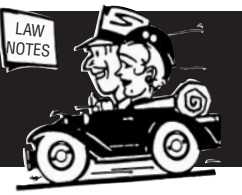
LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES



Volume 24, No. 2 Summer 2014

THE STATE OF THE "MARKET DEFENSE" IN PAY DISCRIMINATION CASES

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Congress enacted the Equal Pay Act of 1963 ("EPA")[1] to dispel the "outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."[2] More than 50 years after its enactment, women working full time in the United States earn on average 77 cents for every dollar earned by men.[3] Even controlling for "choice" factors such as education and hours worked, much of the gender wage gap remains unexplained.[4] Although wage disparities today are more likely the result of benign assumptions and unconscious bias rather than malicious discrimination, the consequences are no less harmful, and President Obama has made narrowing the gender divide a strategic priority. At the center of the policy debate is whether the free market is the proper tool for eliminating wage discrimination or whether legislative intervention is needed. This article provides an overview of the EPA, discusses the "market defense" in pay discrimination cases, and analyzes the anticipated effect of proposed legislation.

I. OVERVIEW OF THE EQUAL PAY ACT

To state a prima facie case under the EPA, a plaintiff (usually female) must show that her employer pays her less than it pays a male employee "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[5] Once a plaintiff establishes a prima facie case, the burden shifts to the employer to justify the pay differential under one of the EPA's four affirmative defenses. The employer must demonstrate that the pay differential "is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[6]

Pay discrimination claims may also be brought under Title VII of the Civil Rights Act of 1963,[7] but the statutory frameworks of the two statutes differ significantly. Plaintiffs alleging pay discrimination under Title VII are often limited to disparate treatment analysis, for which they must establish discriminatory intent.[8] By contrast, the EPA is a strict liability statute—no showing of discriminatory intent is necessary.[9] Another key distinction between the statutes relates to their contrasting burden frameworks. Title VII claims proceed under the three-step burden-shifting framework of *McDonnell Douglas v. Green*,[10] under which an employer rebuts a prima facie case of discrimination by articulating a legitimate, non-discriminatory reason for the adverse employment action. The plaintiff then has an opportunity to show that the employer's articulated reason is a pretext for discrimination, and the plaintiff must ultimately persuade the trier of fact that she was the victim of intentional discrimination.[11] By contrast, EPA claims proceed under a two-step burden process, under which overcoming a prima facie case requires an employer to establish an affirmative defense and ultimately persuade the trier of fact.[12]

II. THE MARKET DEFENSE

Under the EPA, the "factor other than sex" defense has emerged as a topic of controversy when employers attribute wage disparities to the "market." The "market defense" comes in several forms, and distinguishing among them is important. In one version of the defense, employers attempt to justify a wage disparity for the reason that women as a class will work for less pay than men as a class, a factor which they contend is based on supply and demand principles, not sex. Courts have flatly rejected this theory. In *Corning Glass Works v. Brennan*, the United States Supreme Court refused to allow an employer to blindly perpetuate a wage disparity that "arose simply because men would not work at the low rates paid women,"[13] and lower courts have followed suit.[14] Accordingly, employers cannot justify pay disparities based on broad market assumptions about men and women as entire classes.

In another version of the defense, employers argue that the market demand for a particular male employee justifies paying him more than a particular female employee performing equal work based on their comparative prior salaries, competing offers of employment, and salary negotiation. For example, an employer may defend paying a male employee more than a female employee because he was making more money in his previous job. Similarly, an employer may argue that it gave a male employee a raise (but did not give a raise to a female employee performing equal work) because the male employee threatened to accept an offer for a higher paying position at another company. Third, an employer may argue that a male employee who demanded more pay when negotiating his salary should be paid more than a female employee performing equal work who did not demand more pay (or who was less successful in her negotiations). Courts often deem pay disparities based on these individualized market factors lawful.

A. Prior Salary

In a typical case involving prior salary, *Wernsing v. Department of Human Services*, the plaintiff stated a prima facie case of wage discrimination because she and a male co-worker performing equal work received disparate starting monthly salaries ($2,478 compared to $3,739).[15] The wages were set pursuant to the company's policy of "giv[ing] lateral entrants a salary at least equal to what they had been earning" previously, which the employer argued was a "factor other than sex."[16] The court accepted the employer's defense. According to the court, "women's market wages will be lower on average," and although acknowledging the possibility that prior salaries may themselves be

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STATEMENT OF EDITORIAL POLICY

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

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

THE STATE OF THE "MARKET DEFENSE" IN PAY DISCRIMINATION CASES

(Continued from page 1)

discriminatory, "this is something to be proved rather than assumed."[17] Without any evidence from the plaintiff to support the possibility that the prior salaries were discriminatory, the court affirmed the lower court's grant of summary judgment in favor of the employer.[18]

On the other hand, some courts closely scrutinize an employer's reliance on prior salary to ensure that the market is not used "as a vehicle to perpetuate historically unequal wages caused by past discrimination."[19] Other courts go one step further, permitting the defense only if prior salary is considered along with other gender-neutral factors.[20] Nonetheless, this market defense is generally accepted.

B. Competing Offers

The same is true for competing offers of employment. In *Glunt v. GES Exposition Services, Inc*., after the plaintiff established a prima facie case of wage discrimination, the employer defended its decision to give a male employee performing substantially equal work a higher salary, in part, based on "its need to draw him from a competitor."[21] According to the court, "[o]ffering a higher salary in order to induce a candidate to accept the employer's offer over competing offers has been recognized as a valid factor other than sex justifying a wage disparity."[22] Other courts addressing the issue are in agreement, reasoning that the practice of salary matching to lure new employees or retain existing workers is a legitimate business tactic.[23]

C. Salary Negotiation

In *Horner v. Mary Institute*, considered the leading case on salary negotiation, the court accepted the employer's defense that it paid a male physical education instructor more than a female physical education instructor (performing the exact same job) because the male instructor demanded more pay and was unwilling to work for less.[24] The court agreed, finding negotiation to be a "factor other than sex."[25] Cases following *Horner* bear out similar results, signaling to employers that pay differentials that result from salary negotiation will withstand judicial scrutiny.[26]

III. THE PAYCHECK FAIRNESS ACT

Introduced to Congress on January 23, 2013, the Paycheck Fairness Act ("PFA") states that "artificial barriers to the elimination of discrimination in the payment of wages on the basis of sex continue to exist," and "the Equal Pay Act has not worked as Congress originally intended."[27] Accordingly, the PFA proposes several modifications to the statute. Perhaps most significantly, the PFA would vastly narrow the fourth affirmative defense by replacing the language "factor other than sex" with "a bona fide factor other than sex, such as education, training, or experience."[28] If enacted, defending a wage disparity based on a "bona fide factor other than sex" would require an employer to demonstrate that the factor is both "job-related" and "consistent with business necessity," and even then, the "defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose with-

out producing such differential."[29]

The likely effect of narrowing the fourth affirmative defense is the near elimination of the market defense. Individualized market factors such as prior salary, competing offers, and salary negotiation do not fit well with the enumerated list of bona fide factors—"education, training, or experience." Nor are they likely to be considered "job-related" and "consistent with business necessity." Job-related suggests having some relation to the skills, knowledge, or ability required for the position in question. With regard to prior salary and competing offers, what another employer has offered or previously paid an employee for a different job is not directly related to that individual's skills, knowledge, or ability to perform the job in question. To show "business necessity," an employer would likely need to show that there is no other equally qualified applicant or employee who is willing to work at the going rate. And although a practice of matching prior salaries and competing offers to lure and retain skilled workers may in some cases qualify as "necessary," an employer would have a difficult time explaining why it could not raise the salaries of other employees performing equal work.

"Pay Equity"

In most cases, salary negotiation likewise has no direct relation to the skills, knowledge, or ability required for a job. Certainly, there are exceptions in which negotiation skill is a legitimate job requirement, and it could be argued that an employee's ability to successfully negotiate his or her own salary is a good proxy for negotiation skill in general. But even in those cases, an employee would have an opportunity to demonstrate that relying on salary negotiation as a proxy for negotiation skill in general is not consistent with business necessity because "an alternative employment practice exists that would serve the same business purpose without producing such differential."[30] An employee could propose, as an alternative, that negotiation skill be measured more directly because, especially for women, the ability to negotiate on one's own behalf is not an accurate measure of the ability to negotiate on behalf of others.[31] Studies show that, although women have difficulty with self-promotion, they can be extremely effective when negotiating to promote the interests of others.[32]

IV. CONCLUSION

For the time being, relying on individualized market factors is largely permitted. But change may be on the horizon. President Obama has made pay equity an important item on his agenda, and proposed legislation could require employers to reevaluate their wage-setting practices.

— END NOTES —

1 29 U.S.C. § 206(d)(1).

2 *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (internal quotation marks omitted).

3 Ariane Hegewisch et al., *The Gender Wage Gap 2013: Differences by Race and Ethnicity, No Growth in Real Wages for Women*, Institute for Women's Policy Research (March 2014).

4 Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceilin*g, 63 SMU L. Rev. 17, 27 (2010).

5 29 U.S.C. § 206(d)(1).

6 *Id.*

7 42 U.S.C. § 2000e-2.

8 *See AFSCME v. Washington*, 770 F.2d 1401, 1406 (9th Cir. 1985).

9 *Bauer v. Curators of Univ. of Missouri*, 680 F.3d 1043, 1045 (8th Cir. 2012).

10 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973).

11 *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

12 *Stanziale v. Jargowsky*, 200 F.3d 101, 107 (3d Cir. 2000).

13 *Corning Glass*, 417 U.S. at 205.

14 *See, e.g., Taylor v. White*, 321 F.3d 710, 718 (8th Cir. 2003); *Brennan v. City Stores, Inc*., 479 F.2d 235, 241 n.12 (5th Cir. 1973).

15 *Wernsing v. DHS*, 427 F.3d 466, 467 (7th Cir. 2005).

16 *Id.*

17 *Id*. at 470.

18 *Id*. at 470-471.

19 *Taylor*, 321 F.3d at 718.

20 *Balmer v. HCA, Inc*., 423 F.3d 606, 613 (6th Cir. 2005); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995).

21 *Glunt v. GES Exposition Servs., Inc*., 123 F. Supp. 2d 847, 859 (D. Md. 2000).

22 *Id.*

23 *See, e.g., Winkes v. Brown Univ*., 747 F.2d 792 (1st Cir. 1984); *Foco v. Freudenberg-NOK Gen. P'ship*, 892 F. Supp. 2d 871, 878-79 (E.D. Mich. 2012).

24 *Horner v. Mary Inst*., 613 F.2d 706, 709-10 (8th Cir. 1980).

25 *Id*. at 714.

26 *See, e.g., McHenry v. One Beacon Ins. Co.,* 2005 U.S. Dist. LEXIS 46573, at *36 (E.D.N.Y. Aug. 29, 2005); *McNierney v. McGraw-Hill, Inc*., 919 F. Supp. 853, 860 (D. Md. 1995).

27 Paycheck Fairness Act, § 2(4), available at http://www.govtrack.us/congress/bills/113/s84.

28 *Id*. at § 3(a)(2).

29 *Id*. at § 3(a)(3).

30 *Id.*

31 *See* Nicole Buonocore Porter & Jessica R. Vartanian, *Debunking the Market Myth in Pay Discrimination Cases*, 12 Geo. J. Gender & L. 159, 200 (2011).

32 *See* Linda Babcock & Sara Laschever, *Women Don't Ask: Negotiation and the Gender Divide* 154-57 (2003). ■

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

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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.

"OPPOSITION" RETALIATION UNDER TITLE VII: THE SUPREME COURT DECLINES TO RESOLVE THE QUESTION OF TO WHOM AN EMPLOYEE MUST CONVEY COMPLAINTS OF DISCRIMINATION

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Title VII of the Civil Right Act, 42 U.S.C. § 2000e *et seq*., proscribes employer retaliation against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." § 2000e-3(a). Though the United States Supreme Court has addressed the necessary content of an employee's statement of opposition to an unlawful employment practice in order for Title VII protection to apply, a Circuit Court split remains as to the question of how and to whom opposition speech must be conveyed.

Prior Supreme Court Ruling

In *Crawford v. Metropolitan Government of Nashville & Davidson County*, 555 U.S. 271 (2009), the Supreme Court addressed the scope of the anti-retaliation provision of Title VII as it applied to the content of statements made by the fired employee. In *Crawford*, the plaintiff, a school district employee, and two of her coworkers alleged that they were sexually harassed by their boss, the school district's employee relations director. After investigating the allegations, the school district fired the plaintiff and her two coworkers, claiming alternative reasons for the firings.

The plaintiff filed a charge with the Equal Employment Opportunity Commission, alleging that she was fired in retaliation for her opposition to the harassment, in violation of Title VII. Subsequently, she filed suit in federal court. The District Court granted summary judgment for the defendant, holding that the plaintiff could not satisfy the opposition clause of Title VII because she had not "instigated or initiated any complaint, but had merely answered questions by investigators in an already-pending internal investigation, initiated by someone else."[1] The United States Court of Appeals for the Sixth Circuit affirmed the trial court's grant of summary judgment in the defendant's favor on the same ground, holding that the "opposition clause" of Title VII "demands active, consistent 'opposing' activities to warrant . . . protection against retaliation."[2]

The Supreme Court granted certiorari and subsequently reversed the grant of summary judgment. The Court found that Title VII did not define "oppose," and therefore, looked to the dictionary definition. *Webster's* defined "oppose" as "to resist or antagonize . . . ; to contend against; to confront; resist; withstand."[3] The Supreme Court found that the plaintiff's description of her boss's inappropriate behavior to the internal investigators would certainly qualify in the minds of reasonable jurors as resistant or antagonistic to such behavior. This was sufficient to show "opposition" under Title VII.

In a separate concurrence, Justice Alito agreed that the opposition clause of Title VII prohibits employer retaliation against an employee who testifies in an internal investigation of alleged sexual harassment. Justice Alito wrote separately, however, to declare his opinion that such protection "should not extend beyond employees who testify in internal investigations or engage in analogous purposeful conduct."[4] Justice Alito cautioned that an interpretation of the opposition clause that protected conduct that was not active and purposive could open the door to retaliation claims by employees who never expressed a word of opposition to their employers. Justice Alito concluded by noting that the question of whether the opposition clause protected employees who never communicated their views to their employers through active conduct was not before the Court, and therefore, not decided. It is this very question that has remained and caused a split in the Circuit Courts.

Federal Circuit Split

In the wake of the Supreme Court's opinion in *Crawford*, the federal Circuit Courts were left to determine whether Title VII protected statements made by an employee to persons other than his or her employer. Though the Supreme Court had clarified the scope of Title VII protection in regard to the "content" of the employee opposition speech, the question of the required "context" or recipient of the employee opposition speech remained.

On one hand, the First, Second, Third, Fifth, Sixth, and Ninth Circuits have all held that the anti-retaliation provision of Title VII applies to statements made by an employee to persons other than his or her employer. In arguably the broadest interpretation of protection, the Second Circuit has held that Title VII protects employees' actions "protesting against discrimination by industry or by society in general."[5] The Sixth Circuit has held that "an employee may complain about discrimination to anyone,"[6] and that "the complaint may be made by anyone and it may be made to a co-worker, newspaper reporter, or anyone else about alleged discrimination against oneself or others."[7] In another case, the Sixth Circuit reiterated that the only limitations on the scope of the opposition clause are that "the manner of opposition must be reasonable, and . . . the opposition [must] be based on a reasonable and good faith belief that the opposed practices were unlawful."[8]

On the other side of the split, the Fourth and Tenth Circuits have held that the opposition clause of Title VII does not protect statements made by an employee to persons other than his or her employer.[9] In particular, the Fourth Circuit has held that Title VII only protects informal complaints in the context of a retaliation claim, "when they are made by the employee to *the employer*."[10]

In one of the most recent federal appellate decisions on this issue, *DeBord v. Mercy Health System of Kansas, Inc*., the plaintiff contended that shortly after she was hired by the defendant, her supervisor began regularly placing his hands down the back of her shirt, making offensive sexual comments, and using sexually suggestive language when the plaintiff wore certain items of clothing. One day during work, the plaintiff wrote several

Facebook posts that claimed her supervisor (1) had paid her money for hours she did not work, (2) was a "snake," and (3) needed to keep his "creapy [sic] hands" to himself. The Tenth Circuit found that the Facebook posts were insufficient to establish "opposition" under Title VII because these posts, by themselves, did not provide any notice of workplace harassment to the defendant.

Recent Petition for Writ of Certiorari

In a recent petition for certiorari from the Tenth Circuit, the plaintiff in *DeBord* posed the question presented as follows:

"Does section 704(a) prohibit retaliation against a worker because of the worker's statements:

(1) only when the statements are made to the worker's own employer or to federal or state anti-discrimination agencies (the rule in the Tenth and Fourth Circuits), or

(2) also when the worker's statements are made to any other person (the rule in the First, Second, Third, Fifth, Sixth, and Ninth Circuits)?"[11]

Unfortunately, the Supreme Court recently denied certiorari in this case, and the question remains: to whom must the employee's "opposition" be conveyed in order for Title VII anti-retaliation protection to apply? Despite the Supreme Court's recent willingness to address issues involving Title VII interpretation, the Court's reluctance to address this question may lead to further disparity in employment decisions depending upon the federal jurisdiction in which an employee plaintiff lives and works—in 2014 alone, over 300 federal cases involving section 2000e-3 have been decided. That said, given Justice Alito's previous concurrence in *Crawford* and the Supreme Court's recent string of decisions narrowly interpreting Title VII protections,[12] employment plaintiffs may be relieved that the Court has declined to address the issue at this time.

— END NOTES —

The views expressed in this article are those of the author, and do not necessarily reflect the views of the court by which he is employed.

1 *Crawford,* 555 U.S. at 275 (internal quotation marks omitted).

2 *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., TN,* 211 F. App'x 373, 375 (6th Cir. 2006).

3 *Crawford,* 555 U.S. at 275 (quoting *Webster's New International Dictionary* 1710 (2d ed. 1958)).

4 *Crawford,* 555 U.S. at 281 (Alito, J., concurring).

5 *Sumner v. United States Postal Serv.,* 899 F.3d 203, 209 (2d Cir. 1990).

6 *Fields v. Fairfield Cnty. Bd. of Developmental Disabilities,* 507 App'x 549, 556 (6th Cir. 2012).

7 *Johnson v. Univ. of Cincinnati,* 215 F.3d 561, 580 (6th Cir. 2000).

8 *Jackson v. Bd. of Educ. of Memphis City Sch. of Memphis, Tenn.,* 494 F. App'x 539, 544 (6th Cir. 2012).

9 *See Debord v. Mercy Health Sys. of Kan., Inc.,* 737 F.3d 6421 (10th Cir. 2013); *Pitrolo v. County of Buncombe, N.C.*, 2009 WL 1010634; 105 Fair Empl. Prac. Cas. (BNA) 1675 (4th Cir. 2009). Though *Pitrolo* was not a published opinion, and therefore is not binding precedent in the Fourth Circuit, it has been cited for this exact proposition by the district courts of that jurisdiction. *See, e.g.*, *DeMasters v. Carillion Clinic*, 2013 WL 527 4505 (W.D. Va. 2013).

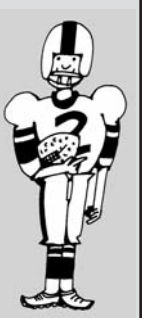
10 *Pitrolo,* 2009 WL 1010634 at *3 (emphasis added).

11 Petition for Writ of Certiorari at i, *DeBord v. Mercy Health Sys. of Kan.,* No. 13-0118 (10th Cir. Mar. 13, 2014).

12 *See, e.g., Vance v. Ball State Univ.,* 133 S. Ct. 2434 (2013); *Univ. of Texas. Sw. Med. Ctr. v. Nassar,* 133 S. Ct. 2517 (20`13). ■

THE NORTHWESTERN FOOTBALL CASE AND *LAWNOTES*

John G. Adam
Legghio & Israel, P.C.



In a historic decision, the Chicago NLRB Regional Director ruled in March 2014 that Northwestern University scholarship football players are "employees" within the meaning of the National Labor Relations Act. The Regional Director ruled that the players had a right to a representation election. *Northwestern University and College Athletes Players Association (CAPA)*, 198 LRRM 1837, 2014 WL 1246914 (03/26/2014).

The NLRB Region conducted the secret-ballot election on April 25. As the Board in Washington, D.C. granted review of the Regional Director's decision, the ballots were impounded. *Northwestern*, 2014 WL 1653118 (04/24/2014). If and when the Regional Director is upheld by the Board, the ballots will be counted.

You likely have heard and read the expansive media coverage of the case. It includes cries from certain quarters that the Regional Director's ruling signals the demise of Western Civilization. What you may not know about, however, is the *Lawnotes* connection to the case.

Lawnotes editor Stuart M. Israel helped design the game plan and developed some great plays. I, *Lawnotes* associate editor John Adam, was the "quarterback" of the great legal team that represented the College Athletes Players Association at the NLRB hearings in Chicago. Whatever Israel says, I categorically deny that I requested that my *Lawnotes* title be changed from associate editor to "Johnny Football."

Lawnotes is not new to the intersection of labor law and college football. Bob and Amy McCormick, law professors at MSU, home of the 2014 Rose Bowl champion Spartans, laid out a legal basis for such a ruling more than seven years ago in the pages of this journal as well as in other publications.

Lawnotes featured Bob's groundbreaking views in a cover article in 2007. Robert A. McCormick, "Are College Athletes Employees?" Vol. 16, No. 4 *Labor and Employment Lawnotes* 1 (Winter 2007). Bob's article was a condensed version of Robert A. McCormick and Amy McCormick, "The Myth of the Student-Athlete: The College Athlete as Employee," 81 Wash. L. Rev. 71 (2006). Back then the professors McCormick opined that NCAA-regulated athletes in Division I revenue-generating sports are employees.

"Green 81. Green 81. Hut-Hut." Sorry. Anyway, as the Northwestern case is pending at the Board in Washington, we will not now dance in the end zone. Nor are we at liberty now to give a play-by-play account of the case. We must punt when it comes to the details. Instead, we direct you to the NLRB web site where you can instantly replay the briefs and Regional Director's decision. www.nlrb.gov/case/13-RC-121359. Reading the briefs is almost as exciting as a Division I football game, and there is no risk of getting a concussion. BYOB.

Finally, we expect that some *Lawnotes* readers are of the demise-of-Western-Civilization viewpoint. Everyone is entitled to an opinion, even those of "the sky is falling" school who formulated their opinions while banging their heads on the locker-room wall without a helmet. So express your opinions. Preferably, you will express any negative views regarding unionized athletes in strong letters to the NCAA or Donald Sterling or the Lions' defense. *Lawnotes* reports, you decide. Or the Board decides. Or maybe the Supreme Court decides. ■

APPELLATE REVIEW OF MERC CASES

D. Lynn Morison
Michigan Bureau of Employment Relations

I. WAYNE COUNTY –AND– AFSCME COUNCIL 25
(Court of Appeals No. 303672, issued February 13, 2014; MERC Case No. C10 A-024, issued March 29, 2011, 24 MPER 25)

In an unpublished opinion, the Court of Appeals affirmed MERC's finding that Wayne County violated §10(1)(e) of PERA.

The parties' collective bargaining agreement expired in 2008. Fact-finding proceedings had been pending since September 1, 2009, and were pending as of January 22, 2010, when the County informed employees that they would be laid off for one day each week. On summary disposition, the ALJ found that the County violated its duty to bargain by unilaterally reducing, from five to four, the number of days in the workweek. On exceptions by the County, MERC found no merit to the County's arguments that the ALJ had been biased and made procedural errors. MERC affirmed the ALJ's decision.

On appeal, the County argued that MERC erred in finding that its one day per week "lay off" of employees was a breach of its duty to bargain. The County contended that the matter involved a good faith dispute over contract interpretation, not an unfair labor practice. It argued that the employer possesses the exclusive right to manage the affairs of the County, which includes the right to select the manner in which employees are laid off. Therefore, the County argued, these layoffs were not a mandatory subject of bargaining. However, the Court majority agreed with MERC that the County did not lay off employees; the County merely shortened their workweek. The parties' collective bargaining agreement defines "layoff" as "a separation from employment as the result of lack of work or lack of funds." The County claimed that a budget crisis allowed it to lay off employees under this definition. MERC concluded that a "separation from employment" requires the termination of the contractual relationship. Here, there was no true separation from employment. Employees retained their positions but their hours were reduced. Although the County's management retained the ability to implement layoffs, it lacked the authority to cut employees' hours in violation of the collective bargaining agreement.

After a collective bargaining agreement expires, neither party may unilaterally alter terms or conditions of employment, unless the parties have reached an impasse in their negotiations for a new contract and have not begun the fact finding process. An employer that takes unilateral action on a mandatory subject of bargaining prior to impasse or while in fact finding commits an unfair labor practice. In this case, the parties had reached impasse, but had agreed to commence fact finding before the County took action to reduce the workweek. Thus, the Court majority held that MERC did not err in finding that the County committed an unfair labor practice.

On appeal, the County contended that the ALJ had improperly required it to affirmatively prove that it had not committed an unfair labor practice. After reviewing the pleadings, the ALJ concluded that the undisputed material facts supported the union's contention that the County committed an unfair labor practice. The ALJ issued a show cause order requiring the County to assert facts and legal arguments supporting its contention that it had not breached its duty to bargain when it reduced the workweek from five days to four. The ALJ cautioned the County that if its response to the order did not assert and factually support-a valid defense, a decision recommending partial summary disposition would be issued without a hearing or other proceedings. The Court held that this did not shift the burden of proof – the show cause order merely advised the County that the union had satisfied its burden of proof and invited the County to put forth a contradictory view. The County also argued that it was not given the opportunity to present oral argument on the issue of summary disposition. MERC's rules provide that parties must request oral argument. The County did not request oral argument, and it was not precluded from requesting oral argument. MERC did not deny the County the opportunity for oral argument. Thus, there was no procedural error. The County further claimed error resulted from the ALJ's failure to decide its motion for disqualification. The Court majority found that MERC correctly determined that it would not have been necessary for the ALJ to recuse himself. The County's argument that the ALJ was biased is, essentially, that the ALJ made procedural errors and reached the incorrect conclusion. This is not enough to establish bias. Even erroneous adverse rulings against a party do not establish bias.

The opinion by the concurring member of the Court focused on the specific language of the collective bargaining agreement that stated that the workweek consists of five eight-hour days. That provision was not the issue at impasse, and the union did not make a clear and unmistakable waiver of the provision. Although a broader provision allowed the County to manage the affairs of the employer, the County's action was in clear violation of the more specific provision that unambiguously provided the standard for a workweek. The wording in the narrower provision in the collective bargaining agreement precludes the County's reliance on the broader provision in support of its action of reducing the workweek. The concurring member of the Court noted that even as a matter of contract interpretation, the County could not have laid off the employees for one day each week without breaching the contract.

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II. MOUNT PLEASANT PUBLIC SCHOOLS–AND-MICHIGAN AFSCME COUNCIL 25, AFL-CIO AND ITS AFFILIATED LOCAL 2310, AND LAKEVIEW COMMUNITY SCHOOLS-AND-LAKEVIEW EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION/MEA/NEA

(Court of Appeals Nos. 304326 and 304342, issued October 15, 2013, MERC Case Nos. C10 C-059 and C10 E-104; issued May 11, 2011; 25 MPER 37)

The Court of Appeals affirmed MERC's dismissal of unfair labor practice charges alleging that the respondents violated their duty to bargain when they refused to bargain over procedures for bidding on the subcontracting of noninstructional support services pursuant to section 15(3)(f) of PERA, MCL 423.215(3)(f).

On March 15, 2010, Mt. Pleasant Public Schools (Mt. Pleasant) issued a request for proposal (RFP) for professional cleaning services for many of the locations within the district, including those already staffed by AFSCME Local 2310 members. AFSCME demanded to negotiate over the bidding procedure, but Mt. Pleasant denied its request. Consequently, AFSCME filed a charge against Mt. Pleasant alleging that it violated its duty to bargain under PERA by denying AFSCME an equal opportunity to bid on professional cleaning services. On January 22, 2010, Lakeview Community Schools (Lakeview) provided prospective bidders with an RFP to notify them that it was seeking bids for student transportation services. On January 25, 2010, LESPA submitted a demand to bargain on the bidding-process terms, which Lakeview declined. LESPA then submitted a "renewed" demand to bargain over the bidding-process terms, as well as a demand to bargain over the decision to subcontract and the effects of subcontracting transportation. Lakeview also declined these requests. Consequently, LESPA filed a charge against Lakeview alleging that Lakeview violated PERA in that it denied LESPA the opportunity to bid on a transportation contract on an equal basis as other bidders, and refused to bargain.

After holding a hearing in which both cases were consolidated, the ALJ recommended dismissal of the charges. MERC affirmed the ALJ's Decision and Recommended Order on exceptions.

On appeal, the charging parties argued that MERC: (1) misinterpreted Section 15(3)(f); (2) erroneously shifted the burden of proof to the charging parties to demonstrate that they were not provided with an equal opportunity to bid; and (3) failed to support its findings with substantial evidence. In addition, AFSCME argued that MERC erroneously denied its motion to reopen the record.

The Court of Appeals found that the plain language of section 15(3)(f) prohibits collective bargaining over four subjects: (1) the decision to contract, (2) the procedures for obtaining the contract, (3) the identity of the third party, and (4) the impact of the contract. The Court, however, further noted that if the bargaining unit is not allowed an opportunity to bid on an equal basis, then those four subjects are no longer prohibited from collective bargaining. If, on the other hand, the bargaining unit is given an opportunity to bid on an equal basis, then there can be no bargaining over the four subjects.

The charging parties argued that MERC erroneously shifted the burden of proof to them to prove that they were not provided with an opportunity to bid on an equal basis as the other bidders. However, the Court disagreed, noting that it was not sufficient for the charging parties to merely allege that they were not afforded an opportunity to bid on an equal basis. Indeed, the charging parties were obligated to provide the factual allegations necessary to establish their claim. Consequently, the Court held that MERC did not err by requiring the charging parties to establish that they were denied an equal bidding opportunity.

The Court found that substantial evidence supported MERC's findings that the statute does not require a public school employer to provide an RFP "that is designed for response by a bargaining unit or a labor organization" and that a bargaining unit will often have to "act in the manner of" a third-party contractor when bidding pursuant to an RFP seeking bids for noninstructional support services. Similarly, the Court found sufficient evidence to support MERC's conclusion that charging parties could not complain that they were not provided with an opportunity to bid on equal basis because neither charging party submitted a proper bid. The Court also rejected AFSCME's argument that MERC erroneously denied its motion to reopen the record. The Court found that MERC's decision regarding whether to reopen the record was discretionary, and that MERC did not abuse its discretion in denying AFSCME's motion.

These cases are currently before the Michigan Supreme Court on applications for leave to appeal.

III. DETROIT PUBLIC SCHOOLS –AND- TEAMSTERS LOCAL 214 –AND- DENICE GREER AND 194 MEMBERS OF TEAMSTERS LOCAL 214,

***(*Court of Appeals No. 311218, issued October15, 2013; MERC Case Nos. C07 K-252; Decision issued April 17, 2012, 25 MPER 77; Order Denying Reconsideration issued June 25, 2012, 26 MPER 12)**

In an unpublished opinion, the Court of Appeals affirmed MERC's denial of the Appellants' motion to intervene and file exceptions to an ALJ's Decision and Recommended Order on an unfair labor practice charge filed by Teamsters Local 214 (union) against Detroit Public Schools (employer). The motion and proposed exceptions were filed by an individual, Denice Greer, on behalf of herself and other members of the bargaining unit represented by the union. MERC concluded that Greer had no right to intervene because the duty to bargain in good faith is between the union and the employer, not the employer and the individual employees.

The unfair labor practice charge by Teamsters Local 214 alleged that the employer violated PERA by making a unilateral change to terms and conditions of employment, when, in July of 2007, it failed to pay wages at the rates required by the parties' collective bargaining agreement. In May 2005, the union and the employer had agreed to a 5.71 percent wage reduction, which was to expire on June 30, 2007. They agreed to negotiate further on the issue of wages for the period beginning July 1, 2007 and also agreed that wages would be restored to their pre-concession level effective July 1, 2007 if they did not reach an agreement regarding concessions by June 30, 2007. The parties failed to reach a new agreement by June 30, but the employer continued to apply the 5.71 percent wage concessions after that date. Subsequently, the union filed the unfair labor charge with MERC alleging that the employer's unilateral decision to continue the wage concessions after July 1, 2007 violated PERA. The employer ended the 5.71 percent wage concession as of January 15, 2008. On February 15, 2008, the employer made a proposal that incorporated a 1.2 percent wage concession that had previously been proposed by the union. When the union failed to respond to that proposal, the employer declared that they were at impasse and implemented the 1.2 percent wage concession.

The ALJ found that the employer's failure to restore the proper wage rate on July 1, 2007, was both a unilateral change in wages and a repudiation of an undisputed provision of the collective bargaining agreement in violation of the duty to bargain. However, the ALJ also concluded that the employer acted properly when it declared an impasse and implemented the 1.2 percent

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wage concession. Neither party filed exceptions to the proposed order. On June 13, 2011, Denise Greer on behalf of herself and 194 members of the union filed a motion with MERC seeking to intervene in the matter between the union and the employer and to file exceptions to the ALJ's Decision and Recommended Order. Greer claimed that the union breached its duty of fair representation by agreeing to extend the 5.71 percent wage concession through June 30, 2007 without properly obtaining ratification by the Union's members. Subsequently, MERC denied the motion to intervene and, in the absence of exceptions by the parties, adopted the ALJ's Recommended Order.

On appeal to the Court of Appeals, Greer argued that MERC abused its discretion by denying the motion to intervene. The Court explained that intervention in a matter before MERC is controlled by Commission Rules, which limit intervention to "persons having such an interest in the subject of the action that their presence in the action is essential to permit the commission to render complete relief." The Court observed that the duty to bargain runs exclusively between the employer and the union. An individual employee cannot assert the claims of his or her union. Since the union represented Greer and the other union members before MERC, their presence was not essential for MERC to render relief. Thus, the Court agreed that Greer had no right to pursue an unfair labor practice charge against the employer. The Court further agreed with MERC's finding that Greer's claim that the union violated its duty of fair representation should have been pursued in a separate action.

***MACOMB COUNTY, MACOMB COUNTY ROAD COMMISSION, AND 16TH JUDICIAL CIRCUIT COURT –AND- AFSCME COUNCIL 25, LOCALS 411 AND 893, INTERNATIONAL UNION UAW LOCALS 412 AND 889, AND MICHIGAN NURSES ASSOCIATION*,**

(Supreme Court No. 144303, issued June 12, 2013; Court of Appeals No. 296416, issued September 20, 2011; MERC Case Nos. C07 D-083, C07 D-086, C07 D-087, C07 D-086 and C07 E-115; issued November 24, 2009; 22 MPER 102).

The Supreme Court reversed the decision of the Court of Appeals and remanded to MERC for dismissal of unfair labor practice charges alleging that the respondents violated their duty to bargain when, without bargaining, they changed the method used to calculate joint and survivor benefits under the parties' collective bargaining agreements.

AFSCME Council 25 Locals 411 and 893, the International Union UAW Locals 412 and 889, and the Michigan Nurses Association filed unfair labor practice charges against Macomb County, the Macomb County Road Commission, and the 16th Judicial Circuit Court. Their charges asserted that by changing the method for calculating pension benefits, the respondents had lowered pension benefits without bargaining on the issue as required by the Public Employment Relations Act (PERA). The parties' collective bargaining agreements provided employees with various pension-plan options, including one in which payments terminated at the death of the employee (straight-life pension) and another in which pension benefits continued until the death of both the employee and his or her beneficiary (joint-and-survivor pension). A Macomb County Retirement Ordinance mandated that the optional joint-and-survivor benefit be the actuarial equivalent of the standard straight-life benefit. All of the collective bargaining agreements involved in this dispute expressly or implicitly incorporated the Ordinance.

In 1982, the respondents switched from using gender-based actuarial tables to calculate the joint-and-survivor benefit to using a 100% female actuarial table for all retirees. In 2006, the respondents determined that use of the 100% female mortality table resulted in higher pension benefits for those employees who chose the joint-and-survivor option. On this basis, the respondents adopted a different mortality table for calculating those benefits.

The Administrative Law Judge (ALJ) recommended that MERC dismiss the unfair labor practice charge. She determined that a retirement plan's actuarial assumptions were mandatory subjects of bargaining under PERA, but concluded that the duty to bargain had been satisfied because the collective bargaining agreements covered the issue of retirement benefit calculations and the parties had agreed to have those benefits calculated as provided in the retirement ordinance. The ALJ also determined that, where the issue in dispute is a matter of contract interpretation, the matter must be resolved by the parties' agreed upon grievance procedure.

On exceptions by the charging parties, MERC concluded that the actuarial assumptions at issue were never memorialized in the retirement ordinance or any of the collective bargaining agreements referring to the ordinance. MERC reasoned that, although the ordinance did not define the phrase "actuarial equivalent," the parties had amended their agreements by longstanding practice and tacitly agreed to continue the use of the 100% female actuarial table. Consequently, MERC held that the respondents' unilateral change violated the duty to bargain.

In a split opinion, the Court of Appeals affirmed MERC's decision, concluding that actuarial assumptions were mandatory subjects of bargaining, that the term actuarial equivalence did not unambiguously mean equal in value and that the parties' past practice of using the 100% female actuarial table constituted a tacit agreement to continue using it absent collective bargaining.

In reversing the Court of Appeals, the Supreme Court held that the collective bargaining agreements granted the respondents discretion to use actuarial tables to establish pension benefits and that the Retirement Commission's use of the 100% female actuarial table to calculate those benefits for twenty-four years, by itself, did not constitute the clear and unmistakable evidence necessary to overcome the collective bargaining agreements' coverage. The Court further held that the 2006 change in calculation method did not create a new term or condition of employment that would trigger the need to bargain. On the contrary, the Court held that the remedy for this dispute lies in the grievance and arbitration procedures that the parties chose to adopt.

In reaching its decision, the Court noted that § 15(1) of PERA requires a public employer to engage in collective bargaining with its employees with respect to mandatory subjects of bargaining and that the calculation of retirement benefits is a mandatory subject of collective bargaining. While the parties do not need to reach an agreement on a subject of mandatory collective bargaining, neither party may take unilateral action on the subject absent an impasse in the negotiation. When the parties reach a negotiated agreement for a provision in the collective bargaining agreement that fixes the parties' rights, further mandatory bargaining is foreclosed because the matter is covered by the agreement.

In determining whether MERC may resolve an unfair labor practice charge involving a breach of contract, the Court noted that MERC must initially determine whether the subject of the claim is covered by the contract. If a collective bargaining agreement covers the term or condition in dispute, then the details and enforceability of the provision are left to arbitration. As a result, when the parties have agreed to a separate grievance or arbitration

process, MERC's review of a collective bargaining agreement in the context of a refusal-to-bargain claim is limited to determining whether the agreement covers the subject of the claim.

In this case, the Court found that UAW 412, Units 39, 46, 49, 55, and 75, UAW Local 889, AFSCME Local 411, and the Michigan Nursing Association's collective bargaining agreements incorporated the terms of the retirement ordinance in the definition of retirement benefits. As a result, those charging parties' claims challenging the change in the long-standing method used to calculate pension benefits are covered by the collective bargaining agreements and the grievance procedure is the appropriate avenue for the charging parties' claims. In addition, the Macomb County Road Commission and AFSCME Local 893 collective bargaining agreement implicitly incorporated the retirement ordinance to the extent that the ordinance governs optional joint-and-survivor benefits and the grievance procedure is the appropriate forum in which to challenge the calculation of those pension benefits as well.

Although the charging parties alleged that the twenty-four-year past practice of using the 100% female actuarial table to calculate benefits became part of the contract, the Court disagreed and held that this extended period of time was not sufficient to show tacit agreement to modify the contract. A charging party may pursue an unfair labor practice complaint because of the changing of a term of employment established by past practice despite the fact that the practice is contrary to the collective bargaining agreement, but only when the past practice amounts to an amendment of the collective bargaining agreement. Additionally, where a charging party claims that a respondent unilaterally changed a past practice that is covered by and contrary to unambiguous language in the collective bargaining agreement, that party must present clear and unmistakable evidence establishing the parties' affirmative intent to revise the collective bargaining agreement to incorporate the past practice. Furthermore, the charging party must show that the parties had a meeting of the minds with regard to the past practice such that there was an agreement to modify the contract.

In this case, the retirement ordinance expressly provided the retirement commission with discretion to adopt actuarial calculations that apply to the retirement system. The commission's decision to alter a long-standing method used to calculate pension benefits, by itself, did not constitute a unilateral change in a mandatory subject of bargaining as that method had not become part of the parties' agreement.

The Court further noted that doubt about whether a subject matter is covered by the collective bargaining agreement should be resolved in favor of having the parties arbitrate the dispute. The arbitrator, not MERC, is best equipped to decide whether a past practice has matured into a term or condition of employment.

Justice McCormack, joined by Justice Cavanagh, dissented and concluded that the parties' twenty-four-year intentional practice of using a very specific formula for achieving actuarial equivalence amended the contract and required bargaining anew before a unilateral change could be made. Although actuarial equivalence is an unambiguous term of art, the respondents' application was contrary to its plain meaning. Consequently, this application prevented the respondents from relying upon this plain meaning and obligated the respondents to bargain before making a change.

— END NOTE —

Appreciation is extended to Carl Wexel, Verna Miller, and Michael M. Long for their assistance with the preparation of these case summaries. ■

TO AND FROM THE EDITOR

Stuart—We had a case in the 90s. (You won). Since, I read your *Lawnotes* columns with great anticipation and enjoyment. The current issue is no exception. Few subjects on law interest me more than word selection and grammar. I reveled in your piece ["Words Matter" Vol. 24, No.1 *Labor and Employment Lawnotes* 18 (Spring 2014)]. The *Hobson's choice* discussion is priceless. An appropriate use of *Occam's razor* is always welcome. However, I must point out one (arguably glaring) error. Ironically, it is found in your sentence about your concern for criticism about, *inter alia*, punctuation.

Alas, your use of a comma after "capitalization" followed by an "and" is improper. In a list of one-word items, the second-to-last is not followed by yet another comma; the "and" is in lieu of a comma.

Notwithstanding this egregious—a word grossly overused by every litigator!—mistake, I will remain a faithful reader. Best wishes.

Alan D. Penskar, of counsel
Harris, Goyette & Winterfield, PLC

Alan—I am glad you enjoyed the column. With regard to your comment on the serial comma, however, I must say that you are wrong, wrong, and wrong. See Stuart M. Israel, "In Defense of the Serial Comma" Vol. 19, No. 2 *Labor and Employment Lawnotes* 23 (Summer 2009). My 2009 column addressed the serial comma, also known as the Harvard comma and the Oxford comma. I explained:

> This is the comma that appears after the penultimate item, before the "and" or "or," in a list of three or more items, as does the comma after "white" in "red, white, and blue." Indeed, "red, white, and blue" versus "red, white and blue" seems to be a frequent battleground in the war between the pro- and anti-serial comma forces.

I opined:

> It is time to end the war and declare a rebuttable presumption in favor of the serial comma. Serial commas promote clarity and precision. They cost almost nothing (although, unfortunately, they are now exclusively manufactured in places like Malaysia). And they don't add to the word count in Sixth Circuit briefs. Even if a serial comma doesn't always clarify, using one is like eating chicken soup when you are sick: it may not help, but it can't hurt.
>
> If you need more to persuade you, consider the example posted on the *ABA Journal* website by one Andrej Starkis. He quoted a book dedication which, almost assuredly, would have profited from a serial comma: "To my parents, God and the Virgin Mary."

You told me the book dedication is a "quirky example," perhaps the exception that proves the rule. In response, I borrow from Alexander Pope: to omit a serial comma is human; to include it is divine.

In further defense of the serial comma, I refer you to its consistent use in 28 U.S.C. §1746. Surely 535 members of Congress can't be wrong.

Stuart M. Israel
***Lawnotes* editor, attorney-at-law, and proctor-in-admiralty** ■

ANATOMY OF AN INITIATIVE: EEOC AND THE USE OF CREDIT HISTORY BY EMPLOYERS IN THE SELECTION PROCESS

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The EEOC adopted its Strategic Enforcement Plan on December 12, 2012. The plan identifies six priorities. The first listed priority is the elimination of barriers in recruitment and hiring. One of the examples given is employer background checks. The EEOC, however, had already considered and started litigation with respect to employer policies utilizing credit histories.

On October 20, 2010, the EEOC conducted a public meeting to explore the use of credit history by employers as an employee selection criterion. The meeting marked the first public discussion concerning the use credit history in the hiring process. It is unlikely that the EEOC could have imagined at that meeting how its initiative would be received by the courts.

One of the employer witnesses from the U.S. Chamber of Commerce addressed the issue of whether the use of credit history could ever be job related. The witness referred to the policies of the Department of Homeland Security ("DHS"). DHS includes financial responsibility as a conduct issue which could render an individual unsuitable. Incidents of previous debt do not automatically disqualify an applicant but can be assessed to determine whether they are sufficient in nature of gravity to result in an unsuitable determination for a particular position. Efforts to rectify the debt are examined, and it is determined that the effort is not present; an applicant can be disqualified strictly on the basis of bad debt. The witness observed that the government's rationale is not so different from a private sector employer who considers credit history.[1]

The EEOC's chief psychologist also testified and stressed the fact that much is unknown with respect to any link between credit history and a propensity for financial wrongdoing. He stated that the use of credit checks should be considered along with deterrence and detection, but that the optimal balance of background checking and security measures is an area where not enough is known,[2] In his oral presentation, the psychologist noted that the presentation established that some of the issues are understood but there is a lack of theory and data that would give a complete picture.[3] In response to an observation by one of commissioners that "we are really lacking information on this topic…the impact the information is having in terms of discrimination analysis."[4] The witness agreed.

The EEOC should have recognized the red flag that was raised about the use of credit history by federal agencies. Specifically, its failure to consider that its own policies regarding an applicant's credit history would have a significant impact on its litigation.

Prior to the public meeting, the EEOC had filed a lawsuit against Freeman, a nationwide convention, exhibition and corporate events marketing company in October of 2009. A charge of discrimination had been filed in January of 2008 by a woman alleging that she had not been hired because of her credit history. After its investigation, the EEOC filed a pattern and practice action alleging unlawful race discrimination. The EEOC expanded its case to include matters not alleged in the charge to include allegations that the company had also discriminated against blacks, Hispanics, and males in using criminal histories in hiring decisions.

Freeman used a criminal history check for applicants for general positions, usually at the post-offer stage. The review was multi-stage with the purpose of determining whether the conviction made the applicant unsuitable for employment. Applicants for credit sensitive jobs would be subject to a credit history check. A list of criteria was applied to determine whether the applicant should be excluded.[5]

The scope of the complaint was reduced through motions and stipulations. The court limited claims concerning hiring decisions made after March 23, 2007, 300 days before the charge which was filed. The court also dismissed all claims regarding decisions based on criminal history made prior to November 30, 2007, 300 days before the EEOC told the company it was expanding its investigation to include race claims based on criminal records.[6] The parties stipulated to the dismissal with prejudice of claims alleging discrimination against Hispanics.

The company challenged the experts' reports and the use of statistics and moved for summary judgment. The company argued that there was no credible statistical evidence on which the EEOC could base a disparate impact claim. The court agreed and dismissed the case. The report of Kevin R. Murphy, the EEOC's principal expert did not, to say the least, impress the court.

The court rejected the attempt of the EEOC to blame any issues with Murphy's database on the failure of the company to provided sufficient information during discovery. The expert acknowledged in his report that he had access to information of over 580,000 applicants although his testing database included fewer than 2.014.[7] The headings of the court's review of the expert's report highlight the issues the court had. The headings are:

Murphy had access to, but did not utilize, the materials necessary to create an unbiased accurate testing database.

Murphy's database does not cover the time period identified in the EEOC's claims.

Murphy enhanced his disparate impact results by including "fails" from the discovery materials.

Murphy's database includes data generated under the old credit check policy.

Murphy's database omits all data from half of the Defendant's branch offices.

Murphy's database is rife with material errors and unexplained discrepancies.

Murphy's supplemental reports cannot save his flawed analysis.

The court's harshest criticism came with respect to the use of information obtained during discovery. The court stated, "In an egregious example of scientific dishonesty, Murphy cherry picked certain individuals from other discovery materials in an attempt to pump up the number of 'fails' in his database and suggest that his database included sufficient data for the time period past fall of 2008."[8]

The court stated that even if the report were admissible, the EEOC and its experts failed to identify the specific policy or practices causing the alleged disparate impact. Statistical analysis must isolate and identify the discrete element in the hiring process

that produces the discriminatory outcome. The court noted that when the hiring process has multiple elements, the plaintiff must identify the element that it is challenging and demonstrate that each particular challenged practice causes the disparate impact unless the elements cannot be separated for analysis.[9] Here, the court stated that the EEOC made no effort to break down what is clearly a multi-faceted multi-step policy. As a result, the EEOC failed in this element of the case.

The court had some parting observations for the EEOC. It noted at the beginning of its opinion that the EEOC had filed several actions against employers who utilize criminal/credit histories on the theory of disparate treatment. According to the court, the present case is a theory in search of facts to support it where no facts exist to support the theory. Actions of this nature which are brought by the EEOC based on inadequate data places employers in a "Hobson's choice" of ignoring criminal/credit histories and exposing themselves to potential liability for criminal and fraudulent acts of employees or incurring the wrath of the EEOC for using information deemed fundamental by most employers. The court concluded, "Something more, far more, than what is relied upon by the EEOC in this case must be utilized to justify a disparate impact claim based upon criminal history and credit checks. To require less, would be to condemn the use of common sense, and this is simply not what the discrimination laws of this country require."[10]

As bad as the decision in *Freeman* was for the EEOC, things got worst in its appeal of summary judgment in *EEOC v. Kaplan Higher Education Corp.* ("*Kaplan*")[11]. In the district court, the EEOC utilized the same expert who participated in the Freeman case. The statistical information which was used by the expert to support his opinion that the use of credit history had a disparate impact of Black applicants was not based on information provided by the company. The EEOC subpoenaed records from the departments of motor vehicles for 38 states and the District of Columbia ("D.C."). Fourteen states and D.C. provided records that identified an applicant's race. The remaining 24 states provided copies of driver license photos. A team of 5 "race raters" was assembled to look at the photos and to determine the race of the individual. A procedure was established to deal with situations when a consensus could not be reached. The defendants challenged the system as nothing more than guesswork, unsupported by any scientific study. Defendants argued that the EEOC could simply ask the applicants their race, but the EEOC took the position phone surveys are not acceptable because the response rates suffer from racial disparity.

The defendants filed a motion for summary judgment which the district court granted. The reports submitted by the expert were inadmissible since there was no evidence the use of "race raters" was reliable. The court stated that there was no evidence that determining race by visual means is generally accepted in the scientific community. The court noted that the EEOC discourages employers from visually identifying individuals by race and is appropriate only where the individual refuses to self-identify.

During discovery, the defendants sought to discover the EEOC's policy on the use of credit checks on the basis that it was relevant to its business necessity defense and its estoppel defense. The court found that the defendants' arguments were persuasive and that how and why the EEOC makes the risk level designations for position descriptions is relevant to the business necessity defense. The court also stated that discovery as to how or whether the EEOC uses credit checks will inform the viability of the business necessity defense and may be relevant to the estoppel defense if it is found that the practices are consistent with those which the EEOC challenges in the lawsuit.[12] In its opinion granting summary judgment, the court noted that the EEOC requires credit checks in 84 of 97 positions. Its handbook bases the need for the checks on the notion that *"overdue just debts increase temptation to commit illegal or unethical acts to meet financial obligations."*[13]

The 6th Circuit issued its 7 page opinion three weeks after oral argument. Although the court's review of the issue of the court's rejection of the expert's report and methodology is instructive, only the first and last paragraphs of the decision need be read to see just how little the court thought of the EEOC's case.

In the first paragraph of its opinion, the court stated the EEOC sued the defendants "for using the same type of background check that the EEOC itself uses."[14] The court quoted the rationale as set forth in the EEOC's handbook which stated that overdue just debts increase the temptation to commit illegal acts as a means of obtaining funds to meet the financial obligations. The court stated that the defendants have the same concern and run checks on applications for positions that provide access to student financial information; the court noted that, "For that practice, the EEOC sued Kaplan."[15].

In the final paragraph of its opinion, the court succinctly identified the weaknesses of the EEOC's case:

> *The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself.*[16]

The outcome in *Kaplan* is far different than what the EEOC indicated in its December 21, 2010 press release announcing the filing of the litigation. The press release stated, in part, "Since at least 2008, [Kaplan] has rejected job applicants based on their credit history. This practice has an unlawful discriminatory impact because of race and is neither job-related nor justified by business necessity, the EEOC charged in its lawsuit." [17]

What will the EEOC's reaction be to the two decisions? The EEOC has appealed the *Freeman* decision to the 4th Circuit. It is unlikely that it will abandon its initiative concerning credit history use in the selection process. There are several responses that can be expected.

The first would be a change in expert witnesses. The courts' obliteration of the methodology and report of the EEOC's expert in language not often seen in opinions should mean the end of that witness' participation in pending or future cases.

The second change may be a refocusing on employers that have a more "across the board" automatic disqualification for poor credit history that does not take different items into account such as nature of issue and timing of the poor credit. The court in *Freeman* referred to the company's policy as "multi-faceted, multi-step." As a result, the court found that the EEOC had failed to establish which component was the "culprit."[18] In its reply brief to the 4th Circuit, the EEOC argued it did identify a specific employment process, namely the use of credit and criminal checks with the hiring process. Depending upon the outcome of the appeal, a challenge to an across the board policy would avoid the issue of identifying a particular policy causing the disparate impact.

The third change would be the EEOC's strategy concerning the impact of the Uniform Guidelines on Employee Selection. ("Guidelines"). The EEOC in Kaplan filed a motion for the reconsideration of the court's grant of summary judgment, which was denied. One of the bases of the motion was the court's treatment of the issue of the company's alleged noncompliance with

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the EEOC's Guidelines. The defendants argued that they did not have an obligation to maintain the records. The court noted that the EEOC did not seek any legal relief or address the legal ramifications of the noncompliance until its current motion for reconsideration where it now asks for an inference of spoliation; an inference of adverse impact; and a finding of estoppel and unclean hands. The court refused to consider the arguments because the EEOC failed to raise them in any of the multiple motions filed in the case.[19] In any future litigation where the employer has not maintained records concerning applicants, the EEOC will litigate the issue from the beginning and not after the end. The existence of records will be a focus of the agency's pre suit investigation.

It remains to be seen if the EEOC can salvage its initiative concerning employer use of credit history. The institutional failure to appreciate the courts' concern with the "Do as I say…" approach based on seriously flawed reports is puzzling.

The agency would do well to revisit the testimony given by a former vice chair during a meeting considering public input to the Strategic Enforcement Plan. The witness cautioned that the systemic initiative would gain acceptance by the courts by the careful and professional undertaking of what are complicated investigations and litigation. To succeed, the initiative must achieve the respect of the courts as it seeks to have the courts recognize the efforts and purposes of the EEOC in bringing cases. The witness cautioned that the commission should consider the possibility that in its zeal to ramp up a nation-wide systemic program, it "may have bitten off more than it can chew" especially in those areas where the law is unsettled.[20]. Sound advice, indeed.

— ENDNOTES —

1 Statement of Michael Eastman, pp.3-4 (10/20/10).

2 Statement of Dr. Richard Tonowski, p. 2 (10/20/10).

3 Transcript of 10/20/12 meeting, p. 5.

4 Transcript of 10/20/12 meeting, p. 12.

5 *EEOC v. Freeman*, 961 F. Supp. 2d 783, 788 (D. Md. 2013).

6 961 F. Supp. 2d at 789.

7 961 F. Supp 2s at 793.

8 961 F. Supp. 2d at 795.

9 961 F. Supp 2d at 799.

10 961 F. Supp. 2d at 803.

11 _F. Supp. 2d_, 2013 U.S. Dist. LEXIS 11723 N.D. Ohio 2013).

12 Order dated 4/18/12, p. 8.

13 2013 U.S. Dist. Lexis at pp. 3-4.

14 _F.3d_, 2014 U.S. App. LEXIS 6490, p.196th Cir. 2014).

15 Id.

16 Id. at p.6.

17 12/21/10 press release (FEOC website)

18 961 F. Supp. 2d at 800.

19 Opinion dated 5/6/13, p. 6.

20 Written testimony of Leslie E. Silverman, p.3. (7/18/120. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

I was selected to hear a case back in 2012 involving Montcalm County Community College. I remember it distinctly because the settlement we worked out was so satisfying. In fact, I wrote a column about it. See "For What It's Worth" Vol. 22, No. 4 *Labor and Employment Lawnotes* (Winter 2013).

I billed the parties for a day of hearing, a half day of travel, and a night in a hotel. It came to $829 per party. They paid me, and I closed the file.

Just over two years went by.

Then on May 14, 2014 I got a letter from the IRS. It said I had underreported my income for 2012 by $74,452 and I now owned $32,034 in taxes, penalty, and interest. Enclosed with the letter was a list of the 1099s the IRS had added up to reach its conclusion. The letter suggested I might want to review the list and compare it with my records.

I did that.

The 1099 from Montcalm County Community College stood out. According to the IRS my fee for the Montcalm County Community College case was not $829; it was $82,900.

I dug out the original 1099 and there it was: Wages, Fees and Compensation $82900. There was no decimal point between the 9 and the 0. If you were a machine you could think that Montcalm County Community College paid Goldman $82,900. If you were a person you might wonder why all of Goldman's other 1099s are for payments that are smaller by two orders of magnitude or why Montcalm County would pay somebody $82,900 without withholding any taxes. But it's a good bet there are no human beings involved in this process. A machine read the 1099, added it up with the rest of my 1099s, and came up with a number that was $75,000 greater than what I had reported. So it sent me a letter.

I filled out the form the machine sent me and checked the box that said I disagree. I wrote as polite a letter as I could and attached the original invoice I had sent to Montcalm County Community College, the stub of the check they sent me, and the 1099 with the missing decimal point. I put it all in the envelope the machine sent me with the return address showing through the window and sufficient postage affixed thereto. And I deposited same in the U.S. mail.

Stay tuned.

So what is the moral of this story? Here are three suggestions:

Be careful with your decimal points.

Keep your tax documents. As the immortal Fats Waller said, "One never knows, do one."

And as Roseanna Roseannadanna used to say, "It's always something." ■

DECLARATIONS AND RULE 56(c)(4)

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

During the summer after my first year of law school, I worked at Community Legal Counsel, an Office of Economic Opportunity "impact litigation" center. Those were the days. As the Beatles put it: "We all want to change the world."

On my first day, I showed up at the CLC office in downtown Detroit resplendent in my only suit. The lawyer-director said, "Let's go. You're going to take affidavits." We quick-marched for several blocks to the City-County building, to a picket line. We spoke to picketers and I took notes. My new mentor told me to get affidavits to support some motion, the details of which are now lost in the mists of time. He said he'd see me back at the office. He left.

Armed with the analytical skills and practical insights of a soon-to-be second year law student, I thought: *What exactly is an affidavit?!*

I managed to prepare affidavits which witnesses signed and which we used to support the picketers' quest for justice. Since then, I've had a particular interest in affidavits and their more utilitarian compatriots, declarations.

Under Fed.R.Civ.P. 56(c)(4), an "affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."[1]

How do you put the rule into practice?

First, decide whether you want an affidavit, or a declaration, or another sort of statement. Your choices are in 28 U.S.C. §1746:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated…

Section 1746 is bad news for the notary public profession. A declaration, if "subscribed" to by the declarant "under penalty of perjury," is just as good as a notarized affidavit. If "executed within the United States," the required "subscription," in the words prescribed by Section 1746(2), are: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." Or, you can satisfy Section 1746 by using "substantially" similar words.

Second, after matters of form are resolved, you have to address content.

One method is to ask the aspiring witness to set out the pertinent facts in the witness' "own words." Then add the Section 1746 magic words, get a signature, and file the declaration with your Rule 56 papers to present the truth, the whole truth, and nothing but the truth.

Another method is to interview the witness and then draft the proposed declaration your way—the way that is tailored to your advocacy objectives. Then have the witness review your draft for accuracy. Then edit to make sure the accurate declaration is clear, succinct, pertinent, persuasive, and doesn't inappropriately spill any beans or shoot anyone on your side in the foot.

You can use the first method if **(1)** you are big on delegation to witnesses; **(2)** you are confused about the ethical propriety of "coaching"; and **(3)** you are crazy. Otherwise, use the second method.[2]

Before you get the declarant's signature, run down the Rule 56(c)(4) checklist. Is the content based "on personal knowledge"? Does it "set out facts"? If not, changes must be made. Cross out the "conclusory assertions not based on personal knowledge." See *Reed v. Proctor & Gamble Mfg., Inc*., 556 Fed. Appx. 421 (6th Cir. 2014). Get rid of that "argumentative interpretation of statements of fact." See *Briggs v. Potter*, 463 F.3d 507, 512 (6th Cir. 2006).

"Further declarant sayeth not."

Then be sure the facts recounted are "admissible in evidence." If the declaration includes hearsay, for example, make sure it is admissible under a Fed.R.Evid. 803 or 804 exception or under 807.

At some point—better sooner than later—make sure the declarant is "competent to testify on the matters stated." Take a look at Fed.R.Evid. 601, 602, and 701.

The *competent* requirement has given rise to some curious practices. For example, it is not unusual for declarants to vouch for their own competence. Indeed, one of the Michigan practice books on my shelf offers the following form: "I have personal knowledge of the facts stated in this affidavit and, if sworn as a witness, am competent to testify to them." Says you!

If you want your declarants to vouch for their own competence, why settle for formulaic "conclusory assertions"? How about:

> I state a bunch of facts in this declaration. Rest assured that you can totally rely on them because I am competent to testify about those facts, and you can take my word for that. In particular, I am not certifiably insane. You can take that to the bank, too. Also, I'm writing under penalty of perjury, so you've *got to* believe me.
>
> Please ignore all those who say I'm off-the-deep-end; they are a bunch of envious conspirators and paranoids out to get me. In conclusion, I *really am* competent and I *am really* competent. Further declarant sayeth not.

The better approach, I suggest, is to "show" competence, as Rule 56(c)(4) requires, as well as "personal knowledge," with factual content—the who, what, when, where, how, and, maybe, the why and why not. This applies a good across-the-board advocacy rule: don't tell; show.

With these basics in mind, you are ready to sally forth; to create accurate, factual, clear, succinct, persuasive declarations to effectively prosecute or defend Rule 56 motions; and to put notaries out of business.

— ENDNOTES —

1 The pre-2010 ancestor of Fed.R.Civ.P. 56(c)(4) is Fed.R.Civ.P. 56(e)(1), which is addressed in cases decided before the 2010 rules changes.

2 See Stuart M. Israel, "The Lawyer's Obligation To The Truth In Litigation, Negotiation, and Mediation" Vol. 16, No. 2 *Labor and Employment Lawnotes* 6 (Summer 2006), reprinted in revised form in course materials, The Institute of Continuing Legal Education (March 2008 (ANDRI) and April 2012 (LELI)), and Stuart M. Israel, "Coaching Witnesses" Vol. 10, No. 3 *Labor and Employment Lawnotes* 10 (Fall 2000). ■

GOOD "GUIDE" FOR MICHIGAN EMPLOYMENT LAWYERS

John G. Adam
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ICLE's one-volume *Employment Law in Michigan: An Employer's Guide* (Second Edition) is a very useful resource. It is edited by the late Richard Seryak, Claudia Ellmann, and Daniel Kopka. Dozens of Michigan attorneys contributed to the book. It was last updated in 2012, with the next update expected May 2015.

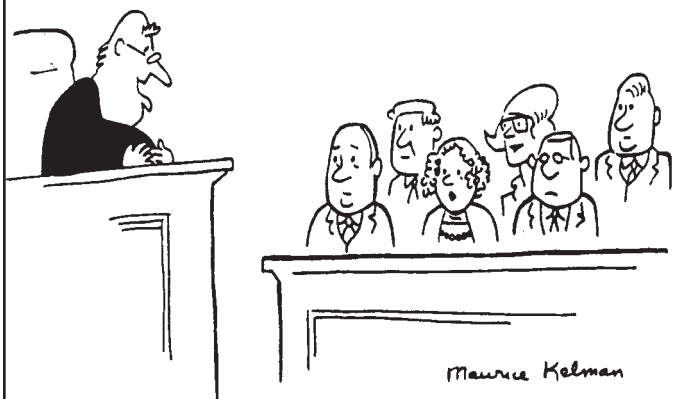
While I confess I have not read all 1,024 pages, having the *Guide* is comforting, like having other essential sources such as *The Developing Labor Law* and *How Arbitration Works*.

The *Guide* has 18 chapters. The chapters address recruiting, interviewing, and testing applicants, personnel files and employment records, ADA/FMLA, immigration, MIOSHA/OSHA, union organizing, unemployment insurance, and ERISA. Each chapter has a detailed table of contents with helpful subsection headings. Like the table of contents in a good brief, the *Guide* table of contents provides an excellent overview and checklist.

For example, I had an unemployment compensation case. I have been successful over time at not losing unemployment cases, but into every lawyer's career, there are defeats—a little rain must fall—so I had to file appeals. Thus, to the *Guide* I turned. I went to Chapter 16, titled "unemployment insurance." That chapter has 60 subsections. The detailed table of contents directed me to the precise sections where I got needed answers. The chapter also contains practical advice on all kinds of unemployment issues, defining *misconduct* and *work stoppage*, addressing appeals to the Michigan Compensation Appellate Commission and to the circuit courts, and filing applications for leave to appeal in the court of appeals.

If you practice employment law the *Guide* is an essential resource whether you represent employers or employees, management or labor. The print edition costs $145, which is cheap when you consider all the attorney hours devoted to the book. ■

Kelman's Cartoon



"You ladies and gentlemen of the jury, are the sole triers of the facts. You'll find it helpful to bear in mind that there are two sides to every story, no one is all good or bad, one swallow doesn't make a summer, a penny saved is a penny earned, and let a smile be your umbrella."

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

UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Thomas Patton
Evi Georgiou
Butzel Long

Employees of Contractor of Public Company Protected from Retaliation under SOX

On March 4, 2014, the Supreme Court issued its decision in *Lawson v. FMR, LLC,* 571 U.S. ___ (2014). The plaintiffs in *Lawson* worked for private companies that provided management and advising services to Fidelity mutual funds. The Fidelity funds are publicly-traded companies registered with the Securities and Exchange Commission and are subject to the Securities Exchange Act of 1934. The plaintiffs brought claims under 18 U.S.C. § 1514A(a), the Sarbanes-Oxley Act (SOX), after one plaintiff was terminated and the other allegedly constructively discharged for raising concerns about possible SEC violations and accounting improprieties.

The issue in *Lawson* was whether the whistleblower protection provision of SOX applied to employees of a publicly traded company's private contractors. The defendants unsuccessfully moved for summary disposition in the trial court, arguing in part that the plaintiffs were not protected by SOX because they did not work for a publicly-traded company. The Court of Appeals for the First Circuit reversed the decision of the district court and held that the plaintiffs were not protected by SOX: "We conclude that only the employees of the defined public companies are covered by these whistleblower provisions. . . ." *Lawson v. FMR, LLC* 670 F.3d 61, 68 (1st Cir. 2012). The Supreme Court reversed the decision of the Court of Appeals.

SOX §1514A provides in relevant part, that "no . . . contractor . . . may discharge . . . an employee" for engaging in protected activity under the statute. The Supreme Court applied the ordinary meaning of these words and found that this section prohibited a contractor from taking action against its own employees, not the employees of the publicly-traded company with which it has a contract: "Absent any textual qualification, we presume the operative language means what it appears to mean: A contractor may not retaliate against its own employee for engaging in protected whistleblowing activity." The Supreme Court noted that interpreting this statutory provision to mean that a contractor may not discharge an employee of a publicly-traded company for engaging in protected activity, would render the provision meaningless since a contractor typically has no control over the employees of the publicly-traded company. In fact, for purposes of this case, the publicly-traded company was a mutual fund that had no employees, relying instead on contractors to perform the day-to-day management of the fund.

The Supreme Court's decision seeks to give effect to Congress' purpose in enacting SOX in the wake of the "Enron debacle" of 1998. The Court stressed that, in enacting SOX, Congress understood "that outside professionals bear significant responsibility for reporting fraud by the public companies with whom they contract, and that fear of retaliation was the primary deterrent to such reporting by the employees of Enron's contractors." For that reason, the Court reversed the decision of the Court of Appeals and concluded that Congress' intention in enacting SOX was to protect professionals employed by contractors

of publicly-traded companies who would otherwise be "vulnerable to discharge or other retaliatory action for complying with the law."

Supreme Court Holds That Severance Payments Are Taxable Wages Under FICA

On March 25, 2014, the U.S. Supreme Court ruled, in *United States v. Quality Stores, Inc*., 572 U.S ___(2014) that severance payments made to employees terminated against their will are taxable wages for purposes of the Federal Insurance Contributions Act ("FICA"), which includes Social Security and Medicare. After the lower court's decision in this case, employers were advised to pay FICA taxes on severance payments, but to consider applying to the IRS to seek a refund of those taxes. This decision renders that practice unnecessary.

In 2001, Quality Stores made severance payments to employees who were involuntarily terminated after the company filed for Chapter 11 bankruptcy. The company initially reported the payments as wages on W-2 tax forms, paid the employer's required share of FICA taxes, and withheld employees' share of FICA taxes. The company later sought tax refunds for itself and its employees for all of the FICA taxes, maintaining that the payments should not have been taxed as "wages" under FICA. When the IRS did not respond to Quality Stores' claim seeking a $1 million refund, Quality Stores commenced an action in bankruptcy court. The bankruptcy court ruled for Quality Stores by concluding that the severance payments were not wages for FICA purposes. The district court and the Sixth Circuit affirmed. The Sixth Circuit determined that because of the enactment of § 3402(o) of the Internal Revenue Code ("Code"), treating "supplemental unemployment compensation benefits" ("SUBs") as wages for *income tax withholding* purposes, Congress had expressly clarified that SUBs were not wages unless the special treatment under § 3402(o) applied. Therefore, because FICA did not have a similar inclusion provision, the severance payments in Quality Stores did not constitute wages for FICA purposes.

However, the Supreme Court ruled that severance payments are wages for FICA purposes, and that the income tax withholding provisions of Code § 3402(o) did not change that classification.

The Court reviewed the history of SUBs. By initially not treating SUBs as wages, SUBs were a way to provide terminated employees additional income without affecting the employees' rights to state unemployment benefits. However, based on numerous Internal Revenue Code rulings, with limited exceptions, SUBs were always treated as taxable income. Terminated employees receiving SUBs were faced with significant tax liabilities, and no federal income tax withholding was applied at the time of payment to offset those liabilities.

In 1969, Congress corrected the problem by enacting § 3402(o), which resulted in most SUBs being treated as wages for withholding tax purposes. The Court ruled that Congress did not intend to redefine or narrow the definition of wages but sought only to resolve the incongruous treatment of SUBs as taxable income but not wages subject to withholding of payroll taxes.

The Court's ruling does not apply to a limited type of severance payments that meet a number of requirements, such as being provided through a trust agreement, and being specifically "tied to the receipt of state unemployment benefits." The Internal Revenue Service still provides in Rev. Rul. 90-72 that such severance payments are exempt from both income tax withholding and FICA. In Quality Stores, the severance payments were not linked to state unemployment benefits. ■

SIXTH CIRCUIT UPDATE

Scott R. Eldridge
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Enforcement of Arbitration Agreement Hinges on Grammar Rules

In *Russell v Citigroup, Inc.,* Docket No 13-5994 (April 4, 2014) the plaintiff, Keith Russell, agreed to arbitrate "all employment-related disputes" with Citigroup. The issue, according to the Court: "Does that mean he must arbitrate a case already pending in court when he signed the agreement?" During his employment from 2004 to 2009, Russell signed a standard contract to arbitrate all disputes. The contract covered individual claims but not class actions. In January 2012, Russell, no longer an employee, filed a class action claim alleging Citigroup did not pay employees for time spent logging in and out of their computers at the beginning and end of each day. The company did not seek arbitration because the agreement he had signed did not include class actions.

In late 2012, while the lawsuit was still in progress, Russell applied to work for Citigroup, which rehired him in January 2013. He again signed an agreement to arbitrate his disputes, which Citigroup had modified to now include class action claims. Russell never consulted with his lawyers before signing the agreement. And Citigroup's outside counsel in the lawsuit did not know that Russell had been rehired or signed a new agreement to arbitrate until about a month after he began working. Relying on the new agreement, Citigroup sought to compel arbitration of the class action. The district court held that the second arbitration agreement did not cover lawsuits filed before it had been signed.

The Sixth Circuit affirmed. According to the Sixth Circuit, "[t]he text [of the agreement] suggests that the agreement does not evict pending lawsuits from court." It explained that the scope of the agreement covers disputes that "arise between [Russell] and Citi." "The use of the present tense 'arise'," according to the Court, "rather than the past tense 'arose' or present-perfect 'have arisen' suggests that the contract governs only disputes that begin – that arise – in the present or future" and "[t]he present tense usually does not refer to the past." Further, the Court explained, Russell's state of mind was such that he expected the agreement to apply to future suits and his behavior in signing the contract without consulting his lawyer would make little sense if he understood the contract to cover the pending case. Similarly, Citigroup's actions suggest that it did not expect the new agreement to cover the pending lawsuit because it – knowing that Russell was represented by counsel in the lawsuit – sent the new arbitration agreement directly to him, not his lawyers. Finally, because the arbitration agreement left no doubt as to its scope, the Court rejected as moot Citigroup's argument that the Federal Arbitration Act requires courts to resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration."

Federal Courts Have Jurisdiction to Decide Whether Action for Declaratory Relief by Union Against Employer is an Arbitrable Dispute

In *Teamsters Local Union 480 v United Parcel Service*, Docket No 12-6253 (April 4, 2014), the Union sought a declaratory judgment to enforce a settlement agreement with UPS. The parties' collective bargaining agreement consisted of two documents: (1) a National Masters Agreement effective from December 19, 2007 through July 31, 2013; and (2) a Supplemental Agreement to the National Agreement effective from the ratification date through July 31, 2013. Together these agreements provide extensive grievance procedures that the Union and UPS must evoke to resolve disputes. Prior to June 2010, the Union filed numerous grievances concerning

(Continued on page 16)

SIXTH CIRCUIT UPDATE

(Continued from page 15)

UPS's methods in assigning work opportunities for shifters. The parties resolved some of the grievances in a settlement agreement on June 16, 2010. In the settlement agreement, UPS agreed to alter its method of assigning work opportunities to shifters and the Union agreed to withdraw certain grievances with prejudice. Seeking declaratory relief, the Union alleged that UPS breached the settlement agreement. The United States District Court for the Middle District of Tennessee dismissed the case for lack of subject-matter jurisdiction.

The Sixth Circuit reviewed (*de novo*) both the dismissal for lack of subject-matter jurisdiction and the district court's conclusion on the arbitrability of a dispute and affirmed. First, the Court concluded that the district court *had* jurisdiction under section 301 of the Labor Management Relations Act, 29 U.S.C. 185. Noting that the dispute centered on interpretations of contracts between the parties, the Sixth Circuit explained that the LMRA gives federal courts subject-matter jurisdiction regarding "suits for violation of contracts between an employer and a labor organization representing employees."

Second, however, the Court held that UPS's breach of the settlement agreement constituted a violation of the CBA and therefore the Union must use the CBA's grievance process before seeking judicial relief. The parties entered into a CBA, which provides that "any controversy, complaint, misunderstanding or dispute" that concerns "interpretation, application or observance" of the CBA is a "grievance" and will be handled under the CBA's grievance procedures. The Court determined that the dispute was a "grievance" under the CBA since both parties agreed that the settlement agreement entails interpreting and applying the CBA. Further, the Court noted that the Union argued that UPS's breach of the settlement agreement "constitutes a violation of the arbitration provision of the CBA."

Employee Discharged as Part of a RIF Presented Sufficient Evidence that he was Replaced by Younger Employee Who Employer Asserted Simply Assumed Duties

In *Pierson v Quad/Graphics Printing Corp, et al.*, Docket No 13-5784 (April 18, 2014) the defendant, QG, LLC terminated the plaintiff, James Pierson, as part of a company-wide cost-cutting initiative. In 2010, QG acquired a rival company, and as part of the acquisition it assumed control of the facility where the plaintiff was employed as the Plant Facilities Manager. Pierson had thirty-nine years of experience in the industry and had seven years of experience in the specialty printing processes performed at his facility. He was never disciplined, reprimanded, or warned about performance deficiencies; nor had he received a negative performance review in the seven years at the facility. On August 19, 2011, QG instructed its Regional Facilities Managers to identify positions under their supervision that could be eliminated. Pierson's Regional Facilities Manager identified him as one who could be eliminated and an Energy Manager at another facility who could assume his duties. On August 22, 2011, Pierson's Regional Facilities Manager spoke to the Human Resources Manager at Pierson's plant and informed her that Pierson would be terminated citing his "failure to be a team player." QG terminated Pierson on August 23, 2011, at sixty-two years of age. His Regional Facilities Manager made no mention to Pierson that his termination was a result of poor work performance or other performance issues, instead mentioning it was part of a work force reduction.

Pierson's forty-seven year old replacement maintained his position as an Energy Manger while assuming Pierson's duties, including managing the infrastructure and preparing environmental reports. He soon began spending a majority of his time (between three to five days per week) at Pierson's old facility before transferring his office space there completely, devoting significant time to Pierson's former duties. Pierson filed suit alleging age discrimination and retaliation under the Age Discrimination in Employment Act. QG filed a motion for summary judgment, which the United States District Court for the Middle District of Tennessee granted because Pierson could not establish a *prima facie* case of age discrimination. Pierson appealed only the district court's grant of summary judgment on the age discrimination claim.

The Sixth Circuit remanded the case back to the district court. It focused solely on the fourth element of the *prima facie* case – whether "the employer gave the job to a younger employee" – because the parties did not dispute the first three elements. Noting that an employer "replaces" an employee when it reassigns an existing employee to assume the discharged employee's duties in a way that "fundamentally changes the nature of his employment," the Court concluded that a reasonable jury could conclude that Pierson was replaced by a younger employee. Further, the Court concluded that there was ample evidence in the record to suggest that QG's reason for terminating Pierson was a pretext in that he presented evidence of the decision-maker's "shifting justifications" offered during discovery. The decision-maker initially determined simply that Pierson's facility no longer needed his position, but later he told another that Pierson was not a "team player." Consequently, the Court concluded that Pierson presented "sufficient evidence to create a genuine dispute of material fact regarding several elements of his age-discrimination claims."

Successor Employer's Unilateral Decision to Replace Retirees' Lifetime Group Health Plan with Health Reimbursement Accounts Breached CBA

In *United Steelworkers, et al. v Kelsey-Hayes Co. et al*, Docket No 13-1717 (April 22, 2014), the plaintiffs represented retired employees who worked for the defendant Kelsey-Hayes Co. until July 2006, when its plant in Jackson, Michigan was shut down. Each had retired under one of three negotiated CBAs in 1995, 1999, and 2003, which contained identical language that Kelsey-Hayes would establish a health insurance plan "either through a self-insured plan or under a group insurance policy or policies insured by an insurance company . . . ." Before and after the plant closed, Kelsey-Hayes provided group insurance plans for the retirees. However, in 2011 things changed when defendant TRW Automotive (who had purchased defendant) sent a letter to retirees indicating it was discontinuing the group health care coverage in 2012 and instead would provide them with Health Reimbursement Accounts. TRW planned to provide contributions of $15,000 in 2012 and $4,800 in 2013. The idea was that retirees could use the HRA's to purchase their own coverage. TRW and Kelsey-Hayes failed to contribute any funding to the HRAs beyond 2013. The plaintiffs sued, alleging a breach of the CBAs in violation of the Labor Management Relations Act and ERISA, and the United States District Court for the Eastern District of Michigan granted the plaintiffs' motion for summary judgment, issued a permanent injunction, and ordered TRW to reinstate the health coverage that had been in effect up until 2012.

The Sixth Circuit held that the implementation of the HRAs breached the CBA because they were not what the parties bargained for originally. It concluded that the CBAs established a vested right to lifetime health care benefits, and the unilateral implementation of HRAs – an entirely different form of benefits – breached the CBAs. Compensating the retirees monetarily will not remedy the breaches of the CBAs, according to the Court, and the appropriate remedy is to require the defendants to do what they agreed to in the CBAs – that is, provide a group health plan. The Court rejected each of TRW's arguments. First, rejecting the argument that HRAs provided better coverage then the group plans, the Court concluded that this "better" or "worse" argument was immaterial as a legal matter. Second, TRW argued that, since the retirees did not challenge earlier changes in group plans, they had waived their ability to challenge the change to HRAs. The Sixth Circuit disagreed, concluding that prior changes to the group coverage did not violate the CBAs because in each case one group plan was replaced with another. Finally, TRW argued that section (h) of the health care supplement gave them the right to unilaterally modify the retirees'

retirement benefits. The Court concluded, however, that this language applied to current employees and, therefore, was immaterial.

Technological Advances May Make Telecommuting a Reasonable Accommodation Under the ADA for an Employee With Irritable Bowel Syndrome

EEOC v Ford Motor Co., Docket No 12-2484 (April 22, 2014) presents the issue of whether a telecommuting arrangement could be a reasonable accommodation under the Americans with Disabilities Act for an employee with a "debilitating disability." In 2003, Ford Motor Co hired Ms. Harris as a resale steel buyer. This position was responsible for handling emergency supply issues and required the individual be available to interact with members of the resale team, suppliers, and other members of the company. Between 2004 and 2008, Ms. Harris received a performance rating of "excellent plus." Throughout her tenure, Ms. Harris suffered from Irritable Bowel Syndrome (IBS). Over time her symptoms worsened and caused her to take FMLA leave. Due to the absences, her performance began to slip. In February 2009, Ms. Harris requested that she be allowed to telecommute on an as needed basis as an accommodation for her disability. Although other resale buyers were permitted to telecommute one day per week, Ford concluded that this would not work for Ms. Harris's job and offered to move her office closer to the restroom or find her a different position in the company that would allow telecommuting. Ms. Harris rejected these options. In April 2009, Ms. Harris filed a charge of discrimination with the EEOC. In July 2009, Ms. Harris was placed on a 30-day Performance Enhancement Plan. At the conclusion of the plan, Ford determined that Ms. Harris failed to meet any of the identified objectives and terminated her. The EEOC sued on Ms. Harris's behalf alleging, among other things, that Ford failed to accommodate her disability. The U.S. District Court for the Eastern District of Michigan granted summary judgment to Ford.

The Sixth Circuit reversed and remanded. It focused on whether Ms. Harris was "otherwise qualified" for the position, despite her disability. According to the Court, Ford had the burden to prove that there was a physical presence requirement that was an essential function of Ms. Harris's position. Noting the importance of technology and how the law must respond to the "advance of technology in the employment context," the Court explained that the workplace is anywhere the employee can perform the essential functions of her duties. Ford argued that face-to-face interaction is extremely important to the facilitation of group problem solving, and that telecommuting was insufficient to meet the requirements and demands of the position. Disagreeing, the Court was not persuaded that positions that entail a great deal of teamwork are "inherently unsuitable" for telecommuting possibilities. And although courts often defer to the business judgment of employers in making these determinations, it noted that, even when Ms. Harris was present, the "vast majority" of interactions between Ms. Harris and her counterparts occurred via conference call. Furthermore, Ms. Harris's position "is not one that actually *requires* face-to-face interactions," according to the Court. Though Ford presented evidence that physical attendance was an essential function, the EEOC offered enough evidence to create a "genuine dispute" as to the conclusion.

The Court then examined whether the two alternative accommodations that Ford offered were reasonable. It stated that, although it was up to the employer to choose accommodations from among reasonable options, the option of being closer to the bathrooms was not reasonable under the circumstances. And because reassignment to another position is only a viable option if the only other way to accommodate an employee's disability would create an undue hardship, Ford was not entitled to force the employee to accept another job because the employee's proposed telecommuting arrangement was reasonable. Thus, the Court held that there was a genuine issue of material fact regarding "whether [the employee could] perform all of her job duties from a remote location." ■

COGNITIVE SCIENCE AND EFFECTIVE MEDIATION AND SETTLEMENT ADVOCACY

Barry Goldman
Arbitrator and Mediator

Most of us, even those who have been negotiating settlements for decades, do it more or less by the seat of our pants. In recent years, however, psychologists, economists and others have made significant progress toward a more rigorous and scientific understanding of human judgment and decision making. By studying what they have learned we can improve our own understanding of the negotiation process and become more effective dispute resolution practitioners.

I. Anchoring

Anchoring is our tendency to overweight certain ideas and to allow them to have undue influence over subsequent reasoning.

"The brain goes here."

The classic experiment involved a wheel of fortune and the number of African countries who are members of OPEC. Participants were asked to spin a wheel rigged to stop either at a low number or a high one. Then in what they thought was an unrelated task, they were asked to guess how many countries in Africa are members of the Organization of Petroleum Exporting Countries.

The subjects who spun a high number guessed higher than the ones who spun a lower number. This and many other anchoring experiments suggest an answer to the age-old negotiator's question: Should I or shouldn't I make the first offer? Yes, you should.

II. Cognitive Load

Cognitive load is the amount of mental work it takes to perform a task. Loading up negotiations with demanding mental work reduces the likelihood of success.

Participants in an experiment are randomly divided into two groups. One group is asked to remember a 7-digit number, the other to remember a 2-digit number. Then all participants are invited to select a snack — either a piece of chocolate cake or a bowl of fruit salad. The subjects who were trying to remember a 7-digit number — the ones with the greater cognitive load — took the cake. They simply didn't have sufficient rational capacity left to remember to eat healthy food.

III. Cognitive Fluency

Cognitive fluency is summed up in the rule: What is easy to understand is true. Stocks with pronounceable ticker symbols perform better on their IPOs than stocks with unpronounceable or "disfluent" ticker symbols. Propositions printed in complex fonts or printed in poorly contrasting colors are less likely to be agreed to than the same propositions printed in clearer fonts or better contrasting colors. Lawyers with fluent names make partner more often and sooner than those with disfluent names.

So: Make proposals as clear and understandable as possible.

(Continued on page 18)

COGNITIVE SCIENCE AND EFFECTIVE MEDIATION AND SETTLEMENT ADVOCACY

(Continued from page 17)

IV. Embodied Cognition

Embodied cognition is the idea that we don't think with our brains alone. The body also has an important role in the judgment and decision making process.

Experimental subjects holding warm coffee cups are better disposed to interviewees than subjects holding cold coffee cups. Subjects holding heavy clipboards judge the conversational topic weightier than those with light clipboards. Candidates interviewed for medical school admission on sunny days are more likely to get in than candidates interviewed on cloudy days. Students cheat less on tests in brightly lit rooms than in dimly lit ones.

So: Make negotiation opponents comfortable. Keep them warm and feed them.

V. The Peak-End Rule

Human beings make hedonic judgments — judgments about pleasure and pain — according to a rule that blends how good or bad the experience was at its peak and how good or bad it was at the end.

Colonoscopy patients were divided randomly into two groups. One got the regular procedure; the other got the regular procedure plus an additional 30 seconds during which the device remained in place but was not moved around. When surveyed about how unpleasant the experience was and how willing they would be to have it repeated, the subjects in the condition with the additional 30 seconds of discomfort rated the experience less unfavorably and reported that they would be more willing to repeat it.

So: If you want your negotiation opponent to return and do business with you again, arrange for your side to make the final concession.

VI. Recommended Reading

Ariely, D. (2008)

Predictably Irrational: The hidden forces that shape our decisions. New York: Harper

Cialdini, R. B. (1993)

Influence: The psychology of persuasion. New York: Quill (William Morrrow)

Goldman, B. (2008 and 2013)

The Science of Settlement: Ideas for negotiators. Philadelphia: ALI-ABA Amazon: http://tinyyyrl.com/kr37z8p

Kahneman, D. (2011)

Thinking, Fast and Slow. New York: Farrat, Straus and Giroux

Malhotra, D. and Bazerman, M. H. (2007)

Negotiation Genius: How to overcome obstacles and achieve brilliant results at the bargaining table and beyond. New York: Bantam ■

MICHIGAN SUPREME COURT UPDATE

Richard A. Hooker
Varnum

***Wurtz v Beecher Metropolitan District*, 495 Mich 242 (2014).**

Plaintiff in this case was employed by the Defendant water and sewer authority as its District Administrator under a 10-year contract that expired in 2010. The contract contained no renewal clause.

In 2008, Plaintiff complained to the county's prosecuting attorney that certain members of Defendant's governing board had violated Michigan's Open Meetings Act. Then, in 2009, he complained over inappropriate expense reimbursement reports submitted by board members in connection with their attendance at a conference in California. He even went so far as to file a complaint with the prosecuting attorney, who in turn brought criminal charges (later dismissed) against the board members. In late 2009, Defendant's board voted not to renew Plaintiff's contract when it expired in 2010, despite Plaintiff's open and explicit threat he would view non-renewal as retaliatory for his complaints. Significantly, Plaintiff was allowed to work the duration of his contract and could not point to any adverse employment action during its term. Following expiration of the contract, Plaintiff sued for violation of the Whistleblowers Protection Act (WPA) and wrongful discharge in violation of public policy.

The Circuit Court granted Defendant summary disposition on both claims, finding with respect to Plaintiff's WPA claim that he had worked through the expiration of his contract and had not been discharged. The Court of Appeals reversed in a split opinion, the majority ruling that non-renewal of the contract had been an adverse employment action. The dissent, on the other hand, opined that as a matter of law, Plaintiff could not satisfy the WPA's necessary elements based solely on the non-renewal of a fixed-term contract. Defendant sought and was granted leave to appeal.

Supreme Court Justice Zahra, joined by all six other Justices, reversed the Court of Appeals. Distinguishing other enactments that expressly prohibited unlawful "failures to hire," as well as what it essentially noted as over-use of the term "adverse employment action," the Court found the acts proscribed by the WPA were acts that could only be taken against an "employee." Since Plaintiff's contract had expired, he was no longer an employee, but instead was simply an applicant for employment, albeit continued employment. Since the WPA has no provision extending its protections to applicants, Plaintiff had no claim, and summary disposition for Defendant was reinstated.

[*Practitioners' Note*: One is left to wonder whether a renewal clause in the underlying contract might have changed the result, especially since the Supreme Court noted the absence of one in its request to the parties for Briefs. Also, there may remain questions in any case where the Plaintiff is able to show a consistently followed pattern or practice of renewal by the defendant in other contracts for specific durations.]

***Henry & White v Laborers Local 1191*, 495 Mich 260 (2014).**

Here the Court embarked on a voyage across the often murky waters of federal preemption. Plaintiffs were employed as business agents of the Defendant Local, working at the pleasure of

the Local's President, Defendant Ruedisueli. Having observed several members working at the request of Defendant Ruedisueli on the renovation of the Trade Union Leadership Building in Detroit, Plaintiffs discovered those members were being paid a flat fee stipend from the Union's picket duty fund instead of wages and benefits at Union scale, and they were working under conditions that did not include required jobsite safeguards. Plaintiffs circulated an open letter to all the Union's members and local media outlets complaining of these improprieties, as well as their suspicion Ruedisueli was receiving an unlawful kickback on the work. They also informed the Union of their intention to report the situation to the U.S. Department of Labor, which they subsequently did. The DOL investigated the matter and ultimately referred it to the U.S. Attorney's Office, which declined to prosecute. Shortly thereafter, Plaintiffs were notified they were being indefinitely laid off due to the "extremely difficult economic climate."

Plaintiffs then brought claims against both the Union and Ruedisueli under Michigan's Whistleblowers Protection Act. Defendants moved for dismissal on the grounds Plaintiffs' claims were preempted by both the National Labor Relations Act (NLRA) and the Labor-Management Reporting and Disclosure Act (LMRDA). The motions were denied, and the Court of Appeals affirmed in an unpublished decision. Defendants sought and were granted leave to appeal, the Court asking the parties for briefs on the following questions:

1. whether either of these federal statutes preempted the WPA claims if the challenged conduct (i.e., the alleged retaliatory layoffs) actually or arguably falls within the jurisdiction of either federal statute;

2. whether a union employee's report to a public body of suspected illegal activity or participation in an investigation of same is of only peripheral concern to the NLRA or the LMRDA (no preemption); and

3. whether the state's interest in enforcing the WPA is so deeply rooted, that in the absence of compelling congressional direction, courts cannot infer that Congress has deprived the state of the power to act.

In an extensive and thoughtful opinion, Justice Kelly wrote for the 5-Justice Majority, answering the 3 questions "arguably," "yes," and "yes," but only with respect to Plaintiffs' WPA claims based on their reports of suspected criminal activity, which are not preempted by either statute. Their claims were preempted, however, to the extent they were based on complaints over the wages, benefits and working conditions of their union's members working on the involved building. Such claims, according to the Majority, lie at the very heart of the NLRA.

In an equally thoughtful Dissenting Opinion, Justice Zahra disagreed, characterizing Plaintiffs' claims as essentially ones for wrongful discharge, and that such claims by union employees against their union employer were more than "arguably subject to" the protections in Sections 7 and 8 of the NLRA. For that reason, he believed Plaintiffs' claims were preempted in their entirety. ■

MERC NEWS

NEW STAFF AND PLANNED SEMINAR

Ruthanne Okun, *Bureau Director*

In early April 2014, BER welcomed Lisa S. Lane to serve as an Administrative Law Specialist, handling Freedom to Work issues. Ms. Lane graduated with a degree in Political Science from the University of Michigan. She received her J.D. from Wayne State University Law School, where she served as an Assistant Editor of the Wayne Law Review. Lisa has a unique perspective on labor law issues, having advocated on behalf of both management and labor. Her legal experience includes inter-related areas such as traditional labor law, labor relations, employment law and litigation, including employee benefits matters. Her background includes having worked at prestigious law firms such as Gregory, Moore, Jeakle, Heinen, Ellison, Brooks & Lane P.C.; Cattel, Tuyn & Rudzewicz; and Hardy, Lewis & Page. In 2008, Ms. Lane shifted from her role as an "advocate" to a neutral role as a grievance arbitrator handling cases as a panel member with both MERC and the American Arbitration Association (AAA).

Ms. Lane has extensive experience in client counseling, as well as in preparing training materials, employment manuals, and other documents for use by clients, attorneys and others. She is a thorough legal researcher and a polished legal writer and presenter. These qualities serve her well at the Bureau where a primary function of her position is responding to FTW inquiries from individuals, employers, labor representatives, legislators and others.

The Metropolitan Detroit Bureau of School Studies announces a summer seminar on "MERC Basics" to be held on August 20, 2014 at the Bank of America Headquarters Building, 2600 W. Big Beaver in Troy, MI. Registration begins at 8:30am followed by presentations conducted by MERC staff from 9am until noon on topics that include:

- The Commission –Who We Are and What We Do
- Contract Mediation
- Grievance Mediation
- Grievance Arbitration
- Fact Finding

The Seminar is open to both Management and Union representatives. Attendance by MERC constituents is encouraged. Information regarding this invaluable training is posted on the MERC web-site at www.michigan.gov/merc and on the web-site of the Metro Bureau at www.metrobureau.org.

NEW ALJ HEARING MERC CASES

Yasmin Elias, *MAHS Administrative Law Judge Manager*

On March 31, 2014, the Michigan Administrative Hearing System (MAHS) welcomed Travis Calderwood as its newest Administrative Law Judge assigned to hear cases on behalf of MERC. ALJ Calderwood previously served as an Administrative Law Specialist with the Bureau of Employment Relations. Prior to joining state service, ALJ Calderwood was employed with the law firm of Collins & Blaha, P.C., in Farmington Hills. There he represented public school districts in all areas of employment and labor law, as well as in state and federal compliance and regulatory issues. ALJ Calderwood attended Hillsdale College where he earned numerous scholarships and awards and graduated with a B.A. in Political Economy. He received his law degree from the Ava Maria School of Law in Ann Arbor, where he was awarded a full tuition scholarship. ALJ Calderwood is a member of the Michigan State Bar. ■

MERC UPDATE

Erin M. Hopper
White, Schneider, Young & Chiodini, P.C.

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

Maud Preston Palenske Memorial Library -and- AFSCME Council 25, Local 2757.09 and Local 2757.10, Case No. C12 K-223 (April 10, 2014).

Charging Party AFSCME filed an Unfair Labor Practice Charge (ULP or Charge) alleging that Respondent Employer repudiated the parties' collective bargaining agreement (CBA) when it refused to process and arbitrate a grievance filed by Charging Party. Respondent asserted that the contract had expired, despite a provision for automatic renewal, because it had given notice to Charging Party of its intent to allow the CBA to terminate. Administrative Law Judge (ALJ) Julia Stern determined that Respondent had not given sufficient notice of intent to terminate the contract, and therefore the contract had not expired. Respondent's refusal to arbitrate the grievance was therefore a repudiation of the agreement. After consideration of exceptions filed by Respondent, the Commission upheld Judge Stern's findings that the Employer had engaged in an unfair labor practice.

The parties' CBA, which was set to expire on April 30, 2012, contained a provision which stated that it "shall be automatically renewed from year to year…, unless either party hereto gives the other party at least sixty (60) days' written notice, by certified or registered mail, before the end of the term of this Agreement or before the end of the anniversary date thereafter of its desire to terminate, modify, or change this Agreement." On March 20, 2012, Respondent sent a letter to Charging Party stating, in part, that "we hereby serve notice that the local Union wishes to engage in negotiations with the Employer or its authorized representatives." Additionally, on April 18, 2012, after the parties began bargaining, they signed a document entitled "Ground Rules," which stated, in part, that "[t]he Current Agreement will terminate in April 2012 …[;] [t]he parties are hereby [in] mutual agreement to seek the modification of, or changes to, the Collective Bargaining Agreement. … [and if] either party wishes to terminate the agreement after the expiration they shall provide thirty (30) days written notice."

ALJ Stern found that Respondent had not given the sixty days required notice to terminate the contract, and therefore the contract had not expired and Respondent was obligated to abide by the arbitration provision. Respondent filed exceptions, claiming that both the March 20, 2012 and the April 18, 2012 Ground Rules gave Charging Party sufficient notice of its intent to terminate the CBA. However, the Commission found the exceptions to be without merit. As the Decision and Order explained, notice of a party's intent to terminate a contract must be unambiguous, and agreed with the ALJ's finding that "the notice of a desire to negotiate was too ambiguous to constitute a notice of termination." Because Respondent failed to give proper notice to Charging Party of an intent to terminate the contract, the CBA did not expire, and Respondent's failure to process a grievance to arbitration constituted an unlawful repudiation.

Service Employees International Union (SEIU) Local 517M -and- Paula J Diem, Case No. CU12 I-041 (February 13, 2014).

Charging Party individual Paula Diem filed a ULP Charge against Respondent SEIU alleging that it breached its duty of fair representation by collecting full union dues from her paycheck after she had elected to convert to agency fee payer status. After a hearing at which Respondent did not appear, Administrative Law Judge Doyle O'Connor found that Respondent had violated its duty, and therefore recommended that Charging Party be reimbursed the $337.46 which she had unknowingly overpaid to Respondent. ALJ O'Connor also recommended that Charging Party receive an additional $185.00, plus interest, to make her whole for the wages she lost as a result of having to attend the hearing on her Charge. The Commission affirmed the ALJ's findings, with the exception of the lost wages payment, which it found it does not have authority to order.

In October 2008, Charging Party submitted the appropriate form to Respondent to have her payroll deductions changed from the full union dues to merely union service fees. Respondent acknowledged receipt of the form, and sent Charging Party confirmation of her change in status in late October 2008. Then, in May 2012, Charging Party received a ballot to vote regarding the union's constitution, a decision in which, as a fee payer, she was not eligible to participate. This prompted her to contact her employer, and she learned that full dues, as opposed to service fees, were being deducted from her salary. When she approached Respondent about the issue, Respondent initially stated that Charging Party would receive a full refund of her overpaid dues, but later apparently changed its position and stated that it had no record of Charging Party's 2008 dues form, and reimbursed only a small portion of the allegedly overpaid amount.

Charging Party then filed a Charge against Respondent, alleging a breach of the duty of fair representation. Respondent filed an answer and appearance, but failed to appear at the hearing on the Charge. Charging Party presented her proofs, and ALJ O'Connor found that her uncontested evidence supported a finding that Respondent had breached its duty, and recommended an award of the full amount of her dues overpayment, as well as the amount of wages she lost for having to attend the hearing.

The Commission affirmed the finding that Respondent had breached its duty. As the Commission explained: "The elements of a union's duty of fair representation include: 1) serving the interests of all members without hostility or discrimination; 2) exercising its discretion with complete good faith and honesty; and 3) avoiding arbitrary conduct." The Commission stated that although the duty of fair representation does not apply to "strictly internal union matters that do not impact the relationship of bargaining unit members to their employer," this was not such a case. "[T]he collection of agency fees from nonmembers cannot be characterized as purely an internal union matter because it can only be accomplished pursuant to a negotiated contract provision, and there is a potential impact on employment should the nonmember refuse to pay." Therefore, Respondent had a duty of fair representation toward Charging Party regarding the deduction of her union dues, and the proofs supported a finding that that duty was breached.

The Commission did not, however, affirm the ALJ's award of costs for Charging Party's attendance at the hearing. In finding that it does not have authority to award costs or fees, the Commission cited to Goolsby v Detroit, 211 Mich App 214 (1995), stating that support for the argument in favor of awarding costs and fees often references Section 16(b) of PERA, which enables MERC to "take such affirmative action … as will effectuate the policies of this act." MCL 423.216(b). However, as found by the Court of Appeals, "that language is not sufficiently specific to authorize an award of either attorney fees or costs." Therefore, the Commission affirmed the ALJ's recommended order with the exception of the award of costs and fees. ■

WHAT DOES SUBSTANTIVE COMPLIANCE WITH EMPLOYMENT LAW REALLY LOOK LIKE?

Professor Sandra J. Defebaugh
Department of Marketing & Law
College of Business, Eastern Michigan University

What Is Substantive Compliance?

Achieving meaningful compliance with employment law is an important challenge businesses face. In my practice as a corporate employment attorney and a professor teaching employment law in a graduate program for business managers, I have endeavored to advise and teach my clients and managers (students) about the substantive nature of employment laws to insure what I call "real compliance," meaning following the law in a way that is intrinsic and natural to the manager's way of being and doing business.

To achieve lasting impact, real compliance should grow out of integrity, or a consistency of being and operating in a particular fashion no matter what the circumstances. This article seeks to provide a lens or perspective to help us understand what underlies these laws—their intent—as a meaningful way that makes them positive guides for behavior.

Merely to advise and instruct clients and managers on the form or terms of employment law is insufficient to accomplish that purpose. Something is missing. That missing element can lead to situations that we have all heard about where management complains that despite the company's following of the letter of the law, the employment culture remains negative, adverse, or suspicious with employees having an erroneous perception of illegal activity and filing baseless complaints. How is it that following the form of employment law to the letter can still have such negative consequences in the employment culture?

The answer is because merely following the form or letter of the law is insufficient to insure meaningful compliance with it, compliance that reflects the spirit or substantive aspect of the law. Indeed, the substantive nature of employment laws is to facilitate a positive and productive work interaction based on the relationship standards of respect, honesty, trustworthiness, and integrity. Often, however, somewhere along the line as we render advice or teach employment law, we forget to give our clients and managers an important overall perspective—that employment laws are about relationships and relationship standards directed at building, insuring, maintaining and sometimes repairing the employment relationship and its culture to facilitate a positive and productive work culture and business. I call this the "substantive" nature of employment laws.

I have observed that when advice or instruction is focused on the relationship attributes of the law, clients and students seem more likely to get that Eureka or aha moment and realize that when they also focus business decisions on operating out of respect, integrity, trustworthiness and honesty in the employment relationship, insuring compliance with the law also seems to come together naturally and positively. I refer to this relationship perspective as the "substantive" view of employment laws. Let's explore what it might look like to view or explain employment law to our clients/students from that perspective.

Understanding the Relational Foundation of Business.

The logic of the substantive view starts with showing clients/students the very nature of what business is. In its simplest and broadest view, business is all about relationships. It is a composite of stakeholder relationships (informal or via contracts) with employer/employee interactions constituting one of those stakeholder relationships. This employer/employee relationship is the most significant stakeholder relationship and is the heart's blood of an organization; nothing gets done outside of it —be it positive or negative. A great deal depends on that relationship and its operating values, standards, decision-making and actions. It is not unlike a personal relationship or a marriage—bad marriage culture, bad product.

Understanding Relational Standards

Once clients or trainees understand this relational foundation, we would next look at understanding that all relationships operate out of "relational standards," and it is these standards that influence or drive decision-making that, in turn, creates the culture of the relationship or entity, be it personal or professional. We would see that relational standards are based on values. Values influence both personal and professional decision-making and behavior. Values are internalized preferences for states of being. They shape or even drive behavior by guiding it; values can be called the DNA of action. Values powerfully influence each individual's mindset and his/her decisions and actions. Similarly, organizations (being made up of individuals) develop shared values that affect the workplace culture, its way of being. Understanding this helps us understand the value bases behind employment laws that mandate certain behaviors. Compliance with these mandates is strengthened when driven by similar values in employees.

Identifying Values

The next step in insuring real compliance is to identify common values that operate in a workplace and which of those values influence positive results or attributes and which influence negative ones. The process would start

(Continued on page 22)

WHAT DOES SUBSTANTIVE COMPLIANCE WITH EMPLOYMENT LAW REALLY LOOK LIKE?

(Continued from page 21)

with identifying common values that facilitate positive and productive relationships both personally and professionally. For example, we might consider how the values of respect, honesty, trustworthiness and integrity operate to facilitate not only positive personal relationships but also positive professional relationships and how many of the employment laws reflect these values. Later we will explore the important process of having the client identify the relational standards or values operating in the organization's culture and the impact of those standards or values on the organization, be it positive or negative.

The next step is to consider how employment laws themselves articulate and enforce certain relationship standards that reflect those positive values in order to facilitate productive work environments and companies. By way of example, let's examine the underlying values that we see reflected in the conduct or relationship standards mandated in four of the more significant employment laws.

National Labor Relations Act: The National Labor Relations Act mandates that the employment relationship allow employees to organize for the purpose of communicating or interacting with management on subjects of hours, pay and working conditions utilizing a process of good faith collective bargaining and certain concerted activities. The law considers it an unfair labor practice for either management or unions to interfere with these employee rights and to fail to operate out of good faith in the negotiating and communication process set up called collective bargaining. *http://www.law.cornell. edu/uscode/text/29/157.* These statutory requirements represent an attempt to set up processes and standards that will facilitate channels of communication, good faith discussion, sharing of information, decision-making and actions that reflect the values of mutual respect, honesty and trustworthiness.

Fair Labor Standards Act: A second example of the values underlying a law is the Fair Labor Standards Act. In drafting Section 202 of the act, Congress found that the "existence…of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well being of workers" has numerous unacceptable adverse effects. The statute goes on to impose certain relationship standards relative to minimum wage, overtime pay and the use of child labor *http://www.law.cornell. edu/uscode/text/29/202* . As with the previous law, underlying these statutory requirements, one can see operating the underlying values of respect, trustworthiness, honesty and integrity.

U.S. Equal Employment Opportunity Statutes: U. S. Equal Employment Opportunity statutes similarly merit study. We find in 2 U.S. Code 1311(a) the statement that

> All personnel actions affecting covered employees shall be made free from any discrimination based on—(1) race, color, religion, sex, or national origin, within the meaning of section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–2);(2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a); or (3) disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29U.S.C. 791) and sections 102-104 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112–12114) *http://www.law.cornell. edu/uscode/text/2/1311*.

We again see in these mandated standards for relationships the operation of underlying values of respect, honesty, trustworthiness and integrity. Operating out of these underlying values leads to decision-making and action based on job-related, professional business criteria rather than the discriminatory criteria of race, sex, age, national origin, religion and disability.

Occupational Safety and Health Act: A further example of value-driven mandated behavior is in 29 U.S. Code 65(a) of the Occupational Safety and Health Act (OSHA). Here Congress states that it " finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments." *http://www.law.cornell.edu/uscode/ text/29/chapter-15.* The statute then mandates relationship standards directed at providing a safe and healthy workplace by encouraging both employers and employees to engage in efforts to reduce occupational hazards and by allocating rights and mutual responsibilities to each to achieve such a goal. As before, the underlying values operating in these statutory requirements are respect, trustworthiness, honesty, and integrity.

Understanding Mutuality

This relationship perspective is incomplete, however, without an understanding that it is a two way street affecting the employee as well as the employer—it is not just for the benefit of one party or the other. Inherent to the substantive nature of the employment laws is the assumption that the employer is entitled to operate his/her business with relationship expectations made of employees including values-based standards of performance and conduct (such as honesty, respect, trustworthiness, integrity, work ethic.)

Within the context of the law, employers have a number of rights including the rights to hire and fire, set perform-

ance and conduct expectations, and manage the workforce, to name a few. If we look at those rights, we can often find the underlying values. For example, if we look at standards for discipline and discharge, such as those required for just cause, we would see proscribed conduct (e.g. theft, falsification, illegal drug usage and workplace violence) that reflects breaches in the values of honesty, respect, trustworthiness and integrity by employees.

Relevance and Practical Application of the Substantive View

Lastly, why is this substantive view or relationship perspective of employment law relevant? Our role as advisors or teachers of employment laws or standards is to lead the client or managers to a place where legal compliance is natural and integral to the manager's decision-making and actions. Compliance must grow out of and reflect integrity, a consistency of being and doing whatever the circumstance. This is an important aspect of being a business professional. Communicating only the form of the law is just one part of the story. When advising or teaching about substantive compliance from a relationship perspective, we can also give the client or manager tools to facilitate a positive and productive work culture and business.

In closing, let's utilize this perspective to consider what some practical advice and instruction for the client and manager might look like. It is not enough for the client or manager to know and comply with the forms, procedures and processes required in employment laws. Rather than stopping here, have your advice or instruction include imparting an understanding of the original intent underlying the law or regulation to help the client understand that law fully both to help train others to understand as well as to comply with the laws or regulations. Thus, one must train the client or manager to focus on the substantive nature of the law–-the employment relationship and the operation of relationship standards. This focus helps the client or student identify the operating values and standards in such areas as employment culture, decision-making matrixes, policies, procedures, and training. One must also train clients or students to assess or determine whether these values, in turn, underlie efforts to make legal compliance natural and intrinsic to the organization's way of operating as well. Doing so can help facilitate a positive and productive work culture.

An organization's self-assessment of the operating culture underlying its employment relationships and then its consideration of the process of transformation is a big first step. An important ongoing second step is to consult with counsel as the organization goes through the process. That helps the organization stay on track and maintain an ongoing perspective on how to insure both procedural and substantive compliance. ■

READ ALL ABOUT IT IN THE E-NEWS!

Daniel Swanson
Vice-Chair, Labor and Employment Law Section

The Labor and Employment Law Section took a leap into the 21st Century on June 5, 2014 with the publication of the inaugural "e-News." The e-News is a quarterly newsletter sent by e-mail to all Section members. It is part of the Section's ongoing effort to better serve and communicate with our membership.

Rob Boonin, LELS Chairperson, delegated the task of developing the e-News to me. I quickly responded by forming a committee of smart, dynamic, ambitious, and tech- savvy newer attorneys who took up the charge of developing, writing, and editing the e-News. Members of the committee are:

Jay Boger
Ellen Hoeppner
Erin Hopper
Michael Jackson
Zachary Mack
Allyson Miller
Alidz Oshagan
James Reid
Tad Roumayah
Jessica Vartanian
Anne-Marie Vercruysse-Welch.

The e-News' mission is to inform members of relevant and interesting information about Section members, recent and upcoming Section events, developments in the law, and practice tips and programs of interest to LEL Section members sponsored by others.

We are proud of the inaugural issue of the e-News. Still, it is a work in progress. I urge LELS members to email to me *(dswanson@sommerspc.com)* your ideas, comments, and suggestions about the e-News, so we can improve each succeeding issue. Our goal is make the e-News your source about what's happening within the Section and the place to find information useful to your practice.

If you didn't receive the first edition of e-News on June 5, check to make sure that it didn't get caught up in your spam filter. Watch for the next e-News in September. ■

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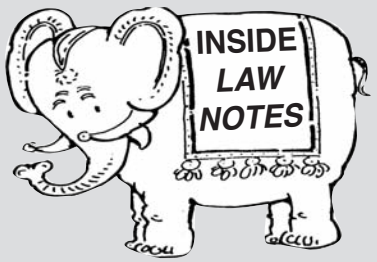
INSIDE *LAWNOTES*



- Jessica Vartanian writes about the Equal Pay Act and the future of the "market defense."
- Sean Dutton reviews Title VII's protection of employee-voiced opposition to unlawful employment practices.
- John "Johnny Football" Adam addresses the *Lawnotes* connection to the NLRB's Northwestern University football players' case.
- Lynn Morison reviews recent MERC cases in the appeals courts.
- Alan Penskar opines to the editor about the serial comma, and the editor opines back.
- Barry Goldman writes about his letter from the IRS. He writes, too, about using cognitive science to enhance mediation and settlement advocacy.
- Stuart Israel writes about declarations and Rule 56(c)(4).
- 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 Kelman cartoon, and more.
- Authors John G. Adam, Regan K. Dahle, Sandra J. Defebaugh, Sean T. H. Dutton, Scott R. Eldridge, Yasmin Elias, Evi Georgiou, Barry Goldman, C. John Holmquist, Jr., Richard A. Hooker, Erin M. Hopper, Stuart M. Israel, Maurice Kelman, D. Lynn Morison, Ruthanne Okun, Thomas Patton, Alan D. Penskar, Daniel Swanson, and Jessica R. Vartanian.