 CFR 164.512(e). HIPAA further provides that in the event of a conflict, it trumps state law except where state law is more stringent.

The appellate court affirmed the trial court's denial of the Family Foot Center's motion to compel. In doing so, it noted that under Michigan's physician-patient privilege, MCL 600.2157, the right to waive the privilege rests solely with the patient. Unlike HIPAA, the court continued, the privilege did not contain exceptions for disclosing patient information in judicial proceedings. After finding a conflict existed between HIPAA and Michigan's physician-patient privilege, the court concluded that the privilege trumped HIPAA because it was more stringent. Accordingly, it affirmed the trial court's decision that the patient information sought by the Family Foot Center during pre-trial discovery was protected from disclosure.

Health care providers receive requests for patient information in many different contexts. The *Bonanni* case underscores the importance of not relying solely on HIPAA for guidance. Instead, a detailed analysis of the applicable federal, state and local laws and regulations must ensue prior to making any disclosure of patient information. ■

## WISDOM FROM THE EAST... OF EUROPE: INNOVATIONS AND BEST PRACTICES IN POLISH AND LITHUANIAN LABOR LAW

Charles Szymanski  
Vytautas Magnus University  
Kaunas, Lithuania

Lithuania and Poland have both exported much to the United States over the last two centuries. For the most part, these “exports” have been the human capital and rich cultural traditions of the various Polish, Lithuanian, Jewish, and Belarusian immigrants who came to America from the lands of the old Polish-Lithuanian commonwealth. Legal innovations from either of these two countries, however, are not something that comes to mind when one thinks of their contributions to the United States.<sup>1</sup> The Soviet occupation<sup>2</sup> of both countries from 1945-89/91, of course, had no small part to play in the stunting of the development of the Polish and Lithuanian legal systems. Since the collapse of the U.S.S.R., however, there has been a real flowering of development of the law in Poland and Lithuania. It may be worth a short look to see how these countries have dealt with some vexing problems in American labor law, and whether or not these solutions would be worthwhile to adopt (in one form or another) in the United States.

*Mandatory employment contracts.* Employment at will in the United States is either a problem or a blessing, depending on one’s point of view. In both Poland and Lithua-

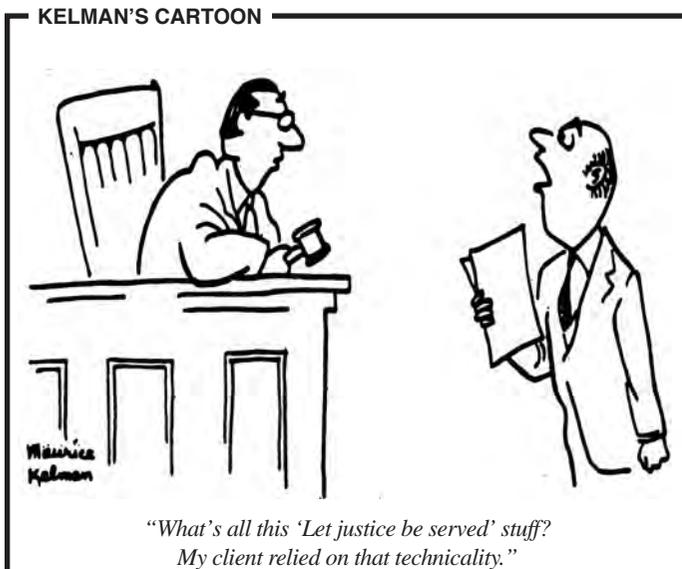
nia, as is the case in most of Europe, the employment at will doctrine does not exist, and individual employment contracts are mandatory. Such contracts are either for a term (of varying lengths), or are non-term (indefinite). Thus, for example, in Lithuania, a temporary employment contract may be for a period up to two months, and a fixed term contract may last as long as 5 years. At its expiration, if a fixed term contract is not terminated by the parties, it is automatically renewed as a non-term contract. However, if the work involved is really permanent in nature- and not for a specific project or undertaking- the employer should conclude a non-term contract with the employee at the outset.<sup>3</sup>

Still, even a permanent contract may not be as definite as it seems. The parties may agree upon a three month probationary period in their contract, which the employer can end with three days notice, and the employee with no notice. Otherwise, the employee can terminate the contract upon giving 14 days advance notice to the employer. This privilege does not extend in both directions. The employer, in contrast, may only terminate the contract of an employee for what would be considered “just cause” in the United States, or for economic or business restructuring reasons that would necessitate a layoff.<sup>4</sup>

In the event of a layoff, the Lithuanian labor code specifies the order in which employees are laid off, requires significant advance notice to the employee, and mandates severance payments, based on specified criteria. With regard to the order of layoff, priority to retain their job is given (1) to employees who have been injured at work in the past, (2) those caring for small children or for disabled family members, (3) long-term employees (with over 10 years of service), (4) those given special protection against layoff through the terms of a collective bargaining agreement, and (5) union leaders.<sup>5</sup>

Thus, by statute, Lithuanian law provides some of the key benefits given to employees by collective bargaining agreements in the United States: protection from termination without just cause, and also an order for layoffs, albeit one that is not purely based on seniority.

*Arbitration.* There have been numerous American court decisions grappling with the question of the fairness of a mandatory arbitration clause signed by an employee at the outset of his or her employment. For the most part, such arbitration agreements are lawful, so long as the procedure for selecting a neutral arbitrator to hear the dispute is balanced. Still, even since *Gilmer*, there has been an undercurrent of thought suggesting that an employee required to sign an agreement to arbitrate any disputes that may arise out of the employment relationship, as a condition of being hired, has not really agreed of his or her own free will to give up access to the courts.



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

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## WISDOM FROM THE EAST... OF EUROPE

(Continued from page 9)

In Poland, the legislature has provided a simple solution. An agreement to arbitrate employment disputes is only valid when it is signed *after* the dispute has arisen.<sup>6</sup> The practice in the United States of signing such agreements at the start of one's employment, applicable to future disputes, would therefore be invalid in Poland. There is some merit to the Polish position: it is perhaps a better measure of whether both the employer and the employee truly believe that arbitration is a superior way of resolving disputes.

*Harassment.* The Civil Rights Act in the United States prohibits sexual and racial harassment at the work place, even if such harassment does not result in a tangible job action, such as termination. However, general harassment not directed towards a specific race, gender or religion, or other protected class, is generally not actionable unless it passes the rather high threshold for a claim of intentional infliction of emotional distress under state laws.

The Poles, on the other hand, *do* prohibit such generalized harassment, called "mobbing." Mobbing claims require more than proving that a boss or supervisor is demanding or difficult. There must be evidence of a continued pattern of severe harassment, but it is less than that typically required for American emotional distress claims.<sup>7</sup>

The existence of a cause of action for mobbing certainly seems fair, and may have the effect of keeping extraordinarily mean supervisors in line. On the other hand, it is difficult to imagine how this would work in the United States, as almost every disgruntled employee could potentially try to make out such a claim.

*Vacation Benefits.* Throughout Europe, vacation benefits are much more generous than those given to employees in the United States. Rather than two weeks vacation, many employees enjoy four to six weeks of free time from work every year. While there may be cultural or other sociological reasons for this discrepancy, there are several interesting legal points worth pointing out.

In Poland and Lithuania, the amount of vacation time an employee receives is fixed by statute, and not by the employer. Lithuania sets a minimum number of vacation days an employee must receive each year (28 days for most employees, 35 days for single parents and disabled persons, and 58 days for those who work in high risk occupations).<sup>8</sup> Poland provides a sliding scale of vacation benefits, which increases the longer the employee is in the workforce. Interestingly, employees who receive a higher university and even graduate level of education receive vacation credit for

this time. Significantly, the amount of vacation time is not tied to an employee's seniority with one employer; his or her total work experience (with any number of employers), as well as time spent at college or a university, counts toward his or her annual vacation allotment.<sup>9</sup> Thus, vacation benefits are quite portable, unlike in the United States.

*Damages.* For the most part, Polish and Lithuanian labor law provide greater rights to individual employees than their American counterpart. A big exception is in the field of damages. Under Polish labor law, if an employer wrongfully discharges an employee in violation of the contract, the employee may be awarded reinstatement and, with a few exceptions, a maximum of three months back pay. A minor saving grace is that the amount of back pay is not offset by any interim earnings. The exceptions involve the termination of pregnant women, employees about to become eligible for retirement benefits, and officers of labor unions.<sup>10</sup> These specially protected employees are entitled to full back pay. In cases involving unlawful discrimination, employees are also entitled to some damages for emotional distress. However, these damages are rarely substantial.

Of course, everything is relative: under the employment at will doctrine, an employee has no right to receive any back pay if he or she is terminated without cause. In the Polish case, there is the possibility to at least receive some compensation for a wrongful discharge.

*Procedure.* In Poland, specialized labor courts have jurisdiction over employment disputes. These labor judges therefore necessarily have a certain level of expertise in construing the Polish labor code. They also are used to dealing with unrepresented parties (usually employees).<sup>11</sup> Informal complaints from the management bar suggest that the labor courts are generally sympathetic to employees.

*Conclusions.* Polish and Lithuanian labor law in many instances provides greater individual rights to employees, especially by guaranteeing a just cause standard for dismissal. This is offset to some extent in the Polish case by the rather restrictive cap placed on back pay, and by the general European aversion to punitive damages and otherwise high damage awards, even in cases involving racial or gender discrimination.

In a wider sense, the pros and cons of these kinds of systems mirror the debate about ending the employment at will system. That is, is it a fair trade-off for employers to grant employees great across-the-board job protection, in exchange for stricter caps on damage awards? Certainly, the Polish three month cap on back pay awards, even if imported to the American system along with a requirement of mandatory employment contracts, would seem somewhat harsh. It would place the burden of risk in delays in the court system on the employee, and reward employers that decide to aggressively litigate every case.



It is beyond the scope of this article to reach a conclusion on the relative merits of employment at will, and what, if any system should replace it. Still, based on anecdotal evidence, I would suggest that in Poland and Lithuania, the labor law system is not hindered by the availability of small damage awards. Employers, on the whole, do not appear to make economic determinations that it would be cost effective to illegally fire one or more employees in a given case; in other words, they are not trying to “game” the system.<sup>12</sup> Perhaps these attitudes, rather than the letter of the law, make such a labor law regime workable. Whether this would be so in the United States is a question I leave up to the reader to decide.

Probably the most interesting practical idea to import into the American system would be the concept of portable vacation benefits fixed by state or federal law. In the United States, too often workers who change jobs are penalized by starting from zero with respect to the accrual of vacation time. If vacation benefits were fixed by statute, and the amount of vacation time earned tied to the years of work experience and education, this would produce a fairer, uniform result. Such benefits need not even be raised to the four to six weeks common in Europe, but could reflect the current American practice of two to four weeks leave. The main point is that they remain fixed over the course of an employees career, irrespective of how many times he or she changes jobs.

Comparative studies of labor law systems need not be simply an academic exercise, and need not be limited to comparisons between the systems of larger countries. Sometimes interesting innovations may be found in various corners of the globe, and in this case, even Poland and Lithuania, countries with strong historic ties with the United States.

#### —END NOTES—

1 Although the United States Constitution did directly influence the May 3, 1791 Polish-Lithuanian Constitution. One of the driving forces behind the May 3 Constitution was Tadeusz Kosciuszko, who was both a Polish-Lithuanian patriot and an American one. Kosciuszko came to the United States during the revolution and made a significant contribution to the American side. His experience in the American revolution influenced his later efforts to reform, and rescue, the Polish-Lithuanian commonwealth.

2 And annexation, in the case of Lithuania.

3 See An Introduction to Lithuanian Law (J. Kirsiene, Ed.) (forthcoming 2011), at pp. 185-187

4 Id.

5 Id.

6 See Polish Civil Code, Article 1190

7 See Polish Labor Code, Article 94(3)

8 See An Introduction to Lithuanian Law, supra, at pp. 185-187

9 See Polish Labor Code, Article 152, 155

10 See Polish Labor Code, Art. 57(1)(2)

11 See Polish Labor Code, Article 262(1)

12 Of course, labor relations are not a model of purity. Rather than game the system from within, the trend among employers appears to be avoiding the system altogether by hiring employees as independent contractors. Employees tend to be cooperative with these efforts due to the tax advantages they receive from being classified as independent contractors. ■

## MICHIGAN COURT PROVIDES GUIDANCE ON THE APPLICATION OF THE MEDICAL MARIJUANA ACT

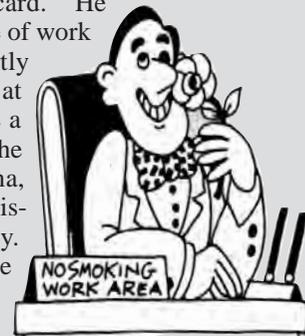
Marlo Johnson Roebuck  
Jackson Lewis LLP

Michigan, keeping in line with the other 15 states with medical marijuana laws, declined to extend the provisions of its 2008 Medical Marijuana Act to regulate private employment. In *Casias v. Wal-Mart Stores, Inc.*, No. 10-CV-781 (W.D. Mich. Feb. 11, 2011), the employee had worked at Wal-Mart for five years when he applied for and obtained a medical marijuana registry card. He began to use marijuana outside of work for medical purposes. Shortly thereafter, he injured his knee at work and was required to take a post-accident drug test. After he tested positive for marijuana, Wal-Mart terminated him consistent with Company policy.

*Casias*, represented by the American Civil Liberties Union (ACLU), filed suit alleging that his discharge violated the Medical Marijuana Act, which provides that a qualifying patient shall not be: denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with this act...M.C.L. § 333.2642(a).

The U.S. District Court for the Western District of Michigan dismissed *Casias*' claim and held that the Medical Marijuana Act provided a potential defense to criminal prosecution or other adverse action by the state, but did not regulate private employment. Thus, the court concluded that private employees are not shielded from disciplinary action as a result of their use of medical marijuana; nor are private employers required to accommodate the use of medical marijuana in the workplace. The court reasoned that Michigan voters could not have intended such consequences and accepting *Casias*' argument would create a new category of protected employees, which “would mark a radical departure from the general rule of at-will employment in Michigan.”

*Casias* has appealed the court's ruling to the 6th Circuit Court of Appeals, so it is not certain whether the ruling will stand or be overturned. Currently, Michigan is one of 16 states with medical marijuana laws. (The other states are Alaska, Arizona, California, Colorado, Hawaii, Maine, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia.) ■



“No problemo.  
I smoked before work.”



## FLSA AMENDMENTS PROVIDE CLARITY BUT STOP SHORT OF CHANGES

Christopher M. Trebilcock  
Miller Canfield

After baking for nearly three years in the United States Department of Labor's ("DOL") regulatory oven, a batch of regulations clarifying the Fair Labor Standards Act ("FLSA") became effective May 5, 2011. First published for notice and comment on July 28, 2008, under the Bush Administration, the final regulations are as noteworthy for the proposed rules that did not become effective, as they are for the amendments adopted. As set forth below, the regulations clarify certain issues but do not impose any new requirements for employers or provide new protections for employees.

### CLARIFICATIONS

Summer weather often brings with it summer employment of students home from college. Private employers hiring students from summer jobs take advantage of the "youth opportunity" wage provision of the FLSA. The final rule amends the regulations to conform with the FLSA by confirming that employers may pay the \$4.25 per hour "youth opportunity" wage to employees under 20 years of age in the first 90 calendar days of employment. As provided in the statute, employers cannot use this provision to displace current employees, including by way of reductions in hours, wages, or benefits.

Over the last several years, numerous restaurants in Michigan and across the country have been targeted by the DOL and subject to collective action litigation based on claims of various violations affecting tipped employees, tip pools, and tip credits. The final rule clarifies that: (1) the FLSA does not impose a maximum contribution percentage on valid mandatory pools; (2) "tips are the property of the employee, and that ... the only permitted uses of an employee's tips [are] through a tip credit or a valid tip pool..."; (3) employers may only take the tip credit for the amount of tips that the employee ultimately receives; and (4) the FLSA requires employees to "adequately inform" employees of the "employer's use of the tip credit provisions of section 3(m) of the Act." The final regulations also amend the Act to reflect the recent increase to the federal minimum wage. The maximum tip credit, therefore, is increased to \$5.12 per hour. An employer's minimum cash-wage obligation to employees remains \$2.13 per hour.

In addition to the tipped-employee clarifications, the final rule brings the regulations up to date with the Worker Economic Opportunity Act of 2000 by adding stock options to the types of "remuneration that are excluded from the regular rate when determining overtime pay..." The 2000 legislation intended to prohibit employers from counting stock options toward minimum wage and overtime payments. The DOL noted that only two comments were received regarding this provision and advised that it "will consider offering further guidance on the issues raised in the comments and other issues through non-regulatory means."

### REJECTIONS

Had the Bush-era proposed rules been adopted wholesale, several now rejected provisions would have made significant changes to existing law.

*First*, the DOL declined to amend the fluctuating workweek method of calculating overtime to permit the payment of nondiscretionary bonuses to non-exempt salaried employees. Advocated by employer groups, the DOL concluded that "unless such payments are overtime premiums, they are incompatible with the fluctuating workweek method of overtime..." The DOL expressed concern that the proposed rule would permit employers to pay a reduced salary and "shift a large portion of employees' compensation into bonus and premium payments" potentially resulting in large swings in wages earned dependent on the number of hours worked.

*Second*, the DOL rejected the opportunity to clarify whether and when "service advisors" working for car dealerships can qualify as exempt employees under the FLSA. Section 13(b)(10)(A) of the Act provides that "any salesman, partsman, or mechanic primarily engaged in the selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles ... to ultimate purchasers" are exempt. According to the DOL, amending this exemption to include "service managers, service writers, service advisors, or service salesmen" would be problematic because "there are circumstances under which the requirements for the exemption would not be met."

*Third*, employers who provide employees a car were hoping to obtain guidance on which activities incidental to use of the car are compensable. The final rule simply restates the statutory language of the Employee Commuting Flexibility Act of 1996, which provides in relevant part that the use of an employer-provided car is not compensable time if it "is within the normal commuting area for the employer's business ... and is subject to an agreement." The DOL did, however, confirm its interpretation of the regulation in two significant respects: (1) "The agreement may be a formal agreement, a collective bargaining agreement, or an understanding based on established industry or company practices"; and (2) "the intent of [the Act is] that the employee incur no out-of-pocket or direct cost for driving, parking or otherwise maintaining the employer's vehicle in connection with commuting."

*Fourth*, the proposed regulations would have permitted employers to apply a meal credit (i.e., the cost of a meal provided to an employee) toward an employee's minimum wage even if the employee voluntarily refused the meal. Current law permits employers to take the meal credit when employees' accept the meal. The DOL cited dietary and religious concerns that might prevent employees from accepting the meal provided by the employers.

*Finally*, the DOL rejected a proposed change to how public employers administer compensatory time off systems. The FLSA permits public employers to grant employees compensatory time off in lieu of overtime cash payments pursuant to an agreed upon plan. Although the DOL "consistently interpreted its regulations as requiring that an employee's request for compensatory time on a specific date must be granted unless doing so would unduly disrupt ... operations," several federal circuit courts rejected this interpretation and held that the Act only requires that an employee be allowed to use the time within a "reasonable period" of the requested date unless doing so would "unduly disrupt" operations. In addition to confirming its longstanding interpretation, the DOL has rejected calls to clarify whether the payment of the overtime is a valid consideration in determining whether the request for compensatory time off would be unduly disruptive. ■



## LINGUA LATINA MORTUA NON EST

Stuart M. Israel  
Legghio & Israel, P.C.

Despite his own prolixity, Polonius observes in *Hamlet* that “brevity is the soul of wit.” Who can argue with that? Well, lawyers can. Sometimes 20 pages is just not enough to explain fully why “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Still, there is value in brevity. That’s why we present legal argument in “briefs.”

One way to make your point brief *and* authoritative is to invoke a legal maxim. Legal maxims are battle-tested sentences or phrases that succinctly capture the wisdom of centuries of Anglo-American jurisprudence. And when presented in Latin, a legal maxim has *gravitas* that the English translation alone cannot match.



### Legal Latin:

“*Amo, amat, amamus.*”

The right Latin legal maxim can provide a forensic *bon mot* and administer a rhetorical *coup de grace* as effectively today as when Lord Somebody-or-other uttered it before the Queen’s Bench.

For example, your client is accused of damaging another. You clearly see the plaintiff’s plight is just a case of a bad thing happening to a good person—cruel fate, *c’est la vie*. Not your client’s responsibility at all. You have an advocate’s choice.

You can go on and on about causation and foreseeability and “open and obvious” and this or that legal principle, drawing endlessly from verbose and soporific opinions and angels-dancing-on-heads-of-pins law review articles. Or, you can put a prompt end to the debate by invoking *damnum absque injuria*. (“Loss, hurt, or harm without injury in the legal sense... which does not give rise to a cause of action.”). A little Latin, Rule 12(b)(6), case dismissed. *Veni, vidi, vici!*

Remember, *de minimis non curat lex*. (“The law does not concern itself with trifles.”). You shouldn’t have to, either. What decision-maker wouldn’t be swayed by your logic, supported by a little Latin? *Res ipsa loquitur*.

And legal Latin is not only for advocacy. It can be used to demonstrate your membership in our Learned Profession, displaying your erudition to the *hoi polloi* at, say, the grocery store, or the PTA meeting, or your neighborhood picnic. Our ready command of apt Latin maxims is one reason why we lawyers are so highly regarded by the public.

Also, Latin legal maxims can help us gain perspective on

our work. For example, what disappointed advocate, victimized by a block-headed decision issued by a lost-in-the-ozone adjudicator, wouldn’t find solace in reciting *res judicata facit ex albo, nigrum; ex nigro, album; ex curvo, rectum; ex recto, curvum?* (“A thing adjudged makes white, black; black, white; the crooked, straight; the straight, crooked.”). This is the legal version of “Forget it, Jake. It’s Chinatown.”

I am concerned that the use of legal Latin is waning. The social media generation of lawyers practices brevity but, OMG, thinks Latin has something to do with *Dancing with the Stars* mambo night. Oh, you see the occasional *expressio unius est exclusio alterius*, and maybe a *de facto* or *inter alia* or *status quo ante* here or there. Still, most legal Latin seems to be gathering dust, dormant since Gaul was divided into *partes tres*.

I’m not suggesting that lawyers give up on English. Some lawyers are quite proficient in English. Rather, I’m suggesting that lawyers use English *and* Latin. It can’t hurt. *Abundans cautela non nocet*. (“Abundant caution does no harm.”).

Anyway, I, for one, am collecting the best Latin legal maxims. When the occasion arises, I want the right maxim at my fingertips. *Semper paratus. Si vis pacem, para bellum*.

You can help. Please send me your favorite and most effective Latin legal maxims. Send instructions on how to use your maxims. Send anecdotes about the times your maxims won the day, and maybe saved your client’s bacon, or yours. Send your Latin legal maxims to [israel@legghioisrael.com](mailto:israel@legghioisrael.com). Please send them ASAP. *Carpe diem! Tempus fugit!* ■



## LOOKING FOR *Lawnotes* Contributors!

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

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

For information and publication guidelines, contact *Lawnotes* editor Stuart M. Israel at Legghio & Israel, P.C., Suite 600, 306 South Washington, Royal Oak, Michigan 48067 or (248) 398-5900 or [israel@legghioisrael.com](mailto:israel@legghioisrael.com).

## EMERGENCY MANAGERS, FISCAL ACCOUNTABILITY, AND LABOR MEDIATION

James Amar, *Mediation Supervisor*  
*Michigan Employment Relations Commission*

This article discusses public sector collective bargaining issues in municipal units of government and school districts that are in financial distress and as a result require the Governor to appoint an emergency manager under the Local Government and School District Fiscal Accountability Act, 2011 PA 4, which took effect March 16, 2011. According to the Senate Fiscal Analysis, the law provides for “the review, management, and control of the financial and other operations of a local government (a municipal government or a school district).” This law allows state intervention into and control of municipal units of government via the appointment of an emergency manager in circumstances of financial stress. A financial emergency, as determined under that law, and the appointment of an emergency manager significantly alters labor management relations between public employers and the labor organizations representing public employees.

In 1965, the Michigan legislature enacted the Public Employment Relations Act (PERA), MCL 423.201–423.217, granting collective bargaining rights to public employees. PERA’s jurisdiction extends to all public employees in Michigan except state classified civil service employees and employees of the federal government. PERA is administered by the Michigan Employment Relations Commission (MERC) – which is a three member body appointed by the Governor with the advice and consent of the Senate. PERA provides for mediation of collective bargaining negotiations and disputes concerning wages, hours, and terms and conditions of employment and, also, for the mediation of grievances.

2011 PA 4 identifies conditions that trigger the process for the Governor to designate a review team to assess the financial stability of a school district or municipal unit of government. If the team finds the governmental unit to be in financial stress, it may make a recommendation to the Governor that an emergency manager be appointed to financially manage the unit of government.

The law confers on the emergency manager broad powers, including the right to reject, modify, or terminate one or more terms of an existing collective bargaining agreement, but it does not suspend PERA. Thus, labor law practitioners need to determine the effect that the appointment of an emergency manager has on the rights of employees covered under PERA. For example, do such employees lose the right to file grievances, as permitted in PERA, if the emergency manager has suspended the collective bargaining agreement? Further,

it is not uncommon for collective bargaining agreements to include non-discrimination clauses that incorporate by reference protections emanating from Title VII of the Civil Rights Act, the Elliott Larsen Civil Rights Act, and other federal or Michigan statutes. While employers’ obligations under such statutes would not be changed, there may be questions as to how the suspension of a collective bargaining agreement referencing such statutes would affect labor organizations’ duties to represent employees grieving an alleged violation of those statutes.

Section 13(1)(b) of the Local Government and School District Accountability Act provides that the review team can utilize the services of other state agencies and employees. Inasmuch as the Act empowers an emergency manager to act as the sole agent of the local governmental unit in negotiations, it would seem prudent for an emergency manager to invite a labor mediator into the discussions. This is especially true if it becomes apparent that members of the bargaining unit are likely to encounter significant reductions in their wages and benefits, and/or other alterations (reductions) in conditions of employment. An emergency manager who is not familiar with collective bargaining and with labor management relations may find it helpful to rely upon a labor mediator’s ability to ensure that sensitive dialogue takes place and that the discussion remains positive, civil, and focused toward reaching a prompt resolution. Furthermore, a mediator’s knowledge and familiarity with the negotiation process and the current labor management climate could well be an asset to an emergency manager whose background in this area may be limited. A municipal entity or school district that is economically stressed does not need someone to arrive on the scene and seek to rule by decree – especially since the emergency manager probably will be placed in the uncomfortable position of having to confront an employee group with the grim reality that major economic concessions are necessary.

Finally, a labor mediator from MERC may play a constructive role by working with the emergency manager in a way that may allow the labor organization to acknowledge that it is not being ignored, but is, instead, an integral part of the entire process. As distasteful as concessionary negotiations may be to the employees and their bargaining representative, their stress may be alleviated by bringing in a labor mediator, who might offer suggestions to the emergency manager that have not been thought of previously. The presence of a mediator might allow the emergency manager to consider different scenarios to achieve the desired outcome; the mediator’s assistance might motivate the emergency manager and the labor organization to work collaboratively to generate ideas and alternatives that will cushion the impact of any decisions reached. The ultimate decision is likely to significantly impact employees working in that financially stressed unit of government; any assistance that a MERC mediator might provide to minimize that impact should be welcomed. ■

## APPELLATE REVIEW OF MERC CASES (MARCH 2010 – FEB. 2011)

D. Lynn Morison\*  
*Michigan Bureau of Employment Relations*

### I. LAKE COUNTY AND LAKE COUNTY SHERIFF –AND- POLICE OFFICERS ASSOCIATION OF MICHIGAN, (Court of Appeals No. 293044, issued February 8, 2011, affirmed MERC Case No. C07 A-011 issued June 25, 2009, 22 MPER 59.)

In an unpublished opinion, the Court of Appeals affirmed MERC's finding that the Employer violated its duty to bargain in good faith by refusing to arbitrate a grievance pursuant to the terms of a newly-executed collective bargaining agreement. The Union and the Employer were parties to a 2003-2005 collective bargaining agreement that provided for a grievance procedure concluding in binding arbitration and required just cause for the termination of employees.

The parties began negotiating a new collective bargaining agreement. In May 2006, the parties reached a tentative agreement, which was consisted of a list of changes to the 2003-2005 contract. The parties agreed that, except for the changes listed in the tentative agreement, the language from the 2003-2005 contract would be included in the new agreement. The tentative agreement was ratified by the Union on July 19, 2006; the Employer's attorney then prepared a written draft of the agreement and submitted it to the Union on August 10, 2006. The draft provided the contract was effective from January 1, 2006 through December 31, 2008. The contract was signed by the Union's business agent on September 19, 2006 and by the Employer's representative on October 26.

On September 15, 2006, several days before the new contract was signed by the Union's business agent, the Employer terminated a bargaining unit employee. The Union filed a grievance shortly thereafter, which the Employer denied, contending that since the discharge was subsequent to the expiration of the old contract and prior to the execution of a new contract, it had no obligation to arbitrate based on an alleged violation of the just cause discharge requirement contained in the expired contract.

The sole issue before the Court was whether the timing of the grievance, which was filed after the old contract expired and before a new one was ratified, required it to be arbitrated. The Court found that whether the matter is *actually* arbitrable is a question of timeliness, and is, therefore, a procedural question that must be determined by the arbitrator. Thus, the Court agreed with MERC's conclusion that the grievance is *arguably* arbitrable. The Court explained that the Employer's refusal to take the matter to arbitration was an unfair labor practice, unless the Employer could show that the grievance was absolutely not arbitrable. The Court noted that the language of the retroactivity clause of the 2006-2008 agreement points to the contrary. Accordingly, the Court of Appeals found that MERC did not err in concluding that the Employer committed an unfair labor practice by refusing to arbitrate the grievance.

### II. WAYNE COUNTY -V- ROBERT J. SKRZYPCZAK, JR., (Court

of Appeals No. 292430, issued December 21, 2010, affirmed in part and reversed in part MERC Case No. C07 E-092, issued May 22, 2009, 22 MPER 48.)

In an unpublished opinion, the Court of Appeals affirmed MERC's decision that Robert J. Skrzypczak, Jr. was lawfully terminated from his employment, but reversed its holding that Wayne County (Employer) committed an unfair labor practice. Skrzypczak was employed as a safety engineer in the Employer's risk management division investigating health and safety concerns among several designated areas. In March 2005, Skrzypczak's driver's license was suspended. As a result, his job duties were modified to limit his assignments to those locations within walking distance of his office. Subsequently, as a result of his criminal conviction, he was ineligible to renew the security clearance necessary for him to continue working at the Wayne County Jail; thus his workload was lessened further.

One of his remaining assignments was to work with the safety committee at the juvenile detention facility to statistically analyze an increase in assaults on employees. While working in this capacity, Skrzypczak made several recommendations for changes in restraint procedures; however, the Employer told him that these recommendations were not feasible. Skrzypczak also worked with the union that represented the affected employees to try to get changes made; Skrzypczak was not a member of this union. Skrzypczak continued to aggressively push for these changes. His supervisors received several complaints about Skrzypczak's loud abrasive conduct at safety committee meetings on these issues, to the point that management removed him from this assignment and instructed him to have no further contact with the union. Skrzypczak was then assigned to various administrative tasks; however, he often complained about these assignments and refused to perform certain tasks. The Court of Appeals agreed with MERC that the Employer had demonstrated that Skrzypczak would have been terminated even in the absence of participation in protected activity.

The Employer cross-appealed MERC's finding that it violated PERA by instructing Skrzypczak to cease his contact with the union that represented employees of the juvenile detention center. The Court of Appeals agreed with MERC that the evidence substantiated Skrzypczak's claim that he was instructed to end his contact with the union. However, the Court of Appeals found that MERC failed to properly analyze the issue. The Court determined that a three part test applied to this issue: 1) did the employer's action adversely affect the employee's right to engage in protected concerted activity; 2) did the employer demonstrate a legitimate and substantial business need for instituting and applying the rule; 3) the loss of the employee's right must be balanced against the protection of the employer's legitimate interest.

First, the Court of Appeals determined that Skrzypczak was engaged in protected activity. Skrzypczak was engaged in discussions with the union which represented affected juvenile detention center workers and was in the process of preparing a grievance over the issue. Because PERA protects concerted activities related to such a grievance, Skrzypczak was protected when offering his assistance to the union. Second, the Employer demonstrated a legitimate business need for instructing Skrzypczak to stop his contact with the union. Because Skrzypczak had been removed from

(Continued on page 16)



## APPELLATE REVIEW OF MERC CASES

(Continued from page 15)

his position at the juvenile detention center, he was no longer authorized to represent the Employer on matters related to the center. Third, the Court determined that the balancing of interests favored the Employer in this instance. Skrzypczak was not acting in the interest of his own union; he did not belong to the union he was assisting. Further, no evidence existed that Skrzypczak was actually assisting the union as all of his suggestions were rejected on their merits and there was no evidence that the union sought his assistance.

The Court of Appeals concluded that MERC analyzed the issue under the wrong analysis, using cases in which employees were disciplined for misconduct which occurred while the employee was directly engaged in protected activity. Instead, the Court determined that in this case the challenged conduct occurred as part of the normal work relationship and, thus, the abovementioned three-part test was applicable.

*III. WASHTENAW COUNTY -AND- WASHTENAW COUNTY TREASURER -AND- AFSCME COUNCIL 25, (Court of Appeals No. 286874, issued July 29, 2010, affirmed MERC Case No. C04 F-162, issued July 28, 2006, 21 MPER 27.)*

In an unpublished opinion, the Court of Appeals affirmed MERC's decision that the Washtenaw County Treasurer had committed an unfair labor practice. The Union represents certain employees of Washtenaw County. The County and the Union had entered into two consecutive bargaining agreements; however, the County Treasurer had taken no part in the collective bargaining during either session. The Treasurer was aware that negotiations were taking place based on her attendance at departmental meetings, at which the ongoing negotiations were discussed. The Union did not question the Treasurer's absence from the bargaining table, as the County had typically bargained on behalf of its elected officials.

To avoid a pending layoff, a Union officer sought to bump into a position within the Treasurer's office by using the super-seniority clause of the collective bargaining agreement. The Treasurer refused to allow the transfer. The County then eliminated the position from within the Treasurer's office. When the Union officer attempted to bump into the next available position, the Treasurer once again refused to acquiesce to the request. The County then eliminated that position from within the Treasurer's office. Because the Treasurer had not been involved in the labor negotiations, she felt that she was not bound by the contract negotiated between the County and the Union. The Union filed an unfair labor practice charge alleging that the County and Treasurer had repudiated the collective bargaining agreement.

During the hearing in this matter, the Union's witnesses testified about various incidents that had occurred over the years that caused the Union to believe the Treasurer was bound by the collective bargaining agreement. First, the Treasurer requested that the human resources department transfer a disciplined employee out of the Treasurer's office. Pursuant to this request, the Union, the Treasurer, and the County human resources representatives

began negotiations that resulted in the employee's transfer to another department. Second, the Treasurer terminated an employee for poor performance. The County labor relations director and the Union began negotiations that resulted in a settlement. The Union president testified that the labor relations director held herself out to be representing the County and the Treasurer's office. Further, the Treasurer was aware of the settlement and took no actions to oppose it. Third, the Treasurer began progressive discipline using "union performance cards" to document an employee's misconduct. Ultimately, the Treasurer consulted the labor relations department to determine if the problem employee could be transferred. Utilizing the bumping procedure from the collective bargaining agreement, an employee from another department was transferred to the position. Finally, the Treasurer wanted to find a way for a sick employee to receive health benefits. A conference was held between the Treasurer, the County, and the Union to discuss this possibility. The Union president testified that this meeting took place under the terms of the collective bargaining agreement.

The Court agreed with MERC's determination that an employer typically has no duty to bargain until employees or their representatives seek to bargain. However, in this instance, the Treasurer was a co-employer and waived her right to object to the collective bargaining agreement. While it was true that the Treasurer had raised prior objections to the County regarding her obligations under the collective bargaining agreement, the Treasurer had never voiced any opposition to the Union until long after ratification of the collective bargaining agreement. Further, by engaging with the Union in the past, including implementing the bumping procedure when it was in her favor, the Union reasonably believed that the bargaining agreement was binding on the Treasurer's office. The Court concluded that the Treasurer could not sit idly by, operate under the terms of the contract, and only object when the contract terms did not fit her immediate need.

Further, the Court found no error in MERC's refusal to entertain the Treasurer's argument that the super-seniority clause was illegal. The Treasurer had failed to file a separate charge within the six month limitations period and did not raise the issue until filing a post-hearing brief. Moreover, no evidence was presented on the issue of whether the employee seeking to take advantage of the super-seniority clause performed the contract administration duties necessary for the application of a lawful super-seniority clause.

The Treasurer also claimed that MERC lacked subject-matter jurisdiction to enforce this claim because the Union alleged breach of contract and not an unfair labor practice. The Court determined that the Treasurer misconstrued the allegation against her, and that the alleged unfair labor practice was a repudiation of the collective bargaining agreement, and thus within MERC's jurisdiction.

In addition, the Treasurer argued that because the County had eliminated the specific positions, the case was moot as the employee could not be transferred into a position that did not exist. Because the charge alleged a repudiation of the collective bargaining agreement, the Court found that an order was needed to determine the Treasurer's obligations under the contract. Besides that point, the Court noted that MERC has broad discretion to formulate appropriate remedies in order to "effectuate the policies of the act."



The Treasurer then challenged MERC's refusal to consider her reply brief in support of her exceptions and for its failure to grant her motion to strike the Union's response to her exceptions. The Court found that MERC correctly refused to consider the reply brief, because the General Rules of the Commission allow the parties to file exceptions and a response to the exceptions, but no further supplemental pleadings. Next, the Treasurer moved to strike the Union's response as untimely. The Union had requested and received a 30 day extension to file its response. The Court determined that the Union's response was timely; a 30 day extension adds 30 days from the previous deadline, not 30 days from the date of the request, as the Treasurer argued.

Finally, the Court found no error in MERC denying both parties' requests for oral argument before making its final decision. The Treasurer alleged that because Rule 178 does not expressly state that the Commission may deny such a request, it must lack the authority to do so. The Court concluded that MERC did not abuse its discretion in determining that its authority to grant or deny a request for oral argument was implicit in the rule.

IV. *SOUTHFIELD PUBLIC SCHOOLS -AND- SOUTHFIELD MICHIGAN EDUCATION SUPPORT PERSONNEL ASSOCIATION (MESPA)*, (Court of Appeals No. 290898, issued July 8, 2010, affirmed MERC Case No. C06 L-285, issued February 19, 2009, 22 MPER 26.)

In an unpublished opinion, the Court of Appeals affirmed MERC's dismissal of the Union's unfair labor practice charge alleging that the Employer acted with anti-union animus or hostility in its decision to eliminate a position within the bargaining unit. The Employer was facing a multi-million dollar budget deficit and approached the Union with its plan to reduce the position of "security specialist" from full-time to a part-time position. The Union responded that this reduction would violate the terms of the contract. The Employer then decided to completely eliminate the position because of budgetary constraints and "to remain in compliance with the language of the [contract]." The Union alleged that the Employer retaliated against it because it invoked the contract.

The Court agreed with MERC's determination that this did not constitute an unfair labor practice. The Court found that the Employer's statement about eliminating the position to remain in compliance with the contract did not show animus or hostility; rather, that the Employer recognized that the Union had a "valid point regarding the terms of the contract." Further, the claim that the decision was made to retaliate against the Union was unsupported by any corroborating evidence. In fact, the Employer had previously discussed the possibility of reducing the position before any Union mention of the contract requirements. Finally, the Union's claim that the timing of the elimination demonstrated retaliation, because it occurred immediately after the Union's statement regarding the contract, was insufficient to prove causation when this temporal proximity claim was not supported with any other evidence to further the Union's allegation.

—END NOTE—

\* Appreciation is extended to Joshua Leadford and Iryna Sazonova for their assistance with the preparation of these case summaries. ■



## FOR WHAT IT'S WORTH

**Barry Goldman**  
*Arbitrator and Mediator*

Like other relationships, the relationship between the parties to a collective bargaining agreement and the arbitrator who is called upon to interpret and apply it has a life cycle. Each phase of the cycle has challenges. The first challenge for the arbitrator is achieving what we call "acceptability." It is famously difficult to become "generally acceptable" as a labor arbitrator. Parties won't select an arbitrator they don't know, and they can't get to know an arbitrator they won't select. It's an old story.

At the other end of the life cycle is another challenge. My friend and colleague Norman Brand puts it this way in his book *Labor Arbitration: The Strategy of Persuasion*:

In many collective bargaining relationships there comes a time when you have a difficult "political" case that will result in the arbitrator losing his acceptability, no matter which way he decides.... You may recognize that a certain decision was correct, even though it upheld the position of your opponent. You may, however, be obliged to get rid of the arbitrator because your side has to blame the outcome of a particularly sensitive arbitration on the failings of the arbitrator.

This is not much of a problem if the parties select their arbitrators ad hoc. The loser just strikes arbitrator Jones until the memory of the Jones decision is overwritten by a new decision from arbitrator Smith. But if the parties have agreed to a panel of arbitrators and rotate cases around the panel, eliminating an arbitrator can do real harm. It takes a long time for an arbitrator to learn a contract and build a trusting relationship with both parties to a CBA. Further, eliminating an arbitrator can cause a ripple effect. If the Employer decides that arbitrator A is no longer acceptable, the Union may decide it can no longer agree to arbitrator B. This can cause the Employer to insist on removing arbitrator C, and so on. The years of delicate maneuvering it takes to form an acceptable panel can be lost to collateral damage in this kind of micturition contest.

Brand suggests a solution to this problem. He calls it the default option:

Under the "default" option the parties contractually agree to choose arbitrators ad hoc but to use Smith if they do not agree on an arbitrator. Ordinarily, they will simply use Smith. In a political case they can choose a more expendable arbitrator.

I call this person a Kleenex arbitrator. It is another one of the off-label uses for labor arbitrators I have discussed previously in this column. A Kleenex arbitrator is expendable - use once and throw away. But that doesn't mean he or she is second rate. A well-known and highly respected figure in the field can be called on to serve in the role of Kleenex arbitrator. The designation doesn't attach to the person, it attaches to the role. Thus, arbitrator A can be a member of the permanent panel with respect to CBA 1 and a Kleenex arbitrator with respect to CBA 2, and arbitrator B can serve as a permanent member on the CBA 2 panel and a Kleenex arbitrator for CBA 1.

We don't mind at all.



## UPDATE: IMPLICATIONS OF FEDERAL HEALTHCARE REFORM FOR EMPLOYERS

Catherine Derthick  
Plunkett Cooney

March 23, 2011, marked the one year anniversary of the enactment of federal healthcare reform legislation, the Patient Protection and Affordable Care Act (PPACA), 42 U.S.C. 18001 *et seq.* The PPACA imposes significant new responsibilities on employers, with various effective dates for different provisions of the Act. After the complete implementation of the PPACA, some employers will be required to provide at least minimal coverage to employees, as defined by the Secretary of Health and Human Services, or risk facing penalties.

The PPACA will require the creation of virtual marketplaces by states where eligible individuals and employers will be able to comparison shop for health insurance, known as "Exchanges."

Some health insurance plans, known as grandfathered plans, are exempt from several provisions of the PPACA. Plans that qualify for grandfathered status are those that were in existence on the date of the PPACA's enactment, March 23, 2010, and that provide notice of their intent to remain grandfathered. A plan can lose this status in a number of ways, including changing insurers, making significant benefit reductions, increasing co-insurance or co-pay amounts, lowering employer contributions to the premium, or adding or reducing annual or lifetime coverage limits. Routine plan changes, however, will not deprive a plan of its grandfathered status. Examples include: cost adjustments to keep pace with medical inflation, adding new benefits, modest adjustments to existing benefits, voluntary adoption of new consumer protections, changes to comply with state or federal law or changes in third-party administrators.

Plans that are covered by collective bargaining agreements (CBAs) that were ratified before the enactment of the PPACA will remain grandfathered until the expiration of the last CBA that relates to coverage. After the termination of the last CBA relating to coverage, the plan may still be able to receive the benefit of the ordinary grandfather rule. Note: a change in insurers during the term of the CBA, by itself, will not cause a plan to lose its grandfathered status upon the termination of the last CBA relating to coverage.

There are several immediate concerns for employers (and their attorneys), as various provisions of the PPACA have already taken effect. For example, effective now, both new and grandfathered plans are required to extend dependent coverage to age 26. However, prior to 2014, a grandfathered plan that provides dependent coverage must provide coverage until age 26 only if the dependent is not eligible for other employer-sponsored coverage. The dependent coverage rule does not require employers to cover the children of adult dependents, and a plan cannot condition coverage on whether a child is tax-dependent on the plan participant.

New and grandfathered plans are prohibited from rescinding or canceling the health coverage of an enrollee except in the case of fraud or intentional misrepresentation of fact, and even then, a 30 day notice must be given to an enrollee before cancellation or rescission.

Prior to 2014, both types of plans are also prohibited from imposing preexisting condition exclusions on children under the age of 19. Beginning in 2014, plans may not impose a preexisting condition exclusion on any participant (not just children).

*Lifetime* benefit limits may not be imposed on essential health benefits for any participant under both new and grandfathered plans. From now until 2014, restrictions on *annual* limits for essential health benefits will be imposed on a graduated scale. Beginning in 2014,

however, annual dollar limits on essential health benefits will be prohibited for all plans.

Some PPACA provisions that have already taken effect are applicable only to new plans; grandfathered plans are exempt. For example, new group health plans and insurers must cover certain preventative care services without cost-sharing, including preventative services rated A or B by the United States Preventative Task Force (i.e. screenings for high blood pressure, diabetes, cancer, HIV, depression, alcohol abuse); recommended immunizations (i.e. for hepatitis, measles, polio, influenza); and additional preventative care for women and children.

Additionally, new plans are required to cover emergency services without prior authorization and without in-network requirements. New plans also must permit a participant to designate a primary care provider, pediatrician and an obstetrician/gynecologist (OB/GYN) without authorization or referral. Also effective this year, employers are required to report the value of health coverage it provides on an employee's W-2, and over the counter drugs will become ineligible for reimbursement from a flexible spending account (FSA).

All health insurers and sponsors of self-insured group health plans, including grandfathered plans, will be required, starting in 2012, to provide a summary of benefits and coverage to enrollees and applicants. If a group health plan makes material changes mid-year, the plan must provide notice at least 60 days prior to the effective date of the change.

In 2013, the PPACA will limit annual contributions to FSAs. The Act will also impose an additional 0.9% Medicare payroll tax on employees with annual wages over \$200,000 (or \$250,000 for joint income tax filers) and an annual 3.8% tax on unearned (investment) income for individuals with annual income more than \$200,000 (or \$250,000 for joint income tax filers).

The Act will require, beginning in 2013, employers to provide notice of certain things to employees, including the existence of health insurance Exchanges, potential eligibility for federal assistance if the employer's health plan is "unaffordable" (based on PPACA criteria) and the possibility of losing an employer contribution to coverage if the employee purchases health insurance through a health insurance Exchange.

Employers that offer coverage to employees will also be required to provide a free choice voucher to employees with income less than 400% of the federal poverty level, whose share of the premium is between 8 and 9.8% of their income and who choose to enroll in an Exchange. The value of the voucher must be equal to what the employer would have contributed to the employee otherwise.

There is no *mandate* for individuals to obtain coverage or for large employers to provide coverage under the PPACA. However, there is a strong incentive for both to do so. Beginning in 2014, individuals will be penalized if they do not have minimum essential coverage, and the annual penalty will increase each year. Large employers also will begin being assessed penalties in 2014 if they fail to offer coverage, offer only unaffordable coverage or offer coverage that does not meet minimum value standards. A prohibition on excessive waiting periods will also take effect in 2014; waiting periods cannot be longer than 90 days for any individual to receive health benefits.

Starting in 2018, a 40% excise tax will be imposed on employer sponsored, high cost "Cadillac" plans. The tax will be assessed against the amount of the plan in excess of dollar caps specified by the PPACA.

From now until its full implementation, the PPACA will present a host of new requirements for employers. Employers and their attorneys should make certain a plan is in place to fully effect compliance with the PPACA's provisions and multiple effective dates in order to avoid penalties. ■





## SUPREME COURT UPDATE

Regan Dahle  
Butzel Long

### Court Accepts Cat's Paw Argument in USERRA Case

In *Staub v. Proctor Hospital*, 131 S. Ct. 1186; 179 L. Ed. 2d 144 (2011), the plaintiff, an Army Reservist, worked for Proctor Hospital as an angiography technician. The plaintiff's two supervisors were hostile towards his military commitments, which required him to attend drill one weekend per month and a two to three week training annually. The plaintiff's supervisor made comments to the plaintiff's co-workers that the plaintiff's military duties put a strain on the department. His supervisors also scheduled him for additional shifts, without advanced notice, to penalize him for being away from work.

The plaintiff's supervisors ultimately gave the plaintiff a Corrective Action for allegedly being away from his workstation. The plaintiff was told that he must notify his supervisors when he had no patients and his cases were completed. Several months later, one of the plaintiff's co-workers complained about the plaintiff's unavailability and abruptness to Proctor's Vice President of Human Resources and Chief Operating Officer. The COO directed the plaintiff's supervisor to develop a plan to address problems with the plaintiff's availability. Before any such plan could be developed, however, plaintiff's supervisor advised the VP of HR that the plaintiff had violated the directive in the Corrective Action that he must notify his supervisors when he had no patients and when his cases were complete. Based on this report, and after a review of the plaintiff's personnel file, the VP of HR made the decision to terminate plaintiff's employment.

Plaintiff sued under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq.* The basis of the plaintiff's claim was that his discharge was motivated by hostility to his military obligations. The plaintiff did not contend that the VP of HR harbored any animus, but instead, that the animus harbored by his supervisors influenced the ultimate employment decision. The jury agreed with the plaintiff and awarded him damages. The Seventh Circuit reversed holding that the "cat's paw" theory could not justify recovery unless the non-decision maker exercised "singular influence" over the decision maker such that the decision was based on "blind reliance," and that the evidence did not suggest such blind reliance in this case.

The plaintiff sought review, and the Supreme Court granted certiorari to decide whether the Seventh Circuit's singular influence test was the proper standard to apply when the plaintiff is advancing a cat's paw theory. The Supreme Court held that the Seventh Circuit erred. Applying tort principles of causation, the Court held that instead of the "singular influence" test, the proper inquiry should be whether an agent of the employer "committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision." The Court also instructed that an independent investigation by an agent of the employer who did not harbor any discriminatory animus will not relieve the employer of liability if the independent decision maker relied on facts provided by the biased agent.

### FLSA Protects Employees Who File Oral and Written Complaints

Plaintiff, Kevin Kasten, brought suit against his former employer, Saint-Gobain Performance Plastics Corporation, under the anti-retaliation provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* The plaintiff claimed that the defendant terminated his employment because he made verbal complaints about the location of the company's time clocks. Specifically, the plaintiff made repeated oral complaints that the location of the time clocks prevented employees from getting paid for compensable donning and doffing time. The defendant denied that the plaintiff made any "significant complaint" about

the time clocks and stated that it terminated the plaintiff's employment because he repeatedly failed to punch in and out. The U.S. District Court for the Western District of Wisconsin entered summary judgment in favor of the defendant finding that the plaintiff could not recover because he did not make any written complaint of an FLSA violation. The Seventh Circuit agreed with the district court affirming that the FLSA does not protect oral complaints.

The plaintiff sought certiorari and the Supreme Court granted review to determine whether the FLSA's protection of employees who "file" complaints applies to employees who make both written and oral complaints. The Court reviewed several dictionary definitions of "filed" and concluded that those definitions do not limit the scope of statutory protection to only written complaints. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331; 179 L. Ed. 2d 3799 (2011). The Court came to the same conclusion upon a review of various state statutes, federal regulations and certain judicial usages of the term "filed." Ultimately, the Court could not conclude that Congress intended to protect only those employees who filed written complaints and held that oral complaints can fall within the protection of the FLSA's anti-retaliation provisions.

### California Law Prohibiting Arbitration of Class Actions Preempted by FAA

In *AT&T Mobility LLC v. Concepcion et ux.*, 179 L. Ed. 2d 742 (2011), the Supreme Court addressed whether the Federal Arbitration Act (FAA), 9 U.S.C. §2, preempted a California Supreme Court decision holding unconscionable arbitration provisions that barred class actions. The plaintiffs, Vincent and Liza Concepcion, were consumers who entered into a contract with AT&T for cellular phone service. The contract contained a provision requiring arbitration of any claims brought by the plaintiffs in their individual capacities. After AT&T charged the plaintiffs sales tax for what was supposed to be a "free" cellular phone, they filed suit against AT&T in the United States District Court for the Southern District of California. The plaintiffs' complaint was consolidated with a putative class action alleging that AT&T had, among other things, engaged in fraud and false advertising by charging sales tax on "free" cell phones.

AT&T moved to compel arbitration under its contract with the plaintiffs. The plaintiffs opposed the motion on the grounds that the arbitration provision was invalid under California law as stated in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P.3d 1100 (2005). The rule in *Discover Bank* held invalid any arbitration provision in a consumer contract that barred arbitration of class actions. The Ninth Circuit Court of Appeals affirmed the decision of the District Court and also held that the rule of *Discover Bank* was not preempted by the FAA, because that rule was nothing more than a "refinement of the unconscionability analysis applicable to contracts generally in California. 584 F.3d at 857." The Ninth Circuit finally held that by prohibiting arbitration agreements with class action waivers, it was merely putting arbitration agreements on the same footing as contracts that bar class actions outside of the arbitration context.

The Supreme Court reversed the decision of the Ninth Circuit. The Court noted that the FAA reflects both the liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract. Consistent with those terms, the Court held that it is required to enforce arbitration agreements according to their provisions. While the Court recognized that arbitration agreements can be voided under general contract principles, such as fraud, duress, or unconscionability, those principles were not at issue in this case. In this case, the Ninth Circuit declared the arbitration provision void based on a defense that applies only to agreements to arbitrate.

The Court rejected the plaintiffs' argument that the savings clause in § 2 of the FAA making arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" allowed operation of the *Discover Bank* rule, because that rule was a ground that "existed at law" for the revocation of the contract. The Court concluded that nothing in the savings clause of §2 suggests "an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." Consequently, since the *Discover Bank* rule stood as an obstacle to the accomplishment of the FAA's objective to favor arbitration, the rule was preempted by the FAA. ■



## SIXTH CIRCUIT UPDATE

Scott R. Eldridge

*Miller, Canfield, Paddock and Stone, P.L.C.*

### ADA Plaintiff Not Entitled to “Motivating Factor” Jury Instruction

In *Lewis v Humboldt Acquisition Corp*, Docket No. 09-6381 (Mar. 17, 2011), Susan Lewis, asked a panel of the Sixth Circuit to overrule the holding of another panel on the proper jury instruction for discrimination claims under the Americans With Disabilities Act. Lewis sued in federal district court alleging disparate treatment under the ADA. In her proposed jury instructions, Lewis requested that the jury be instructed to determine whether her perceived disability was a “motivating factor” in the defendant’s decision to discharge her. The district court instead modeled its jury instruction after the Sixth Circuit’s decision in *Monette v Electronic Data Systems*, and thus instructed the jury that Lewis could recover only if her disability was the “sole reason” for her discharge. In rendering a “no cause” verdict, the jury concluded that Lewis’s perceived disability was not the sole reason for her discharge. Lewis appealed. Noting that the ADA prohibits discrimination “on the basis of disability,” the Sixth Circuit explained that of the ten federal circuits to have considered the contours of this causation standard, eight apply a “motivating factor” test. The others, including the Sixth Circuit, require a plaintiff to prove that her disability was the “sole reason” for the adverse action. Refusing to overrule *Monette*, the Sixth Circuit affirmed the lower court’s judgment. The Sixth Circuit concluded that, because the U.S. Supreme Court has not issued an inconsistent decision on the issue, “[a] panel of this Court cannot overrule the decision of another panel” and “[t]he [*Monette*] decision remains controlling authority.”

### Federal District Court Could Hear Union President’s Claims Against Union

The plaintiff in *Kitzmann v Graphic Communications Conference Local 619-M*, Docket No. 09-6500 (Mar. 21, 2011), Steven Kitzmann, was the president of Local 619 of the Graphic Communications Conference. After contentious opposition by Kitzmann, Local 619 voted to affiliate with another labor organization. Under the new affiliation agreement, Kitzmann would still be president, but the position would no longer be compensated. Kitzmann sued Local 619 in state court seeking a declaration that the new affiliation agreement

was invalid for failure to follow proper procedures set forth in the Union constitution. He also alleged breach of his employment contract, which he argued had been created by the Union constitution. The Union removed the matter to federal court, arguing that Kitzmann’s claims were preempted under Section 301 of the Labor Management Relations Act. The district court agreed and rejected Kitzmann’s attempt to remand the matter to state court. Kitzmann appealed. Noting that “the reach of §301 is not limited to contracts between an employer and a labor organization,” the Sixth Circuit concluded that Kitzmann’s claims for declaratory relief – that the Union violated its constitution – alleged a violation of a “labor contract” within the meaning of §301. The federal district court, therefore, had jurisdiction.

### Requirement that City Employees Provide Doctor’s Note to take Sick Leave Upheld

In *Lee v City of Columbus*, Docket No. 09-3899 (Feb. 23, 2011), the plaintiffs were current and former employees of the City of Columbus, Division of Police. The City issued a “Division Directive” instructing that all employees returning to regular duty following sick leave, injury leave, or restricted duty were required to submit to their immediate supervisors a copy of a physician’s note providing the “nature of the illness” and stating whether the employee was capable of returning to regular duty. Upset by the mandatory disclosure and the funneling of medical information through immediate supervisors, the plaintiffs alleged violations of the Rehabilitation Act. The lower court granted summary judgment in favor of the plaintiffs on all claims and entered a permanent injunction prohibiting enforcement of the Directive. On appeal, the Sixth Circuit vacated the lower court’s decision and entered judgment in favor of the City. It concluded that the Directive did not amount to a prohibited inquiry into the plaintiffs’ medical disability within the confidentiality provisions of the Americans With Disabilities Act’s, which have been incorporated into the Rehabilitation Act. The Sixth Circuit held that the requirement that an employee provide a “general diagnosis – or in this case, an even less specific statement regarding the ‘nature’ of an employee’s illness – [is not] tantamount to an inquiry as to whether such employee is an individual with a disability.” According to the Court, “[t]here is no evidence that this inquiry is intended to reveal or necessitates revealing a disability.” Citing to EEOC guidelines, the Court explained further that, even if the Directive could be construed as a disability-related inquiry, it is not prohibited by federal law because it is a workplace policy applicable to all employees, disabled or not.



## 20 “COMMANDMENTS” TO BE A DECENT LABOR AND EMPLOYMENT LAWYER

Carey DeWitt, *Butzel Long*

While talking with newer labor lawyers and others at our firm about how to succeed in our practice, I have noticed that certain themes always seem to re-emerge. Finally, I thought I would write them down, share them, and invite discussion and comment. I know I still have much to learn, but here are a few things I learned along the way about being good at our job. (I know, 10 commandments is bad enough, but they added up to 20, sorry.)

1. Remember what it is like to work for a living: Your sense of fairness and reasonableness comes in part from this. If you lack this perspective, you will not feel the law of the workplace and will not be able to mobilize it for courts and clients. You will thus make poor decisions, using arguably logical but not truly sensible analysis for your advice and advocacy. Every job you have ever had will teach you this “employment common sense,” if you pay attention.

2. If you can, learn what it is like to manage, supervise, and/or own a company, organization, or unit: Your sense of what is realistic comes from in part from this. It helps a lot to understand something about margins, profit and loss, and business planning. But also enjoy knowing and learning about what motivates good managers, supervisors, and employees: It is far more than money—indeed that is the least important third of it, often. Think of pride, team, learning, challenge, growth, promotion, praise, accountability, and loyalty (yes, loyalty still exists).

3. Appreciate the amazing history of the labor law: Strikes and Unions, OSHA, NLRA, Title VII, ADA, Wage and Hour, Farm Workers, Sexual harassment, Pension law, Immigration law, labor antitrust, non-competes, Landrum-Griffin—it is all a seamless web and all interesting, even compelling. And it is all of ours, even if we don’t always like every bit of it.

4. Love getting a good result and making a client happy, even more than getting a good fee!

5. Know BS when you hear it.

6. Be willing to acknowledge your client’s weaknesses and errors. Don’t BS the tribunal: If you gild the lily, you will eventually be exposed, and this will cost you and cost us all.

7. Be a good writer and speaker. Practice these skills.

8. Be willing to risk loss to accomplish your client’s goals. “I have never lost a case!” Hmmm; well, how many risks have you taken for your clients? Sometimes this risk is necessary and appropriate. By the way, if you always settle, this will be known to your opponents.

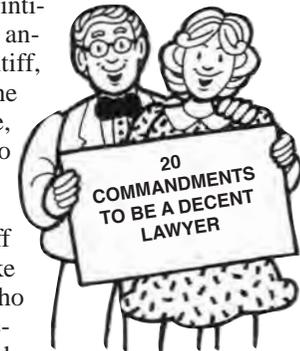
9. Love the ebb and flow of battle. Once you get into it, it can be unbelievably satisfying just to be in a tough one against a good opponent. I remember once, while I was cross examining a recalcitrant witness and scoring a point or two over the rather

harsh objection of my able opponent, the great Labor Arbitrator Gabe Alexander said to us all, “Oh no, sorry, this is the joys of trial.” And it was.

10. To be fair, though, value the act of counseling a client as appropriate to secure compliance, accept decent settlements, save on expense, and avoid unnecessary client risk and trauma. Helping a client in this way gets the least attention but solves the most problems.

11. Develop the skill of working with the facts to present a good story to the jury, judge, mediator, or arbitrator. The facts are almost always there to work with, at least to a degree, if you look for them.

12. Appreciate the incredible intimacy of really looking closely at another person’s life (the plaintiff, claimant, or grievant), appreciate the responsibility of such knowledge, and be thankful you don’t get in so many messes.



13. Laugh at the amazing stuff that comes our way in this job, like the loss of consortium claimant who told me under oath, twice, that before the termination claimant and spouse had relations “7 or 8 times a day, 7 or 8 days a week.” Some people just have more fun, I guess.

14. When the judge or arbitrator is in a mood and smacks you one, or just rules incorrectly, have enough poise and credibility to handle this like an adult.

15. But be stubborn when doing so is in the best interest of your client. That “zealous advocacy” thing is no joke.

16. Do not underestimate your opposition. If you do, you will not be ready.

17. Respect the court or arbitrator. If you don’t, you will receive fewer good rulings and ruin your reputation before them and other neutrals. Courts and Arbitrators are human, and they can’t help but be affected by a lack of respect. Besides, all of us are simply better off as part of a system that encourages respect for those we have chosen to resolve our disputes.

18. Spend time with more experienced hands, who have seen more than you and will share if you ask them. We should listen to these men and women, and learn from them. In my case, it was Bill Saxton, Bob Battista, John Hancock, Don Miller, Mark Nelson, and a few others (and it still is), but most of us have our own mentors. If you don’t have mentors, you should find some, as you will be wiser for having done it.

19. Take pride in your work: This really is not so far from saying, “avoid alienation from your own labor.” That brief, that presentation, that piece of advice or item of service, is a small part of you that you are conveying. Thus, treat your work with the respect that you deserve.

20. Keep your word. ■





## FACEBOOK AND SOCIAL MEDIA: SOMEONE YOU DON'T EXPECT MAY BE WATCHING

Joseph A. Barker

*NLRB Regional Director—Region 13 (Chicago)\**

The National Labor Relations Board continues to feel its way through the legal implications of employer restrictions upon, interference with, and disciplinary reaction to employee use of social media, including Facebook and Twitter. In the last issue of the ChiRO, I summarized my own thoughts regarding the parameters of the Act's protection of employee activity on social media.

Private employers are not unique in their concern about the use of social media by their employees. Even the Board is wrestling with establishing best practices for its own employees' personal use of social media. The Board wants to ensure that its agents remain sensitive to the need to protect the confidentiality of information obtained from parties and witnesses in Board cases when agents use social media on a personal, rather than a professional, level. Also, the Board wants to avoid any perception of bias or conflict of interest.

In this issue, I will examine the use of social media as an investigative tool by the NLRB. Private employers have used Facebook and other social sites to investigate job applicants and discover information that prospective employees may not have shared, or desire to have shared, with their potential employer regarding their personal interests, political views, and social activities. Nothing under the NLRA prevents an employer from using social media to screen out applicants it may deem undesirable for those reasons, as long as it is not a pretext for discrimination on the basis of union or protected, concerted activity.

Employers are not alone in using social media as an investigative tool. Board agents regularly use information that is available to the public on the Internet, including websites, Facebook pages (as a fan or a friend), blogs, tweets, or LinkedIn pages, when investigating issues regarding interstate commerce for jurisdictional purposes, single employer status, and post-judgment collection actions. A website or other social media venue may be considered public even if it requires registration and/or a password, so long as anyone who registers is granted access and no one is excluded. Although the Board is in the process of developing ethics guidelines in this area, such passive review does not implicate skip counsel rules, even if these sites belong to an organization represented by an attorney and contain case-related information.

In contrast to passive review, Board agents are instructed not to engage in interactive communication on a public website, Facebook page, etc., with an organization, manager, supervisor, or agent of a party that is represented by an attorney due to skip counsel concerns. For example, Board agents should not try to "friend" a supervisor or agent of a party represented by an attorney in order to seek information or ask questions regarding a case under investigation.

However, there is nothing that prevents a Board agent from engaging in interactive communication on a public website or Facebook page that belongs to an unrepresented party or person.

This includes a nonsupervisory third-party witness or employee who is not considered represented by a party's counsel or other counsel. However, Board agents are instructed to avoid deception about their identity or work affiliation in accessing the site or seeking information even in these circumstances.

The restrictions noted above also are applicable to third parties. A Board agent should not ask a third party to do something regarding accessing social media which the agents themselves could not do. However, in the course of investigating a case, if a Board agent learns that an unrepresented party or person has posted information that is relevant to the case on his or her Facebook page, the Board agent may ask a person who has access to the page to do so and provide a copy of the posting, even if the site is not available to the public.

The situation is a little trickier if the party or person is a "represented poster." The Board is still developing guidelines for its Board agents in this area. Currently, if an employee witness references a Facebook page during the course of an investigation in response to a general and/or open-ended question from a Board agent that does not mention social media, the Board agent may accept a copy of the posting if the employee witness has access to the page. An example of such a general question may be how the witness knows a supervisor has union animus. Likewise, a Board agent may ask the witness to access the page and provide a copy of the posting even if it is from a site that is not available to the public and belongs to a supervisor/manager/agent of an entity represented by an attorney.

In contrast, if a witness has not voluntarily referenced a Facebook page in response to a general, open-ended question, a Board agent is not allowed under the proposed guidelines to go on a "fishing expedition" for potential evidence by initiating a conversation with the witness about the probability of a relevant posting by a supervisor or agent. Thus, a Board agent is not to ask a witness who has not referenced a specific posting to look on a site to determine if such evidence exists. These prohibitions are intended to avoid deception about the Board agent's identity and work affiliation in accessing the site and to avoid implicating the skip counsel rule.

Although not finalized at this point, these last set of guidelines do seem at odds with other investigative practices by Board agents involving posting of material or dissemination of information. For instance, if a supervisor posts on a bulletin board or distributes a memo to only a select group of employees in the company, and one of those employees later provides it to a Board agent in response to a specific question, there would seem to be no issue. Likewise, even if a supervisor or manager informs an employee in a one-on-one discussion that this is "off-the-record" or "just between me and you," there is nothing that would prevent that employee from providing that information to the Board. In fact, the Board will accept a surreptitious tape recording of that conversation made by the employee even if it may violate a state law.

Of course, even under the guidelines summarized above, the Board can always issue an investigative subpoena seeking relevant Facebook postings or other social media information without running afoul of skip counsel rules by providing a notice of the subpoena to that party's or person's attorney.

—END NOTE—

- The views expressed are those of the author and do not necessarily reflect the official practice or policy of the National Labor Relations Board or its General Counsel. ■



## **PRO HAC VICE ADMISSIONS IN MICHIGAN ARBITRATIONS**

**Richard A. Hooker, Varnum LLP**

On April 5, 2011, the Michigan Supreme Court issued an Order that Michigan Court Rule 8.126 be amended effective September 1, 2011 to require lawyers from other jurisdictions seek and obtain temporary admission to practice in arbitrations held in Michigan. The essential features of the amended rule are:

- A Michigan lawyer associated with the out-of-state attorney must appear in the arbitration matter and make a motion for temporary admission of the out-of-state attorney to the arbitrator. Granting or denying the motion remains within the discretion of the arbitrator;
- The motion for temporary admission must include a current certificate of good standing issued by the jurisdiction in which the out-of-state attorney is licensed and eligible to practice, copies of any disciplinary dispositions regarding the attorney, and an acknowledgement letter from the State Bar of Michigan indicating the required fee for temporary admission has been paid;
- The motion must also be supported by an affidavit verifying i) the jurisdictions in which the out-of-state attorney is licensed, has been licensed or has sought licensure, ii) the jurisdiction where the attorney is presently licensed, iii) the attorney is not disbarred, suspended or subject to pending disciplinary proceedings, and iv) the attorney is familiar with the Michigan Rules of Professional Conduct, Michigan Court Rules and Michigan Rules of Evidence;
- The Michigan attorney must send a copy of the Motion to the Attorney Grievance Commission, which must then act within seven (7) days to notify the arbitrator whether the out-of-state attorney has been granted temporary admission within the previous one-year period and, if so, how many times; and
- The out-of-state attorney may appear in no more than 5 cases in any 365-day period.

That this amended rule is designed to deal with arbitrations conducted under Michigan law is no surprise; nor is the requirement of *pro hac vice* admission under such circumstances terribly radical. The Rule, however, leaves practitioners and arbitrators with important unanswered questions, including:

- What about arbitrations that occur in Michigan, but are governed entirely by federal law, most particularly labor arbitrations pursuant to collectively bargained agreements? There is no exception made in the Amended Rule; nor is there even a requirement in the Rule that the particular matter involve application of Michigan law.
- What about non-attorney advocates who frequently appear before arbitrators and arbitration tribunals due to their specialized expertise in specific fields? Are they now automatically engaged in the Unauthorized Practice of Law simply because the arbitration takes place within Michigan?
- If the arbitrator simply ignores the Rule's requirements and allows the out-of-state attorney to appear without satisfaction of those requirements, is the arbitrator subject to disciplinary action of any kind? Is the subsequent Award valid? Is that Award subject to attack by the non-prevailing party for the arbitrator's failure to exact compliance?
- If the arbitrator selected by the parties denies the motion for temporary admission, is the parties' obligation to arbitrate their dispute still enforceable?

To date, there has been no clarification forthcoming from the Supreme Court on such questions, so practitioners and arbitrators may be forced to choose between affirmative compliance and acceptance of the risks attendant to waiting for actual decisions by the State Bar and the Attorney Grievance Commission. ■

## **SUPREME COURT CONTINUES TO BROADEN SCOPE OF TITLE VII RETALIATION CLAIMS**

**Marlo Johnson Roebuck  
Jackson Lewis LLP**

Title VII protects employees from retaliation if the employee "has opposed any practice made an unlawful employment practice by [Title VII], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. §2000e-3(a). In addition to protecting an employee who has filed a charge against his employer, the U.S. Supreme Court unanimously reversed the 6th Circuit Court of Appeals' grant of summary judgment to an employer, and has ruled that Title VII also protects an employee from retaliation if the employee's fiancé filed a charge against their mutual employer. *Thompson v. North American Stainless*, No. 09-291 (Jan. 24, 2011).

In *Thompson*, the plaintiff's fiancé filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging that her supervisors discriminated against her because of her gender. The plaintiff, who worked for the same company, was discharged about three weeks after the company learned of his fiancé's charge. *North American Stainless* ("NAS") maintained that the plaintiff was discharged for poor performance not related to his fiancé's charge.

The trial court granted summary judgment to NAS. The 6th Circuit, which is comprised of Kentucky, Michigan, Ohio, and Tennessee, initially reversed the trial court, but then affirmed en banc. The U.S. Supreme Court reversed, after noting that because of the procedural posture of the case (i.e., dispositive motion pre-trial), it was required to assume that NAS fired Thompson in order to retaliate against his fiancé. The Court then provided two key reasons for its decision.

First, the Court concluded that Thompson's claim fell within the purview of Title VII because "Title VII's anti-retaliation provision prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" The Court found "it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."

Second, the Court concluded that Thompson had standing to sue because he fell within the "zone of interests" of individuals protected by Title VII because he was an employee of NAS, and injuring him was NAS's intended means of harming his fiancé.

Recognizing that opening up Title VII claims to third parties "will lead to difficult line drawing problems concerning the types of relationships entitled to protections," the Court offered:

We expect that firing a close family member will almost always meet the Burlington standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize.

Because the EEOC received more retaliation charges in its fiscal year 2010 than any other type of charge, Thompson reminds employers that discriminatory comments and actions are prohibited against those who file charges and those who are closely related to employees who file charges. Clear anti-retaliation policies and regular training are fundamental in today's evolving workplace. ■



### Labor and Employment Law Section

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The Michael Franck Building  
306 Townsend Street  
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- FLSA, Title VII, healthcare, and medical marijuana are addressed by Chris Trebilcock, Marlo Roebuck, and Catherine Derthick. Bob Ludolph and Amanda Shelton look at ADA regulations.
- Chuck Szymanski offers lessons — or cautionary tales — from Polish and Lithuanian labor and employment law.
- 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 James Amar, Joseph A. Barker, Regan Dahle, Catherine Derthick, Carey DeWitt, Scott Eldridge, Barry Goldman, Richard A. Hooker, Lee Hornberger, Stuart M. Israel, Maurice Kelman, Robert C. Ludolph, D. Lynn Morison, Marlo Johnson Roebuck, Amanda J. Shelton, Charles Szymanski and Christopher M. Trebilcock.

