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ARBITRATION OF STATUTORY CLAIMS: THE *WRIGHT* DECISION BUT THE WRONG *DICTUM*

John G. Adam
Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C.

The Supreme Court, in a unanimous opinion by Justice Scalia, held that a general arbitration clause in a collective bargaining agreement (CBA) does not require an employee to arbitrate an alleged violation of the Americans With Disabilities Act (ADA), 42 U.S.C. Section 12101 *et seq. Wright v. Universal Maritime Service Corp*., 525 U.S. __, 159 LRRM 2769 (1998), *rev'g* 121 F. 3d 702 (4th Cir. 1997)(Table only). "We hold that the collective bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination. We do not reach the question of whether such a waiver would be enforceable." (Slip Op. 11) The Court rightly overturned the unpublished Fourth Circuit decision, which followed the earlier and equally wrong decision in *Austin v. Owens-Brockway Glass Container, Inc*., 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 519 U.S. 980 (1996).

Wright arose when petitioner sued several stevedoring companies that refused to hire him through the union hiring hall in 1995 because he had settled in 1992 a claim for permanent disability and was awarded Social Security disability benefits. When the companies would not accept Wright through the hiring hall, his union "told him to obtain counsel and file a claim under the ADA." (Slip Op. 3) Wright filed charges with the Equal Employment Opportunity Commission (EEOC), received a right-to-sue letter, and filed suit in federal court. The employers won summary judgment on the ground that Wright failed "to exhaust his remedies under the CBA and the Seniority Plan." (Slip Op. 4) The Fourth Circuit affirmed. The Supreme Court vacated and remanded. (Slip Op. 4, 11)

The Supreme Court reached the correct result and made it clear that the Fourth Circuit's *Wright* and *Austin* decisions were wrong. While reaching the right result - indeed, it is hard to fathom how the employers prevailed at the district and appeals court levels – the Supreme Court's opinion evaded a central issue — whether a union can waive individual access to federal agencies — and contains dictum which misreads federal labor law.

Justice Scalia surveyed the Court's precedent and noted "obviously some tension between" *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)(CBA cannot waive judicial forum for a civil rights claim) and *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991) (ADEA claim is subject to arbitration pursuant to arbitration provision in securities registration form). Justice Scalia found it "unnecessary to resolve the question of the validity of a union-negotiated waiver, since it is apparent to us, on the facts and arguments presented here, that no such waiver has occurred." (Slip Op. 6) While Justice Scalia recognized *Gardner-Denver*'s "seemingly absolute prohibition of the union waiver of employees' federal forum" he wrote that whether or not *Gardner-Denver* "survives *Gilmer*," at a minimum, a waiver must be clear and explicit. (Slip Op. 9) No waiver was found in *Wright*. Justice Scalia noted that the ADA was not incorporated by reference into the CBA. (Slip Op. 8) Nor was there any "explicit incorporation of statutory antidiscrimination requirements." (Slip Op. 9) The CBA contained only a general arbitration clause.

In *Gardner-Denver*, the CBA contained a non-discrimination clause ("no discrimination on account of race, color," etc.) but the Court made clear that "a contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins and are equally available to the aggrieved employee." 415 U.S. at 39, 52. And to drive home the point: "In no event can the submission to arbitration for a claim under the non-discrimination clause of a collective bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII." 415 at 52, n. 15.

Justice Scalia's decision manufactures a "tension" where none exists. "Survives" *Gilmer*? What "tension" between *Gardner-Denver* and *Gilmer*? This is troubling dictum. In fact, the Court in *Gilmer*, speaking through Justice White, reaffirmed *Gardner-Denver.* Justice White distinguished *Garden-Denver* on the basis that it involved a collective bargaining agreement. 500 U. S. at 34-35. "[W] e stressed that an employee's contractual rights under a [CBA] are distinct from the employee's statutory Title VII rights." *Id.* What happened to *stare decisis*? As Justice Scalia wrote, presumably with sarcasm, in a recent case: "It proves that the changes are attributable to nothing but the passage of time (not much time, at that), plus application of the ancient maxim, 'That was then, this is now.'" *County of Sacramento v. Lewis*, 140 L.Ed 2d 1043, 1066 (1998). It is distressing that not a single justice wrote a concurring opinion challenging Justice Scalia's flawed *dictum* in *Wright*.

Compare this with another decision issued two weeks before *Wright*, ruling that a union does not breach its duty of fair representation merely by negotiating a union security clause that tracks the language of the National Labor Relations Act. Justice Kennedy, in a concurring opinion joined in by Justice Thomas, felt the need to emphasize the limited nature of the Court's ruling in the union's favor. He also offered "further observations" as to how a union may be liable. *Marquez v. Screen Actors Guild, Inc.*, 119 S.Ct. 292, 159 LRRM 2641, 2648 (1998). In both *Wright* and *Marquez* the Court constructed their rulings in the narrowest fashion, apparently to undermine the very precedential value of their decisions.

Judge Scalia's opinion in *Wright* ignores the Court's decision in *Livades v. Bradshaw*, 512 U.S. 107, 127, n. 21 (1994) which found no inconsistency between *Gardner- Denver* and *Gilmer*. "In holding that an agreement to arbitrate an [ADEA] claim is enforce-

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STATEMENT OF EDITORIAL POLICY

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

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

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able under the Federal Arbitration Act, *Gilmer* emphasized its basic consistency with our unanimous decision in *Gardner-Denver*." 512 U.S. at 127, n. 21. The Sixth Circuit has also found no tension. "The *Gilmer* Court did not overrule *Gardner-Denver*, but distinguished it and its 'progeny[.]'" *Penny v. UPS*, 128 F.3d 408, 412 (6th Cir. 1997). Finally, Judge Avern Cohn discerned no tension in *Jackson v. Quanex Corp.*, 889 F.Supp.1007 (E.D. Mich. 1995), noting that the employer's "reliance of *Gilmer* fails to take into account the important circumstance that the arbitration clause it seeks to enforce is contained in a CBA." 889 F.Supp. at 1010.

Justice Scalia also ignores legislative history reaffirming *Gardner-Denver.* During oral argument it was noted that the legislative history of the ADA and the 1991 Civil Rights Act, amending Title VII of the 1964 Civil Rights Act, reaffirms *Gardner-Denver.* October 7, 1998 oral argument transcript, 1998 WL 721090 at page 36; *see* H.R. Rep. No. 485, 101st Cong., 2nd Sess. (1990), at 76-77 (ADA); H.R. Rep. No. 40, 102nd Cong., 2nd Sess. (1991) at 97 (1991 Civil Rights Act). The legislative history is not cited in *Wright*, perhaps because Justice Scalia objects "to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law." A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton Univ. Press, 1997) at 31.

Justice Scalia compounds his misreading of federal labor law by citing *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983) for the proposition that a "union can waive its officers' statutory right under section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. Section 158(a)(3), to be free of antiunion discrimination, but we held that such a waiver must be clear and unmistakable." (Slip Op. 9). This mischaracterizes the holding in *Metropolitan Edison.* In *Metropolitan Edison*, the "issue is whether an employer may discipline union officials more severely than other union employees for participating in an unlawful work stoppage." 460 U.S. at 695. The Court, in affirming the NLRB, ruled that the employer's imposition of more severe sanctions on union officials for participating in an unlawful strike was illegal. 460 U.S. at 710. While *Metropolitan Edison* noted that a union can "waive" certain collective statutory rights under the National Labor Relations Act, such as the right to strike, the Court never suggested the union could waive individual access to a federal agency and require arbitration of all statutory claims. Moreover, *Metropolitan Edison* stated that in *Gardner-Denver* "we noted that waiver would be inconsistent with the purposes of the statute [Title VII] at issue." 406 U.S. at 707, n. 11.

Justice Scalia's dictum is more troubling considering that he points out that the Solicitor General, as *amicus*, reminded the Court it could "reconcile the lines of authority by maintaining that federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts — a distinction that assuredly finds support in the text of *Gilmer*." (Slip Op. 6) The Solicitor General's approach also is consistent with *Barrentine v. Arkansas-Best Freight Systems, Inc*., 450 U.S. 728, 745

(1981), which held that claims under the Fair Labor Standards Act of 1938, are "independent" of the CBA and not "waivable" by the Union. FLSA rights are best "protected in the judicial rather than arbitral forum." 450 U.S. at 745.

Instead of citing "some tension" and wondering aloud whether *Gardner-Denver* "survives *Gilmer*," Justice Scalia should have followed *Gardner-Denver* and distinguished the *Gilmer* line of cases – just like Justice White in *Gilmer*, Justice Souter in *Livades*, Judge Cohn in *Quanex* and the Solicitor General in his *amicus* brief. The Court should have held that that the right to file administrative charges or federal lawsuits under the ADA – like Title VII, FLSA, FLMA, OSHA, etc. – is independent of any CBA and can be enforced outside the CBA in federal agencies and courts. See *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984) (holding that fringe benefit funds are not bound to general arbitration clause of the union CBA as third-party beneficiary and can sue directly in federal court for an audit and to collect contributions, citing, among other cases, *Barrentine*). For the Court to evade the issue of whether a union could waive a member's right to access to a federal forum was imprudent, especially because the opinion's *dictum* unnecessarily and unwisely suggests a possible "tension" where none exist.

The Court also ignored other precedent under the NLRA that a union cannot waive a member's right to file state or federal agency charges. *Kolman/Athey Div*, 303 NLRB 92, 138 LRRM 1319 (1991). Unions can refuse to agree to such waivers. While the National Labor Relations Board has not determined whether an employer proposal to waive employee access to federal or state agencies is an illegal or merely a permissive subject of bargaining, it is clear that an employer cannot insist upon such a proposal over the union's objection. *Reichold Chemicals*, 288 NLRB 69, 127 LRRM 1265, 1268 n. 8 (1988)(employer violates the NLRA by insisting on proposal that union waive members' right to file charges at NLRB; NLRB found it "unnecessary to decide whether this proposed waiver was an illegal, as distinguished from merely permissive, subject of bargaining"), *enfd.*, 906 F.2d 719, 721 (D.C. Cir. 1990), *cert denied*, 498 U.S. 1053 (1991). As a result, an " employer cannot compel a union to waive prospectively an employees's right to grieve a contractual violation or his or her statutory right to file administrative charges." M. Posner, J. Neighbors & J. Higgins, *The Developing Labor Law* (3rd Ed. 1997 Cum. Supp.) at 380 (citing *Kolman/Athey Div*., 303 NLRB 92, 138 LRRM 1319 (1991)).

Even if antidiscrimination statutes are incorporated into a CBA, as in *Gardner-Denver*, employee victims of illegal discrimination have two independent avenues to challenge the employer – the arbitral and the administrative judicial forums. As stated in *Gardner-Denver*, "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory practices can be best accommodated by permitting an employee to pursue his remedy under the grievance arbitration clause of a [CBA] and his cause of action under Title VII." 415 U.S. at 59-60. By avoiding the central issue, however, the Court in *Wright* reached the right result but offered the wrong *dictum*. This unfortunately may lead to unnecessary litigation initiated by those seeking to foreclose vindication of statutory anti-discrimination rights. Employers should not be confident that the Court will overturn *Gardner-Denver*, notwithstanding the wrong *dictum* of Justice Scalia's opinion. The Court will and should be loathe to overturn recent precedent and statutory interpretation and upset well-established, sensible law. ■

SEXUAL HARASSMENT: RECENT U.S. SUPREME COURT DECISIONS

Camille Stearns Miller and Cylenthia LaToye Miller
Lewis & Munday, P.C.

Recently, the United States Supreme Court examined and ruled on several hotly contested issues in the area of sexual harassment. Employers and employees now have more clearly defined guidance. As you will read, an appropriate catchphrase that summarizes the rulings might be: "It pays to follow procedures."

Burlington Industries, Inc. v. Ellerth

118 S. Ct. 2257; 1998 U.S. LEXIS 4217 (1998)

After 15 months on the job, Kimberly Ellerth quit, allegedly due to the sexually harassing behavior of one of her immediate supervisor, Ted Slowick. Although Ellerth had never complained to anyone in management about Slowick, she filed a lawsuit against her employer, Burlington Industries, alleging sexual harassment and constructive discharge.

The district court granted Burlington's motion for summary judgment and the Seventh Circuit *en banc* reversed in a decision that resulted in eight separate opinions. The Supreme Court granted *certiorari*, affirmed the Court of Appeals and remanded the case.

The Supreme Court held that the labels "quid pro quo" and "hostile work environment" are not controlling for purposes of establishing employer liability. Rather, an employer is subject to vicarious liability for sexual harassment of an employee by his/her immediate supervisor or a successively higher supervisor even if there is no tangible employment action taken. However, if there is no tangible employment action taken, the employer can raise an affirmative defense to liability or damages. The affirmative defense has two elements: (1) the employer exercised reasonable care to prevent and promptly correct sexual harassment; and (2) the alleged victim failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. If the supervisor's harassment culminated in a tangible adverse employment action, however, the affirmative defense is not available to the employer.

Faragher v. City of Boca Raton

118 S. Ct. 2275; 1998 U.S. LEXIS 4216 (1998)

Beth Ann Faragher resigned from her lifeguard position and then sued the City of Boca Raton and her immediate supervisors, Bill Terry and David Silverman, alleging hostile work environment sexual harassment. Like the plaintiff in *Ellerth*, Faragher had not complained to anyone in higher management prior to her resignation. She did however, complain to one of Terry's subordinates who did not take the complaint to Terry or anyone else in authority.

After a bench trial, the district court found that the supervisors' behavior was sufficiently serious to constitute a hostile work environment and that Boca Raton could be held liable because of

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SEXUAL HARASSMENT: RECENT U.S. SUPREME COURT DECISIONS

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the pervasive nature of the harassment, of which the city had to have knowledge or constructive knowledge. The Eleventh Circuit *en banc* reversed the district court, holding that under *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) and the *Restatement (Second) of Agency* § 219 (1957), the supervisors' actions were not within the scope of their employment, constructive knowledge could not be imputed, and that the city was not liable for negligence in failing to prevent it. The Supreme Court granted *certiorari*, reversed the Court of Appeals and remanded the case for reinstatement of the district court's opinion.

The Supreme Court's holding in this case was identical to its holding in *Ellerth.* However, because the Eleventh Circuit had relied upon agency principles to reach its decision, the Court focused its attention on a agency law. The Court opined that the proper analysis "calls not for a mechanical application of indefinite and malleable factors set forth in the Restatement, but rather an enquiry into whether it is proper to conclude that sexual harassment is one of the normal risks of doing business the employer should bear." The Court concluded that employers should bear that risk and take steps to prevent such harassment.

Importantly, the Court noted the district court's findings that Boca Raton failed to distribute its sexual harassment policy, made no effort to track harassing behavior by supervisors, and that the city's policy did not include a way to by-pass the alleged harassing supervisors in order to file a complaint. In these circumstances the Court found that as a matter of law the city could not be found to have exercised reasonable care to prevent sexually harassing behavior.

Oncale v. Sundowner Offshore Services

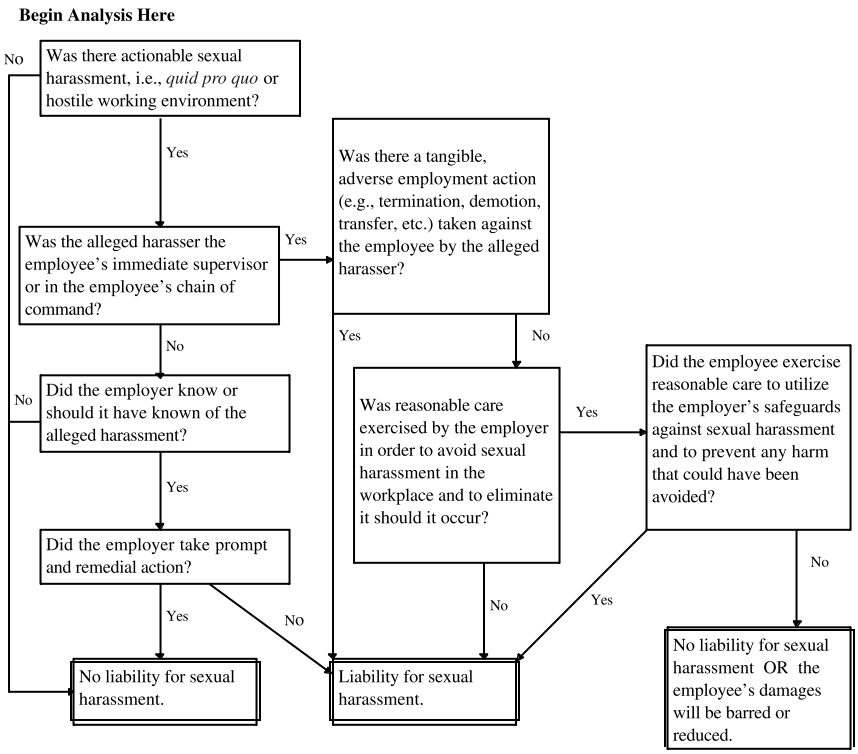
118 S. Ct. 998; 1998 U.S. LEXIS 1599 (1998)

Joseph Oncale quit his employment after suffering alleged repeated sexual harassment, including a threat of rape, from his male supervisor and two male co-workers. Oncale had repeatedly complained to supervisory personnel, but none of the complaints resulted in any remedial action. Oncale's resignation slip stated that he "voluntarily left due to sexual harassment and verbal abuse." At his deposition, Oncale testified that he felt he "would be raped or forced to have sex" if he didn't quit.

Oncale filed a lawsuit alleging sex discrimination and the district court, relying on Fifth Circuit precedent, granted summary judgment, holding that a male does not have a cause of action under Title VII for sexual harassment by male co-workers. The Fifth Circuit, relying on its own precedent, affirmed. The Supreme Court granted *certiorari*, reversed the Court of Appeals and remanded for further proceedings.

The Court held "that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant are of the same sex." The Court stated there was neither statutory nor case law justification for "a categorical rule excluding same-sex harassment claims from the coverage of Title VII." The Court also noted that its holding extends to any kind of sexual harassment that meets the requirements of Title VII. ■

Analyzing Potential Sexual Harassment Liability



Camille Stearns Miller
Cylenthia LaToye Miller

PRACTICAL MESSAGES IN THE SUPREME COURT'S SEXUAL HARASSMENT DECISIONS

Elizabeth Hardy
Kienbaum Opperwall Hardy & Pelton, P.L.C.

Although the two major sexual harassment decisions issued by the U.S. Supreme Court at the end of the 1997-1998 term — *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998) and *Faragher v. Boca Raton*, 118 S. Ct. 2275 (1998) — raise as many questions as they answer, they do convey one clear message that all Title VII employers should heed: Unless an employer has a published sexual harassment policy, a complaint mechanism, and a history of effectively remedying sexual harassment complaints, that employer will stand little chance of escaping liability if a supervisor is found to have created a sexually hostile work environment. Indeed, under these decisions, an employer will be liable *even if* it had no actual or constructive knowledge of the harassing conduct and regardless of whether it had forewarning that the supervisor had any prior history of harassing behavior. While proper handling of a plaintiff's harassment complaint is critical, that alone will not suffice to avoid liability. Following *Ellerth* and *Faragher*, the employer's historical track record will be as crucial as its handling of the complaint at issue.

Defense attorneys have for years urged employers to implement and publish to their employees a policy prohibiting sexual harassment and to establish a complaint and investigatory mechanism. Now, such policies and practices are the linchpin of an employer's defense to a hostile work environment claim involving a supervisor. Employers desiring to minimize such liability — presumably, all sensible employers — should do the following:

1. Implement a formal written policy prohibiting sexual harassment.

2. Disseminate that policy to the entire workforce through one or more effective methods (e.g., employee handbook, posting on bulletin board, individual mailings, etc.).

3. Specify two or more individuals to whom an aggrieved employee can complain (at least one should not be a member of line management).

4. Properly train those vested with investigation responsibility or involve an outside professional with appropriate expertise.

5. Ensure prompt, objective, and fair investigations.

6. Make a determination on every complaint, even if the conclusion is that the employer cannot in good faith determine what occurred.

7. Communicate the findings or conclusions (though not necessarily what disciplinary action will be taken) to each of the parties involved.

8. Take appropriate disciplinary action against the wrongdoer if a determination is made that misconduct — even if it is not legally actionable — occurred.

If an employer adheres to these steps in all instances, it will substantially minimize and possibly insulate itself against liability for the acts of supervisory personnel found to have created a sexually hostile work environment. Insulation, of course, presupposes that the employer has made a genuine effort to protect all employees — not just the plaintiff — from workplace sexual harassment. Practically speaking, this means that the employer must do more than just publishing a policy and walking through a perfunctory investigation. In contentious litigation, an employer will be called upon to prove that it made a serious effort to educate its workforce about the consequences of sexually harassing behavior and that it trained its management and human resources personnel to properly handle complaints.

Providing minimalistic training will not suffice if the stakes are high. Testifying experts who assess the quality and effectiveness of employer training programs are increasingly common in high exposure litigation. Training efforts will be quickly dismissed as insufficient if they are not comprehensive and sophisticated. Likewise, such experts opine on the objectivity, thoroughness, and timeliness of investigatory efforts. The standard against which such efforts are measured is demanding. The independence of the investigators is critical.

While all of this may be a bit of overkill for the garden variety sexual harassment complaint, in today's legal environment it is unquestionably the only safe course of action for employers to follow. The clear message in *Ellerth* and *Faragher* is that employers should anticipate the possibility of sexual harassment in the workplace and take appropriate preventative measures. Otherwise, they can be held liable for the wayward behavior of their managerial and supervisory employees.

Another significant development arising from *Ellerth* and *Faragher* concerns the "theory" of sexual harassment known as "quid pro quo," i.e., the allegation that a supervisor promised a job benefit or threatened a job detriment in conjunction with a request for a sexual favor. The question before the Court on this issue was whether a plaintiff who proceeds under this theory must establish that he or she actually suffered negative job action (e.g., demotion, denial of a promotion or merit pay raise, etc.) after rejecting the supervisor's request for a sexual favor. The plaintiff in *Ellerth* contended that the "threat" of negative job action in conjunction with a request for a sexual favor was actionable under the "quid pro quo" theory, but the Court disagreed. It found instead that a plaintiff who proceeds under a "quid pro quo" theory (as opposed to a "hostile environment" theory, which requires a showing of sexually offensive conduct of a severe and pervasive nature) must establish "tangible harm" — i.e., negative job action — after refusing a request for sexual favor. The Court clarified that the label "tangible harm" has replaced the former "quid pro quo" terminology.

Finally, while Michigan employers are far more likely to be sued under the Elliott-Larsen Civil Rights Act than under Title VII, and Michigan law arguably has a less demanding standard than that articulated in *Ellerth* and *Faragher*, the prudent course of action is for employers to ensure that their policies and practices comply with both federal and state law. *Ellerth* and *Faragher* are not binding on the Michigan courts, and may possibly be in conflict with certain aspects of Michigan law, but strict compliance with federal law should substantially minimize the risk of liability under state law. ■

EEOC REGULATIONS ON WAIVERS OF RIGHTS AND CLAIMS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Adele Rapport
Regional Attorney, EEOC[1]

The Commission published its final legislative regulation governing waivers of rights and claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et.seq. ("ADEA"). The regulations are in the June 5, 1998 *Federal Register* and became effective July 6, 1998. (63 FR 30628 June 5, 1998). The regulations specifically deal with section 7(f) of ADEA — the section of the Older Worker Benefit Protection Act ("OWBPA") concerning knowing and voluntary waivers of rights under the Act. 29 U.S.C.§626(f). The EEOC used the negotiated rule making procedure in drafting these regulations. This was the first time the EEOC used this process where a Negotiated Rule Making Advisory Committee was given the task of drafting the regulations. This Committee included 20 representatives from various stakeholder groups including employee rights advocates, plaintiff's attorneys, labor organizations, state and local governments management attorneys, employer representatives and a few EEOC employees. The final recommendation to the Commission represented a consensus of all of the committee members. While this process did extend the time frame for publication of the regulations, the process requiring a consensus of the diverse committee members should result in a clear understanding, acceptance and compliance with these regulations.[2]

This article will discuss the highlights of the regulations and note the issues which have not been resolved. In this regard it should be noted that these issues may well have been considered, but did not become part of regulations because the committee members did not reach consensus on how to address these concerns.

A. History and Circumstances Under Which the Regulations were Prepared

OWBPA, passed in 1990, included a provision concerning waivers of claims under ADEA. This provision included minimal requirements which must be proven *by an employer* to establish a release of rights under ADEA was knowing and voluntary 29 C.F.R. 1625.22(h). The basic elements of a valid release include requirements as to the manner in which the release is written, minimum time frames for consideration of the release, and a mandatory revocation period among other requirements.

Issues concerning the meaning of the OWBPA language have been well litigated, particularly as to the sufficiency of the information provided to the employee. See e.g. *Griffin v Kraft General Goods, Inc.* 62 F.3d 36 (1st Cir. 1995). As will be discussed later in this article there has also been considerable litigation about the effect of the employee's retention of benefits obtained by signing the release on his ability to pursue an ADEA claim where the release does not comply with OWBPA. The regulations were drafted and issued in hopes of clarifying some of these difficult issues and assisting employers in dealing with practical implementation concerns.

B. Highlights of the Regulations

The regulations acknowledge that OWBPA provides *minimum* requirements for determining whether a release is knowing and voluntary. Other facts and circumstances may bear on the validity of a release such as whether there was a mistake, omission or misstatement in the information furnished by the employer. 29 C.F.R. §1625.22(a)(3). The regulations then provide basic criteria for determining whether a release is in fact knowing and voluntary.

1. The "Ordinary English" Requirement

The entire waiver agreement must be in writing and calculated to be understood by average eligible participant. §7 (f)(1)(A); §1625.22(b)(2). This "ordinary English" requirement applies to entire release and §7 (f)(1)(H); §1625.22(b)(5) information required when the release is provided as part of a group exit incentive.

2. Specific Provisions Required in the Release

The release must specifically refer to ADEA. §7 (f)(1)(B); §1625.22(b)(6). This author has observed that while some Michigan employers do include a reference to OWBPA as well as ADEA, other employers simply make generic references to all possible civil rights claims and fail to mention ADEA at all. This omission alone can render the release invalid.

In addition to the requirement for specific mention of ADEA, the regulations and the statute require that the employee be specifically advised in writing to consult with an attorney. §7(f)(1)(E); §1625.22(b)(7). Most employers do include the advice to obtain counsel in the body of the release. In fact some employers offer to pay for counsel to examine the release and the benefit package. On the other hand, notwithstanding the clear language of the statute (and now the regulations) EEOC investigators still find exit incentive packages that do not contain this simple provision.

3. Provisions the Release Cannot Contain

In addition to the requirement for inclusion of certain language, OWBPA also prohibits certain clauses. For example an employee cannot be required to waive rights which arise after waiver is executed. §7(f) (1)(C); §1625.22(c)(1). The regulations note that this provision does not bar agreements to perform future related employment actions such as agreement to retire at a future date or consulting contracts for a specified term post resignation. §1625.22(c)(2).

In addition, the release cannot contain a provision which would prohibit the employee from cooperating with the EEOC in an investigation. See §1625.22(i). The EEOC is particularly concerned about any release which would limit an employees right to cooperate with the EEOC in any way or limit the employee's right to file a charge. (*See EEOC Guidance on Waivers Under the ADA and other Civil Rights Laws).*

4. Requirements for Consideration

In order to establish a valid release the employer must demonstrate that it paid the employee special consideration for the release. In other words it must be consideration of value to which the individual is not already entitled ¶7 (f)(1)(D); §1625.22(d).

We frequently see specific acknowledgment in a release stating that the amount paid to the employee for the release is valid consideration above and beyond that to which the employee is already entitled. This language alone will not establish special consideration, the employer must demonstrate that it is in fact in addition to the benefits to which employee already is entitled absent a waiver.

If the "special" consideration is merely restoration of a benefit that employer has unlawfully eliminated, the restoration will not "count" as a special consideration. §1625.22(d)(3). For example, if an employer eliminates ERISA protected retiree health plan

benefits, and that decision is later determined to be unlawful, an offer to restore these benefits would not be deemed as special consideration.

The employer is not, however, required to give greater benefit to members of protected age group than the benefits given to other eligible participants simply because they are members of the protected age group. §1625.22(d)(4). In other words the employer does not need to add additional consideration for the release to persons over 40 simply because the employer obtains the benefits of an ADEA waiver in addition to the waivers of other claims which the same consideration will obtain from employees under 40. *Id.*

5. Time Period Requirements

The employer must give 21 days to consider a release where one individual is involved and 45 days notice where more than one individual is involved, such as a severance or other exit incentive or termination program offered to group or class of employees §7(f)(1)(F). The employer must also give the employee 7 days to revoke the release. §7(f)(1)(G); §1625.22(e).

The most frequent invalid release provision seen by the EEOC in this region is the use of a 21 day consideration period (or less) where the employees are entitled to a 45 day period. In that regard the use of the 21 day procedure has some substantive liability implications, particularly where a large corporation has used the shorter time frame and failed to provide the information required for a group program as well. This factual pattern was successfully litigated by the Detroit District office in *EEOC V. Sara Lee Corp.*, 923 F.Supp. 994 (W.D. Mich. 1995). That case was settled on appeal for approximately $330,000 for two individuals following a successful trial and liquidated damage award.

The regulations provide some clarifications on the notice provision. Thus, they provide that exit incentive programs covered by the 45 day consideration provision include voluntary and involuntary programs. §1625.22(e)(3). The regulations further provide that the 21/45 day period runs from date of final offer. If material changes are made to the final offer, the time for consideration of the release starts anew unless parties agree to contrary. §1625.22(e)(4). For example, a corporation may negotiate a severance package with a high level executive and make material changes to the deal in the course of negotiations. In such a situation the time period will run from the final offer, not the initial offer. However, the parties may agree that even material changes do not restart the running of the time period. *Id.*

The releases which do not afford sufficient time for consideration, usually also omit the 7 day revocation period. Omission of this provision alone will invalidate the release even if sufficient notice is given. The regulations clarify that this 7 day revocation period *cannot be waived* or shortened by agreement or otherwise. §1625.22(e)(5). Some employers have tried to do so in the past and we have taken the position that such waivers of the revocation period are invalid.

It should be noted that an employee can start the 7 day period running if he signs the release in less than 21/45 days, as long as shortened time frame is knowing and voluntary and not induced by fraud misrepresentation threats to withdraw benefits, or incentives to "early birds." If the employee does knowingly and voluntarily sign early, the employer can process the consideration in the shortened time frame. §1625.22(e)(6). However, it has been our observation that most employers wait until after the full time period for consideration and revocation has passed before they process the consideration.

6. Informational Requirements

Perhaps the greatest source of confusion and questions (as well as litigation) is the information requirements for 45 day (group) releases. The regulations clarify that certain information must be given at commencement of time frame for signing the release. OWBPA specifically requires that the following information be provided to the employees at that time: the class unit or group covered by the group exit program, eligibility factors and applicable time limits for the program. The employer must also provide the job titles and ages for all individuals eligible or selected and titles and ages for all individuals in same job classification who were not eligible or selected. §7(f)(1)(H). This informational requirement applies to exit incentive programs such as voluntary offers of severance for those who chose to resign and termination programs such as involuntary reductions in force where the employee is given additional consideration for signing a release). §1625.22(f)(iii)(A).

Programs offered to *two or more* individuals are covered by this provision. §1625.22(f)(iii)(B). These programs are usually standardized packages which are not subject to negotiation but do not have to be ERISA covered plans. §1625.22(f)(iii)(D).

The purpose of the informational requirement is to provide the affected employee an informed choice about the waiver. §1625.22(f)(iv). It must be given to each person in the unit who is asked to sign a waiver. §1625.22(f)(2). In that regard an employer's failure to provide this information in the required context suggests that the employee was not given an informed choice and perhaps deliberately so. In other words the absence of this information, particularly if the facts reveal an age pattern in the selection of eligible participants, has substantive implications.

Prior to issuance of the regulations, there was some confusion as to the appropriate "unit" for which the specific employee information is required. The regulations clarify that the decisional unit is determined based on the employers' organizational structure and decision making process. In other words the appropriate unit will be determined based on the unit the employer considered in determining which employees would be asked to sign the waivers and who would not. §1625.22(f)(3)(i)(B). The decisional unit could be one facility or a multi facility regional unit or a specific division or job category in a facility. Other possible decisional units include departments, reporting positions (e.g., all positions which report to the senior vice president) or job categories (e.g., quality control inspectors nationwide). §1625.22(f)(3)(ii)(B-C) with examples in §1625.22(f)(iii)(A-E).

The regulations provide some guidance for determination of the appropriate decisional unit. Initially we will look to the interrelationship of functions as small facilities in a specific geographic area could functionally operate as one unit. Evidence of such integration includes a common personnel function. §1625.22(f)(3)(v). On the other hand if the decision appears to have focused on a distinct internal function (e.g., finance where there is no overlap with other functions, e.g., manufacturing personnel) the decisional unit could be less than facility wide.

The regulations do provide that using a higher level review of a proposed reduction in force will not change the appropriate unit e.g. from facility wide to region wide unless the regional manager reviews the proposed reduction and then adds additional facilities. §1625.22(f)(3)(vi)(A).

An EEOC investigator investigating a group exit or reduction in force will also request this information concerning the decisional unit at a minimum. The regulations clarify that the limitations on the informational requirement to the decisional unit does not

(Continued on page 8)

EEOC REGULATIONS ON WAIVERS OF RIGHTS AND CLAIMS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

(Continued from page 7)

effect the scope of discovery or EEOC investigation (i.e., the requests for information or production can be broader than the decisional unit). §1625.22(f)(3)(vii).

As to the precise information required, the regulations clarify that the employer must use actual age of selectees and non selectees, use of a band of ages improper. §1625.22(f)(4)(ii). The information must also include a breakdown by grade level or other subcategory used by employer. §1625.22(f)(4)(iii). The employer must also provide information which will distinguish between voluntary and involuntary terminations. §1625.22(f)(4)(iv). If the reduction takes place over time, the information must be cumulative so that late offerees will see the entire picture. §1625.22(f)(4)(vi).

The regulations contain a sample of an appropriate informational disclosure in §1625.22(f)(4)(vii). This is not a prototype, but is one method of properly presenting the required information to the employees.

7. Waivers settling Charges and Lawsuits

In addition to the provisions concerning waivers in the ordinary course, the regulations also deal with releases and waivers where a charge or lawsuit has been filed. The releases in these instances must meet the general requirements of OWBPA except for the specific time frame provisions. §1625.22(g)(1). However, the time frame to consider the release under these circumstances must be reasonable. §1625.22(g)(1)(B). Many practitioners allow at least 21 days in these circumstances. The regulations do provide that the time frames used in OWBPA will be considered reasonable. §1625.22(g)(5).

EEOC participation is not required in obtaining a release settling a lawsuit implicating the statutes we enforce. §1625.22(g)(6). However, the regulations further provide that the waiver agreement cannot prohibit or be contingent upon waiving participation in EEOC investigation or proceeding §7(f)(4); §1625.22(i). Moreover the release cannot contain a condition or penalty adversely effecting the employee's right to file charge or complaint or participation in EEOC investigation or proceeding.

C. Issues Not Covered by the Regulations

The regulations did not take a position on some controversial issues. For example, no position was taken on the ratification/offset issue recently decided in *Oubre v. Energy Corp.*, 118 S. Ct.838 (1998), where the court held that an employee did not ratify an invalid release by retaining the benefits of the severance package and did not have to re-tender that amount to be able to proceed with an ADEA action. Neither the court nor the regulations decide the issue of whether the amounts paid in severance should be used to offset an ADEA award in litigation. Accordingly, while the new regulations should answer some questions of practitioners, the court will have to determine other issues related to releases.

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

[2]As indicated above the committee included represented the interests of employees, labor, management and government. It met six times and rules published were consensus decisions only. ■

MONICAGATE AND THE DEPOSITION

Sheldon J. Stark
Stark and Gordon

Once the initial shock and surprise of MonicaGate began to wear off, it occurred to me that the charges against President Clinton might actually effect *my* life. The President is accused of providing deliberately false testimony in his deposition. That deposition took place in the context of a sexual harassment lawsuit, the Paula Jones case. I handle sexual harassment litigation. Will this influence my practice?

Everyone involved in the handling of these cases understands that witnesses don't always tell the truth. Some cynics suggest that when the truth finds its way into the process at all, it is the result of accident rather than intention. I don't go so far; but over the years, I've certainly seen my share of witnesses whose commitment to the truth was less than complete. Lately, I worry that the example set by the President in *Jones v. Clinton*, and the avalanche of commentary on it, will impact future depositions in very negative ways. We have all listened to the pundits *ad nauseum* say that no one is ever prosecuted for giving false testimony in a civil deposition. With few exceptions that I'm aware of, this is a true statement. I don't think Clinton should be impeached. Few people do, and he probably will not be impeached. What message does that send to future deponents, the managers, executive and corporate officers involved? Will that encourage them to dissemble with impunity since we are only discussing "sex lies"? Is that message already out there? Perhaps.

However, I am not discouraged. I am actually optimistic. While Clinton may not be impeached, nor removed from office, he has been severely punished. He's been humiliated; he's been embarrassed; his administration is in disarray; and his agenda has been pushed aside. This proud man who has spent his entire life getting ready to be President of the United States has earned a place in history that will always be controversial, at best. Now that's punishment. I suggest that the President's example sends a different message to corporate representatives who might consider playing fast and loose with the truth: a perjury charge is probably pretty remote. But a worse fate may await the witness who fails to take the testimonial oath seriously. Exposure, censure, derision, humiliation and possible discharge. The present crisis may have a positive effect on the process, after all. In the Clarence Thomas-Anita Hill hearings, many of us worried that there would be a negative effect on women who might consider bringing a sex harassment charge. If the defense could brutalize someone with Anita Hill's qualifications and background, who could possibly be safe and immune? Would the picture of Professor Hill's cross-examination discourage women from coming forward? The answer wasn't long in coming. Complaints of sexual harassment have grown dramatically since 1991, and the Supreme Court last term made clear that it is taking sexual harassment very seriously. The same may well turn out to be true in the deposition of witnesses in sexual harassment litigation. At least, I hope so.

FUNCTUS OFFICIO: A RESPONSE TO ERWIN ELLMANN

George Nicolau[1]

In the Fall 1998 issue of *Lawnotes*, Erwin Ellmann, a distinguished attorney and arbitrator, calls once again for abandoning the doctrine of *functus officio* in arbitration. In the course of his article, entitled "Officially Defunct?", he suggests that my recent proposal to modify Article 6.D.1 of the *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* is "perhaps designed to please no one." I'm sure it will not please Mr. Ellmann. However, I think it will please those who consider the concept of finality one of arbitration's most important hallmarks.

In its present state, Rule 6.D.1. prohibits the "clarification or interpretation of an award . . . without the consent of both parties." In his 1992 paper before the National Academy of Arbitrators,[2] Ellmann proposed the abolition of 6.D.1. so that arbitrators might not only rectify inadvertent mistakes as arbitration statutes already provide. With *functus officio* out of the way, he also suggested that arbitrators would be free to change their awards and tailor "their ultimate judgments to facts and law which may have eluded them or the parties the first time around." Thus, he was plainly advocating that arbitrators have the same authority as federal judges who, under Rule 60(b) of the Federal Rules of Civil Procedure, can, within a year, "undo a judgment made by mistake, inadvertence," excusable neglect or "any other reason justifying relief from . . . the judgment," including newly discovered evidence.[3]

It is this assault on finality that I found disturbing. Though Ellmann characterized his proposal as "modest," it is far from it. The very virtue of arbitration is that once the award is issued, the matter is essentially over. When an arbitrator makes an inadvertent mistake, such as awarding no back pay at all when he meant to give only a two-week suspension, courts have come to the rescue,[4] as Judge Posner did in *Excelsior*.[5] But correcting the language of an award that is mistakenly inconsistent with the conclusions in an opinion is one thing. Changing an award because the arbitrator is subsequently persuaded that the result is wrong is quite another. If that were the rule, motions for reconsideration would abound; matters would rarely be put to rest and the problem that brought the arbitration about in the first place would continue to fester.

That's why my proposal, which Mr. Ellmann finds inadequate, was careful to walk the line between clarification and reconsideration. As my forthcoming paper[6] and Ellmann's paper point out, there have been a number of instances when mistakes have been made only to be rectified two to three years later after a court has directed an arbitrator to make the correction. In those circumstances, an arbitrator was unable to act absent judicial direction because the party who did not stand to benefit from the correction would not consent to the clarification.

The proposal I offered is designed to remove that impediment, saving both time and expense, but go no further. It is still subject to membership ratification and approval by the other signatories to the *Code*, the American Arbitration Association and the Federal Mediation and Conciliation Service, but as recommended by the Academy's Committee on Professional Responsibility and Grievances and the Board of Governers, it reads:

Clarification or Interpretation of Awards

> Unless directed to do so by appropriate authority, an arbitrator may not reconsider the merits of a final award or accept a motion for such reconsideration.
>
> Clarification or interpretation of an award is permissible upon the request of a party. The arbitrator must afford both parties an opportunity to present their respective views.[7]

When compared to Ellmann's suggestion, this is, I agree, a modest step. But, unlike Ellmann's proposed deletion of 6.D.1., it is designed to further a universally understood goal — finality. That is what parties want when they choose arbitration and that is what they should continue to have.

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[1]The writer, a native of Michigan, is a past president of the National Academy of Arbitrators and the author of the paper on *functus officio* referred to in Mr. Ellmann's article.

[2]*Functus Officio Under the Code of Professional Responsibility: The Ethics of Staying Wrong*, Arbitration 1992,. Proceedings of the Forty-Fifth Annual Meeting, National Academy of Arbitrators, ed. Gladys Gruenberg (Washington: BNA Books 1992), 190.

[3]Id, 192

[4]See *Cadillac Uniform & Linen Supply, Inc. v. Local 901, I.B.T.*, 920 F. Supp. 19 (D.P.R. 1996).

[5]56F. 3rd 844 (1995).

[6]"O Functus Officio: Is It Time to Go?," to appear in the Proceedings of the Fifty-First Annual Meeting of the National Academy of Arbitrators, to be published by BNA Books in the spring of 1999.

[7]The proposal to permit clarification at the request of one part as long as both parties are heard while continuing to bar reconsideration of the merits conforms with the Uniform Arbitration Act as well as Section 16 of the Revised Uniform Arbitration Act now under consideration by the National Conference of Commissioners On Uniform State Laws. ■

ERWIN ELLMANN ANSWERS:

If an arbitrator can be entrusted to interpret and apply provisions of an agreement having the profoundest importance to the parties, I should think that he or she can also be trusted to interpret and apply that provision which makes the award "final and binding." If that trust proves misplaced, the selective insight of the marketplace will at least provide a corrective for the future. The courts, meanwhile, will continue to regulate arbitral conduct which they may find to be glaringly inappropriate, though every wrong answer does not constitute a moral lapse. See, e.g. *Teamsters Local 312 v. Matlock, Inc.*, 118 F.3d 985 (3d Cir. 1997).

I should think that we have recently had our fill of political decision-making purporting to reflect moral outrage. Whatever vitality and virtues *functus officio* still may have, I do not think that this ancient doctrine, however diluted, should be a measure of "professional responsibility" or rectitude under the *Code*. My differences with Mr. Nicolau, however, may be less chasmic than he thinks. ■

MERC ON THE WEB

Along with a new director, Ruthanne Okun, MERC has a new web site at www.cis.state.mi.us/ber/merc.htm. MERC decisions will be posted the beginning of the month following their issuance. Decisions are listed by case name with a brief description of the subject matter, date issued and case number. The database will begin with decisions issued in August 1998. There is no way to search using key words, or any other means, which will not be a problem until the number of decisions increases. To read decisions you must download using the Adobe Acrobat Reader, so that when you print, the decision will look like the official copy.

ALJ decisions will not be posted until the Commission has reviewed them. Act 312 decisions and fact-finding reports are not on the MERC web site, but will be posted at another site in the future.

MERC's web site is user friendly. Anyone who has read MERC decisions in the cumbersome binders will appreciate reading and printing cases from the web.

The web site contains other useful information, including appellate activity and the *MERC Messenger.* MERC has followed the "precedent" established by the NLRB, whose web site, www.nlrb.gov, is timely and informative.

VIEW FROM THE CHAIR

Janet C. Cooper, *Chair*
Labor and Employment Law Section,
State Bar of Michigan

Looking back . . . to the Annual Meeting in September . . . Excellent presentations at the afternoon seminar, and we thank Sheldon Stark, Camille Stearns Miller, Deborah Gordon, Paul L. B. McKinney, Elaine Frost, Bob McCormick, Adele Rapport, Joe Marshall, Roy Roulhac and John Brady, who chaired the panel. Dinner attendees were entertained by "A Habeas (Chorus) Line" and ask Shel Stark how to graphically illustrate "MCLA"!

We're also looking back to the National Institute on Age Discrimination, co-sponsored by our Section and the Labor and Employment Law Sections of the American Bar Association and the Ohio Bar Association. Connye Harper gets kudos for bringing this program together in Michigan, the first National Institute ever held in the Detroit area. The faculty was exceptional and we learned much about this growing jurisdiction.

Looking ahead . . . mark your calendar for the Winter meeting, January 29-30, 1999 at the Eagle Crest in Ypsilanti. The Section's third ever Distinguished Service Award will be presented to George Roumell, for his outstanding contributions to the field of labor and employment law as an arbitrator, litigator, professor and mentor to more lawyers than we can count. Our banquet speaker on Friday evening will be Juan Williams, author and commentator who appears regularly on public television and radio. Williams has won many honors for his authorship of "Eyes on the Prize," the extraordinary history of the civil rights struggle, and has just published a biography of Supreme Court Justice Thurgood Marshall.

Our Saturday program will feature updates on MERC, NLRB and EEO law. We will have two panels: the first illuminating the area of witness preparation and the second reviewing the progress of litigation under the laws protecting persons with disabilities.

A bit further ahead, plan to attend the ICLE — Labor and Employment Law Section-FMCS Spring Seminar at the MSU Conference Center in Troy, on April 22-23, 1999. Plans are in the works now, and you won't want to miss this informative session.

Focusing On . . . Justice for All. "The number one priority of the State Bar of Michigan is to assure that access to the legal system is available to all people in Michigan, regardless of their economic situation." To accomplish this ambitious goal, the State Bar, the Michigan Bar Foundation and legal services providers engaged in a planning process, beginning in 1995, to make "Justice for All" a reality.

Recognizing that 80% of low-income people in Michigan lack access to an attorney or the courts when needed, the Michigan Plan for legal services is designed to stabilize existing funding sources for such programs, and to building an endowment fund of $200 million by the year 2020.

Recognition of the need includes knowing that while in Michigan there is one lawyer for every 340 residents, there is only one civil legal aid lawyer for every 9000 low-income people. More than 1.5 million people in Michigan are eligible for legal aid but fewer than 20% of their needs are being met.

The scope of the problem was illustrated dramatically in 1996 when Congress cut $4 million from legal services funding for Michigan. That cut reduced resources by 27%! More than 90% of all matters that come to legal services are resolved outside the courts. More than 80,000 cases were closed in 1997, an average of 485 cases per lawyer. Most of the cases involves matters such as custody, domestic abuse, families threatened with homelessness, problems with unethical business practices, abused and neglected children, and assistance to retirees and persons with disability who need income counseling and medical care.

The state program is a collaboration between private attorneys who contribute *pro bono* services, and a newer program through which large firms have agreed to handle complex cases that legal aid agencies can't accept. The Michigan Poverty Law Program, an innovative partnership of two legal services programs and the University of Michigan Law School, provides state coordination, assistance and support for both legal aid staff and *pro bono* advocates.

Court filing fees and interest on lawyer's trust accounts financed approximately 20% of the nearly $20 million program in 1997. The bulk of the services are provided through eleven area agencies for legal services (90%), and three statewide agencies (10%).

The State Bar has now added to its own staff to further develop the Access to Justice for All program. The program has been honored by the American Bar Association, which presented the Harrison Tweed Award for achievement in preserving and increasing access to legal services for the poor to the State Bar of Michigan at its 1998 annual meeting.

The Labor and Employment Law Section will contribute $2,500 to the Endowment Fund this year. We encourage all of our members to consider endowment contributions this year, and until the need is met. More information is available from the State Bar by calling 1-800-968-6723.

JONES V. CLINTON ORAL ARGUMENTS AND LEGAL DOCUMENTS ON THE WEB

John G. Adam
Martens, Ice, Geary, Klass, Legghio, Gorchow and Israel, P.C.

It did not start with the September 11, 1998 posting of the Starr Report (or, more accurately, the Starrnographic Report) by the House of Representatives on the House Judiciary Committee's web site (www.house.gov/judiciary). Long before the Starr Report, the *Jones v. Clinton* litigation generated several web sites. They contain: (1) audio recordings of the oral arguments at the Supreme Court and the Eighth Circuit; (2) unsealed legal documents, including the complaint, answer, deposition transcripts, the briefs, orders; and (3) proposed settlement documents and the November 13, 1998 settlement agreement. The sites contain some great legal material useful to labor and employment attorneys. Warning: the sites contain "sexually explicit" material.

Eighth Circuit Puts Oral Argument and Docket on the Web. Due to popular demand, the Eighth Circuit Court of Appeals provided an Internet link to the audio recording of the October 20, 1998 oral argument in the *Jones v. Clinton* case, (ls.wustl.edu/8th.cir/Jones/jones.html). You can listen to Jones' attorneys argue why summary judgment was not appropriate. You can listen to the President's attorney argue why it was, and why Lewinsky does not matter. The President's lead lawyer Bill Bennett did not argue, apparently for fear of getting Howard Baker's Watergate question: what did he know about "that woman" and when did he know it. One of the judges asked the lawyer who substituted for Bennett why she did not argue in the brief that the Lewinsky relationship was not relevant because it occurred four years after the 1991 encounter in the Little Rock hotel suite. The judge asked why she did not argue that no pattern or practice relevant to the Jones' allegations can be established by conduct that occurred years later. Wasn't this an obvious argument that should have been made by the Bennett team? Unbelievable!

You can verify that the President's attorneys did not make this argument by reading the appeals briefs filed by President Clinton and the Jones' attorneys. The President's attorneys argued the Lewinsky matter was irrelevant to the summary judgment because the court assumes Jones' facts to be true and that admitting the Lewinsky matter would generate a trial within a trial, but did not clearly argue that post-Jones incidents cannot be used to show a pattern. The 8th Circuit put the entire docket, eight pages of entries, on the Web, allowing you to read all the appeals briefs, the December 2, 1998 order dismissing Jones' appeal and the miscellaneous entries. Read it now before the court takes it off the Web now that the case has settled.

Supreme Court Oral Argument in *Clinton v. Jones*. While you know the result, you can still listen to the audio recording of the January 13, 1997 oral arguments before the Supreme Court in *Clinton v. Jones*, 137 L.Ed.2d 945 (1997). Oyez, Oyez (http//oyez.nwu.edu) is a multimedia web site containing over 340 unedited oral arguments. This debacle of a decision – affirming the Eighth Circuit – held that a president is not entitled to temporary stay of civil proceedings, leading to the far-reaching discovery surrounding the president's "sexual relations." The arguments and the questions were, at best, unimpressive.

The *Washington Post's Jones v. Clinton* Special Report. The Post has an extensive site devoted to the legal documents in *Jones v. Clinton* (www.washintonpost.com/wpsrv/politics/special/pjones/legal.htm). It is a great site because it includes all the major legal documents, including the complaint, answer, interrogatories, request to produce, depositions, subpoenas, affidavits (Lewinsky's too), the motions and the summary judgment briefs and the orders. These documents are a must read, and show why the President viewed the lawsuit as a political attack. For example, the interrogatories ask the President to identify any doctor who treated his, shall we say, private parts, since the encounter with Jones and to identify "every individual (other than Hillary Rodham Clinton) with whom you had sexual relations" since 1977, when he was first elected Arkansas attorney general. The President objected, but not on grounds that it would be too unduly burdensome, or because any term was ambiguous. The discovery eventually was restricted to the period 1987 to the present and to federal and state employees. As to the private parts, you can read the February 17, 1998 order barring Jones from getting medical records concerning the Presidential"genitalia." The site is complete with a warning that the legal documents may be "sexually explicit."

In case the *Post's* site does not satisfy your — shall we say, desire — to read the legal documents, you can also read over 200 *Clinton v. Jones* pleadings on the web site for the United States District Court, Eastern District of Arkansas. (www.are.uscourts.gov/home_page_jvc.htm).

Settlement Agreement and Prior Negotiations Posted on the Web. On November 13, 1998, the attorneys for Jones and Clinton signed a settlement agreement, which you can read at the *Post* web site. The President has 60 days to pay Jones $850,000. (Where is he going to get that money? And why didn't the State of Arkansas defend the case or pay any of the settlement monies?) If you wonder why the President could not settle the case early on, some reasons (such as Jones' insistence upon a "tolling agreement" that would let her file the suit if any agent of the President attempted to discredit her) can be found on the Paula Jones Legal Fund web site (www.jones-clinton.com), which posts the President's May 4, 1994 settlement proposal as well as the1993 *American Spectator* article that Jones claims defamed her by suggesting she (referred to only as "Paula") was the President's "girlfriend." The site even includes the results of a polygraph test, which, surprise!, Jones passed. On the *Post's* site you can read the full text of two August 1997 letters to Paul Jones from her first two lawyers advising that she "further consider our strong settlement recommendation." Reading this stuff you can see why the President could not reach a settlement prior to November 13, 1998 and why litigation against a president is, to quote Vincent Bugliosi, insane. ■

NLRB PRACTICE AND PROCEDURE

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

On September 16, 1998, the region's Practice and Procedure Committee met at the Lansing offices of Varnum, Riddering, Schmidt & Howlett, where we welcomed our two newest members, M. Beth Sax and Scott Brooks. The committee's agenda included a discussion of the NLRB's "budget crisis" and whether the steps taken by the General Counsel to deal with this situation have had any affect on case processing. It was noted that the General Counsel had cancelled all unfair labor practice trials for the month of September 1998 and had placed restrictions on travel by regional personnel throughout much of the fiscal year. There was considerable discussion about the budget situation and whether the current situation was likely to carry over into fiscal year 1999. [After this meeting, a budget for fiscal 1999 was passed and it would appear that this budget will allow the regional offices to do more travel.] Several committee members expressed concern about the inability of board agents to travel to meet witnesses and that because of this the quality of investigations may be affected. While I also share this concern, I noted to the committee that regional personnel are making every effort to insure that the quality of our investigations does not suffer.

The committee next considered whether when unfair labor practice charges are filed too late to allow for investigation before a scheduled election, it is better to have the regional director: (1) automatically postpone the election; (2) hold the election and impound the ballots; or, (3) hold the election, count the ballots, issue a tally and then conduct the ULP investigation. All members agreed that option number 3 was the least desirable and should not be used. As to option number 1, there was some support for this view, especially where the region has time to conduct the unfair labor practice investigation and has some reason to believe that there may be merit to the charges. It was noted, however, that if the union wins the election, the alleged unfair labor practice may become moot. After considerable discussion, the committee agreed that the best procedure in most cases is for the regional director to hold the election and impound the ballots if it is not possible to complete the unfair labor practice investigation before the scheduled election. If the unfair labor practice charge does not have merit, the impounded ballots can be opened and the results of the election certified. If the charge has merit and impacted the election, the ballots need not be opened. While there is some expense and inconvenience involved, it was concluded that this is still the best procedure in most cases.

The committee received a briefing on the most recent mail ballot cases the Board has issued. In region seven when we are going to order mail balloting over the objection of one or both of the parties, we issue a letter to the parties stating our reasons for doing so. Any party who wishes to challenge my direction of a mail ballot election can then request special permission from the Board to appeal the decision. The two most recent Board decisions I am aware of in this area are *San Diego Gas and Electric*, 325 NLRB No. 218 (7/21/98) and *Odebrecht Contractors of Florida*, 326 NLRB No. 8 (8/10/98). In *San Diego Gas*, the Board set forth the new standards that regional directors must consider when deciding on the propriety of using mail ballots. In *Odebrecht Contractors*, the Board sustained a director's use of mail balloting even though the director did not "articulate a rationale" for conducting the election by mail. The Board concluded that it could sustain the director's action based on the evidence presented on the issue.

The Bernard Gottfried Memorial Labor Law Symposium was held on Thursday, October 22, 1998, at Wayne State University. The two major topics for discussion at this year's Symposium were: (1) *Withdrawal of Recognition; Issues Before the NLRB After the Supreme Court's Decision in Allentown Mack Sales;* and (2) *Employment Terms and Conditions of Strike-Replacement Employees: Questions Raised by Service Electric Co. and the Detroit Newspaper litigation*.

The panels for this year's symposium included Board Attorney Thomas Doerr, who along with UAW Associate General Counsel Nancy Schiffer and management attorney Stanley Moore of Plunkett & Cooney addressed the *Allentown Mack* issue. Supervisory attorney Richard M. Whiteman, along with Robert Vercruysse of Vercruysse Metz & Murray, and Ellen Moss of Klimist, McKnight, Sale, McClow & Canzano spoke to the *Service Electric* issue. We also heard a presentation by Professor Douglas Ray from the University of Toledo School of Law on "Labor Relations and Arbitration Advocacy." We were fortunate to have as our luncheon speaker NLRB Board Member Wilma Liebman, who gave a briefing on some of the cases the Board currently has under consideration and also spoke to us about the difficult situation facing the Board when it has had to function with less than full staffing. As most of you know, the President recently nominated John Truesdale to fill the fifth Board member seat. As of the drafting of this column, no action had been taken on Truesdale's nomination.

In a recent decision that I think is worthy of note, a Board panel considered when it would set aside an election which the union won by a vote of 76 to 36 where the polls opened late and there were 160 names on the *Excelsior* list. Quoting from *Jobbers Meat Packing Co.*, 252 NLRB 41 (1980), the panel majority, reversing the regional director's decision to set the election aside, noted that: "The Board does not set aside an election based solely on the fact that the Board agent conducting the election arrived at the polling place later than scheduled, thereby causing the election to be delayed." However, the Board has set aside elections where one of the following three additional factors were present: (1) "the votes of those possibly excluded could have been determinative"; (2) "the record also showed accompanying circumstances that suggested that the vote may have been affected by the Board agent's late opening or early closing of the polls"; or (3) "it was impossible to determine whether such irregularity affected the outcome of the election."

The Board panel majority remanded the case to the regional director to conduct a hearing as to the eligibility of potential voters, and with direction to the hearing officer to "issue recommendations concerning the 19 employees eligibility status and . . . determine whether the number of eligible voters possibly excluded from voting as a result of the late opening of the polls proved determinative of the results of the election." *Midwest Canvas Corp.*, 326 NLRB No. 12 (8/14/98). There was a dissent by Member Brame who would have set the election aside "based on the opening of the polls 20 minutes late and the possible disenfranchisement of voters."

The next meeting of the Practice and Procedure Committee will be in late January 1999, in conjunction with the mid-winter meeting of the Labor and Employment Law Section. Anyone having an issue or question they would like to have addressed by the committee may present their questions or issues to the undersigned or any member of the committee. ■

SUPREME COURT BEGINS 1998-99 TERM

Russell S. Linden and Timothy O. McMahon
Honigman Miller Schwartz & Cohn

The Supreme Court's selection of seven labor cases for review represents a decline from the ten selected this time last year. However, there are a multitude of opportunities for the Court to select additional cases, including a *certiorari* petition filed by the Secretary of Labor on the burden of proof in Occupational Safety and Health Act claims.

1. Court Upholds A Union Security Clause

Marquez v. Screen Actors Guild, Inc., 159 LRRM 2641, 66 USLW 3454 (1998). The Court held that a union does not breach its duty of fair representation by negotiating a union security clause which contains language directly taken from Section 8(a)(3) of the National Labor Relations Act.

2. General Arbitration Clause in Union Contract Does Not Waive ADA Lawsuit

The Court held that a general arbitration clause in a collective bargaining agreement does not limit an employee to use the arbitration procedures to address an alleged violation of the Americans With Disabilities Act, 42 U.S.C. Section 12101 *et seq. Wright v. Universal Maritime Service Corp.*, 525 U.S. _, 159 LRRM 2769 (1998). "We hold that the collective bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination. We do not reach the question of whether such a waiver would be enforceable." (Slip Op. 11).

3. Breach of ERISA Fiduciary Duty

Oral arguments were presented in *Hughes Aircraft Co. v. Jacobson*, 66 USLW 3531, regarding whether an employer violates ERISA by amending an ERISA plan which is funded by both employer and employee contributions. The plan at issue had a substantial surplus of funds which the employer used to establish a new plan. The new plan did not require employee contributions and froze participation in the old plan. Participants in the old plan claim that the employer must terminate the old plan under Title IV and distribute the surplus assets before creating the new plan.

The Court granted *certiorari* in the following cases:

1. Mid-Term Bargaining Clause

The Court will determine whether the Federal Labor Relations Authority can compel a government agency to negotiate over proposed mid-term bargaining. *National Federation of Fed. Emp. v. Dept. of Interior*, 97-1184, 66 USLW 3815. During contract negotiations, the NFFE proposed inclusion of a clause creating a duty to bargain during the contract's term over issues not expressly addressed in the agreement. The Department of the Interior refused to bargain over such a provision's inclusion. This case will resolve a split among the Circuit Courts regarding the FLRA's power to require mid-term bargaining. *See National Treasury Employees Union v. FLRA*, 810 F.2d 295 (D.C. Cir. 1987)(mid-term bargaining proper).

2. Constitutional Right to At-Will Employment

The Court must determine whether an "at-will" employee has a constitutionally protected interest in continued employment. *Haddle v. Garrison*, 97-1472, 66 USLW 3753. The plaintiff assisted in the prosecution of his employer's owner for misconduct associated with the business. The plaintiff claims that he was terminated as a result of this participation in violation of 42 U.S.C. Sec. 1985(2). The plaintiff asserts that the Eleventh Circuit's dismissal of his complaint contravenes both First and Ninth Circuit decisions allowing "at-will" employees to recover for the loss of employment under Sec. 1985.

3. Due Process Rights in Denying Workers' Compensation Benefits

The plaintiffs receive workers' compensation benefits under Pennsylvania state law. *American Manuf. Mut. Ins. Co. v. Sullivan*, 97-2000, 66 USLW 3800. The law provides that medical benefits may be suspended pending the outcome of a review regarding the necessity of medical treatment. The plaintiffs allege that the suspension of benefits is a deprivation of rights without due process of law. The Third Circuit agreed, finding that the Pennsylvania law failed to provide adequate notice and did not provide a pre-deprivation opportunity to be heard.

4. Scope of LHWCA

In *Brooker v. Durocher Dock and Dredge*, 98-18, 67 USLW 3097, the plaintiff was injured when working on the construction of a new sea wall. The issue before the Court is whether the sea wall is a covered "situs" within the meaning of the LHWCA.

The Supreme Court denied *certiorari* in the following labor cases:

Buck v. Fries & Fries, Inc., 142 F.3d 432 (6th Cir. 1998)(table)(In denying *certiorari*, the Supreme Court let stand the court of appeals' finding that an employer need not allow an employee the opportunity to demonstrate his work skills as a reasonable accommodation).

Breedlove v. Earthgrains Baking Companies, Inc., 140 F.3d 797 (8th Cir. 1997)(WARN Act's penalty provision only applies to each work day covered by the failure to give notice).

Basch v. Ground Round, Inc., 139 F.3d 6 (1st Cir. 1998)(Employees' claims of discrimination are tolled until class certification is determined. However, employees may not "stack" successive class actions in an attempt to lengthen the statute of limitations).

Mauro v. Borgess Medical Center, 137 F.3d 398 (6th Cir. 1998)(The plaintiff was an HIV positive surgical technician who was occasionally required to assist with invasive procedures, such as placing hands in an incision. The court of appeals held as a matter of law that such activities were a "direct threat" to others. The Court reached its ruling on "direct threat" in reliance upon the balancing test set forth in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987)).

Hudson v. Reno, 130 F.3d 1193 (6th Cir. 1997)(Statutory caps under Title VII apply to all claims brought by a single plaintiff, not to each individual claim. Further, front pay is subject to statutory caps).

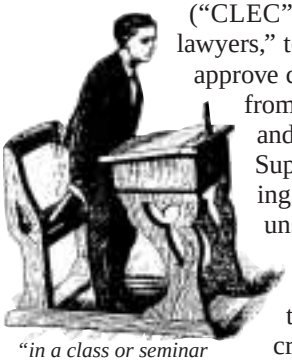
Finally, the Secretary of Labor petitioned for review in *Secretary of Labor v. L.R. Wilson & Sons, Inc.*, 98-188. The Secretary contends that employee misconduct is an affirmative defense to an OSHA violation. The Fourth Circuit ruled that the Secretary must show an employee's failure to use safety measures was foreseeable. Thus, the burden of addressing foreseeability falls upon the Secretary in enforcement proceedings. ■

CONTINUING LEGAL EDUCATION — OR ELSE!

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

"The time to go back to school may be drawing near for Michigan's lawyers." So begins a *Detroit Legal News* article reporting on the State Bar of Michigan's mandatory continuing legal education proposal, recently submitted to the Michigan Supreme Court.

The State Bar proposal calls for a rule requiring that each Michigan lawyer complete 30 hours of CLE every three years. The rule would create a 12-person continuing legal education committee ("CLEC"), "at least nine of whom shall be lawyers," to administer the mandatory program, approve courses, receive compliance affidavits from lawyers, send "delinquency" notices, and report annually to the Bar and the Supreme Court. The costs of administering the program would be funded by an unspecified annual fee added to State Bar dues. A lawyer failing to comply would be placed on "involuntary inactive status." The proposal, which would create Rule 17 of the Rules Concerning the State Bar of Michigan, is published at 77 *Michigan Bar Journal* 1027-1028 (Oct. 1998).



"in a class or seminar setting"

State Bar of Michigan President J. Thomas Lenga was quoted by the *Detroit Legal News* as saying it is "absurd that lawyers don't have" mandatory continuing education. Lenga is reported to have said that since he became State Bar president this summer, he has heard only two lawyers express opposition to the proposal. Well, count me as number three.

First, for the record: I favor CLE. CLE is good. CLE is valuable. I participate in CLE, as a consumer and as faculty. I think we in Michigan are lucky to have a high quality CLE provider like ICLE. I serve on an ICLE advisory board. I think the Labor and Employment Law Section does great service to the bar with its CLE Saturday mornings in January and Wednesday afternoons at State Bar meetings and its co-sponsorship of ICLE and MERC seminars, the Gottfried symposium and other CLE programs, not to mention its quarterly publication of *Lawnotes*. This said, I think *mandatory* CLE is a bad idea.

My opposition comes in part from my observation of the exaltation of form over substance in mandatory CLE programs in other states, with year-end rushes to put in time at whatever course is schedule-convenient, irrespective of the quality or applicability to one's practice. Michigan's failed experience with mandatory CLE for new lawyers — during which many crossword puzzles were completed while videotaped instructors read from outlines — also demonstrates that rigid CLE hours and format requirements are cosmetic, and no guarantors of "education," much less professional competence.

My opposition comes in part from the fact that mandatory CLE reflects unstated resignation to the failure of legal education to create an adequate practical foundation in the law as it is practiced. More clinical programs and simulation courses addressing lawyering skills — not just trial and appellate practice, but also discovery, motion practice and other pre-trial skills, interviewing and counselling, operating a law office, negotiating, legal drafting, persuasive writing, etc. — would better bridge the gulf between the thinking-like-a-lawyer emphasis of many law schools and the being-a-lawyer necessities of practice. There is something wrong when new lawyers, fresh from three years of law school and running the bar examination gauntlet, have to resort to CLE to acquire basic professional skills. Better that the Bar join with the law schools to address the basic curriculum and its relationship to practice rather than forcing all lawyers back into the classroom.

Some of my opposition comes from my preference for what the proposed rule calls "self-study." I like listening to audiotapes in the car or while running. I read books, articles and advance sheets. Under proposed Rule 17.9, I may be able to get advance CLEC approval to engage in "self-study courses involving the use of audio or video tapes, computers, or correspondence courses." However: "Not more than one-third of approved credits for any reporting period may be earned through self-study activities." Although I am a sworn member of the bar, dedicated to the Rules of Professional Conduct, and an officer of the court, it seems I can't be trusted to fulfill my mandatory CLE obligation without serving time in "formal courses conducted in a class or seminar setting." *In loco parentis*.

As I practice with a firm, there's another alternative, under proposed Rule 17.8. "Courses offered by law firms, either individually or with other law firms, corporate legal departments, or similar entities primarily for the education of their members may be approved in advance for credit." As I'm not a solo practitioner, I can sit in our conference room and get CLE credit by listening to my partners wax eloquent, so long as the course description passes muster in advance with CLEC mavens. This convenience, too, is limited: "Not more than one-third of approved credits for any reporting period may be earned through in-office activities."

"self-study"

So, I can meet a third of the requirement with audiotapes and a third in the conference room but still I have to get a third of my "education" in "formal courses conducted in a class or seminar setting."

Why? Is this consistent with the latest in cutting-edge learning theory? I don't think so. People have different learning styles. Many, like me, find the classroom lecture method to be the least effective way to learn, as well as being the most inefficient and inconvenient use of time. Or do I have to sit in class because unless I bear witness with my physical presence at least one-third of the time my affidavit of CLE compliance is not credible? Is there a need for corroborating witnesses in mandatory CLE matters, as in criminal conspiracy cases?

Mandatory CLE is addressed to the lowest common denominator. It is geared to the unconscientious. Isn't this group a small minority of the bar? If not, there is something wrong with the profession that will take measures far more substantial than mandatory CLE to cure. If this group is a small minority, why impose CLE on the vast majority of responsible, conscientious, careful lawyers?

We don't address the small minority of lawyers who are dysfunctional because of alcohol or drug abuse by requiring *all* State Bar members to attend 30 hours of 12-step meetings every three years.

Also, will unconscientious lawyers be so easily transformed? I don't think so. They will be as unmoved by mandatory CLE as they are by professional responsibility, pride in work and the other values that motivate the vast majority of lawyers to be responsible, conscientious and careful.

in loco parentis

State Bar President Lenga identifies the objectives of proposed Rule 17 in his October 1998 *Michigan Bar Journal* column: "Why do we need this? To make us better equipped to serve our clients and to improve our public image." Of course quality CLE makes us "better equipped to serve our clients." That truism justifies CLE, not *mandated* CLE regulated by an expensive bureaucracy. This is really about the vogue among organized bar leadership seeking "to improve our public image." There is nothing wrong with efforts to improve the public image of lawyers, but *imposing* CLE is not an effective way to accomplish that objective.

Mandatory CLE is not new. It has been the fashion for many years. Thirty-nine states have some form of mandatory CLE. As far as I can tell, these programs have done absolutely nothing to improve the public image of lawyers. Indeed, mandatory CLE communicates, to those members of the public who pause to contemplate, that lawyers cannot be trusted to maintain their competence without being *forced* into continuing education and *required* to report compliance in *affidavits*. The negative message: lawyers have to be *compelled* to be conscientious.

Efforts to improve the public image of lawyers would be better concentrated on providing vigorous self-regulation through the grievance process, something lawyers do better than other professions, and on educating consumers of legal services, through initiatives like judicial watch programs, efforts to encourage the simplification and demystification of the legal process, and the distribution of a client "Bill of Rights" to enhance sophistication about selecting and assessing lawyers.

A Bill of Rights might provide prospective clients with meaningful questions to be used in selecting lawyers appropriate to their needs, such as: What percentage of professional time do you spend on my area of legal need? How many cases have you tried involving my area of legal need and what were the results? What CLE courses have you completed in the past three years? What professional publications do you subscribe to? Have you ever been disciplined by grievance authorities or sued for malpractice? Will you give me the name, address and phone number of three client references?

The wide distribution of such a Bill of Rights to consumers (and lawyers) would be exponentially more effective in improving public image, and in heightening lawyer awareness of professional responsibility, than the cosmetic and formalistic mandatory CLE proposal.

A Bill of Rights would be a lot cheaper, too. The April 1998 *Michigan Bar Journal* reports that there are 32,366 Michigan lawyers. If each spent an average of $300 per year on CLE tuition, the annual cost would be $9,709,800. This doesn't include incidental costs (food, travel, lodging, parking, etc.) or lost productivity or the annual fee added to State Bar dues. If the annual fee, to be "established by the CLEC and paid by all active lawyers" in the words of proposed Rule 17.10, is $20, CLEC's yearly budget will be $647,320.

A ten-lawyer firm would spend about $3,000 annually on the tuition for two one-day CLE courses per lawyer (10 lawyers x $300). Lost productivity, however, would add $28,000 to the cost (10 lawyers x 16 lost billable hours x $175 average hourly rate). If only half of Michigan lawyers are hourly billers, the lost billable hour revenue from two CLE days a year would total $45,312,400 (16,183 lawyers x 16 lost billable hours x $175 average hourly rate).

Change the calculus any way you want. Use ten lost billable hours. Use $125 as the average hourly rate. Assume there are only 10,000 hourly billers. Factor in the lost productivity time of corporate counsel, government lawyers, judges and others who don't bill by the hour. Assume the CLEC fee added to dues will be only $10. Subtract what lawyers now spend on voluntary CLE. There is room for debate as to exactly what mandatory CLE will add to the cost of being a lawyer. Whatever the estimate, to paraphrase the late Senator Dirksen, we're talking real money.

While mandatory CLE carries considerable costs, its benefits are not so clear. Have the years of mandatory CLE in other states improved the quality of legal services? Or, phrased negatively, has mandatory CLE reduced lawyer incompetence? In fact, the assumed benefits of mandatory CLE are not quantifiable. They are taken on faith, resting on little more than this Tarzan-like syllogism: "Ignorance bad. Education good. Forced education must be good." I don't know about you, but whenever I spend $10 million, I like to do a cost-benefit analysis that's a little more concrete.

dues increase

Okay, I may be somewhat cranky about this. The path of least resistance would be to just put in my time, pay my added fee, and submit my periodic affidavits. I can fulfill the three-year 30 hour requirement with my business-as-usual CLE activities (assuming CLEC will approve my "self study" after reading this article). But mandatory CLE is such a shallow gesture. It is premised on an undefined "problem." It presumes positive results on faith. It lacks measurable objectives. It will cause thousands of lawyers to spend millions of dollars on image. It is a bad idea that warrants some crankiness — and opposition.

If you agree, submit your measured, constructive, critical analysis of proposed Rule 17 to the Michigan Supreme Court (P.O. Box 30052, Lansing, MI 48909). Do it soon. If enough lawyers speak out, maybe the Supreme Court will listen. If I'm a voice in the wilderness, however, well ... I'll see you in school. ■

LETTERS TO *LAWNOTES*

From Kendall B. Williams to Sheldon Stark, in response to Stark's "View from the Chair" in *Lawnotes*, Vol. 8, No. 3, Fall 1998:

Please accept my thanks and appreciation for your article in the fall, 1998 issue of *Labor and Employment Lawnotes.* It was erudite and timely.

I recall, vividly, the struggles we had at the University of Michigan Law School more than 20 years ago to ensure gender and racial diversity in each law school class. As you noted, most uninformed people believe that affirmative action involves providing some type of hiring or admission preference to unqualified minorities or females. As you correctly point out, nothing is farther from the truth. Each female and minority graduate of the University of Michigan Law School was graded on an equal scale with all other students and, in the large majority of cases, these students have become outstanding lawyers and judges. They have proven that they were not "unqualified" members of their respective law school classes.

Unfortunately, the struggle continues, and in many ways has been made more difficult because of the sense that sufficient time has elapsed, and there is no longer a need to correct the effects of past discrimination. Arguments, based upon naiveté or self-serving ignorance, are being made that today's decision makers are blind to color and gender, and that affirmative action or diversity improvement plans are no longer necessary. Nothing is farther from the truth. Efforts to destroy affirmative action plans and policies in education and the workplace may lead us once again to a society where all professions and most prominent educational institutions are monolithic in appearance; limited to a small elite segment of our population, to the exclusion of ordinary people who happen to not look like the decision makers, or have the same affluent backgrounds.

When I applied for admission to the University of Michigan Law School, I was quite distressed to find the question on the admission application which asked whether members of my family attended the University of Michigan. Being the first male in my family to attend college, this question was unnerving, and substantially reduced my hope for admission into one of the finest law schools in the country. Fortunately, we have individuals like Professor Theodore St. Antoine, who was Dean of the Law School when I was there, and the University's President, Lee C. Bollinger, who have staunchly defended and zealously supported programs to maintain gender and racial diversity at the University of Michigan.

Indeed, as you point out in your article, programs which enhance diversity in employment and education have been "good for us as a society." As Bill Brooks, a former General Motors Executive and advisor to several U.S. Presidents, avers, racial and gender diversity is more than a legal or moral issue; it is a bottom-line economic issue, and if it is not properly addressed by institutions of higher education and the employers in this country, adverse financial consequences will result. They will not attract the best talent available if their organization is monolithic. Likewise, monolithic organizations will ultimately lose market share because our society is, in fact, diverse in terms of gender and race.

I am constantly reminded of one of my experiences as a speaker at a Flint public high school. I was asked to speak to a group of tenth graders at Flint Central High School following their study of the facts and circumstances involved in the "Skokie" case, *Collin v. Smith,* 578 F2d 1197, CA7, 1978. As you will recall, the case involved issues of free speech raised relative to a petition filed by a Nazi organization to "peacefully" demonstrate in front of the Skokie village hall. As I discussed the free speech issues with these sixty students for two hours, I found that more than 90% of them actively participated in the discussion, they were eloquent, and all were able to critically analyze the constitutional and social issues raised by this case. I was amazed at the intellectual and in-depth responses of these students as I challenged them regarding freedom of speech and individual rights issues. Most important, however, is that these sixty brilliant students represented the face of America — girls and boys from several different ethnic backgrounds. These young people are our future business and community leaders, and top professionals; diverse in terms of gender and ethnicity. Our country is better because of its diversity. Monolithic organizations and institutions will not be able to recruit the best, and will not be the best because of their myopic focus.

Gender and ethnic diversity is right for legal and moral reasons. Those who question this premise may be more influenced by Mr. Brooks' point that such diversity is right for bottom-line economic reasons.

It took great courage for you to write an article in support of affirmative action given current public and political opinion. Your leadership as chair of the Labor and Employment Section has been outstanding, and is to be commended. Thank you. ■

LOOKING FOR *Lawnotes* Contributors!

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

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

For information, contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., 1400 North Park Plaza, 17117 West Nine Mile Road, Southfield, Michigan 48075. (248) 559-2110.

SIXTH CIRCUIT ADDRESSES SUSPICIONLESS DRUG TESTING, FMLA AND SUCCESSOR LIABILITY

Gary S. Fealk
Vercruysse Metz & Murray, P.C.

From August through October 1998, the Sixth Circuit published approximately 25 labor and employment cases. The Court's rulings included four cases addressing the Age Discrimination in Employment Act (ADEA), three cases concerning the Americans with Disabilities Act (ADA), five cases concerning the Employee Retirement Income Security Act (ERISA), four cases concerning the Family and Medical Leave Act (FMLA), one case addressing the Fair Labor Standards Act (FLSA), and six cases addressing the National Labor Relations Act (NLRA). The full text of all published Sixth Circuit decisions are available on the Internet at: http://www.law.emory.edu/6circuit/.

ONE-TIME SUSPICIONLESS DRUG-TESTING OF PUBLIC EMPLOYEES UPHELD

The Sixth Circuit has held that one-time, suspicionless, drug-testing of teachers and other "safety sensitive" Tennessee public school employees does not violate the employees' Fourth Amendment right to be free from unreasonable search or seizure. In addition, the court remanded the issue of whether the school district's alcohol testing policy was constitutional to the district for a determination of when the standard for an alcohol policy violation is so low it might detect only off-duty alcohol use, thereby eliminating any legitimate nexus to school safety. *Knox County Board of Education Association v. Knox County Board of Education*, No. 97-5405/5408 (Sept. 29, 1998).

BASEBALL FRANCHISE DOES NOT QUALIFY FOR FLSA EXEMPTION

Bridewell v. The Cincinnati Reds, 155 F.3d 828 (Sept. 25 1998) Baseball franchise did not qualify for a seasonal entertainment exemption from the FLSA under Section 213(a)(3)(B) since more that one-third of its revenue was actually received during the off-season period.

SIXTH CIRCUIT ADOPTS HONEST-BELIEF RULE IN ADA CONTEXT

The Sixth Circuit affirmed an Eastern District of Michigan ruling that a Chrysler employee who suffered from a narcoleptic-like sleeping disorder was not unlawfully discharged for failing to disclose his condition on job-related medical forms. Despite plaintiff's allegations of pretext, the Sixth Circuit upheld the lower court's ruling that that Chrysler's good-faith belief that the plaintiff had lied on medical forms shielded it from liability under the ADA and Michigan's Handicappers' Civil Rights Act. *Smith v. Chrysler Corp.*, No. 97-1572 (Sept. 15, 1998).

AGENCY PRINCIPLES APPLY TO DETERMINE OF WHO IS AN "EMPLOYEE" UNDER THE ADA

Finding that the ADA uses the "same sort of vague definition of employee and employer found in ERISA", the Sixth Circuit extended the Supreme Court's decision in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) to ADA cases. In *Darden*, the Supreme Court held that common-law agency principles determine who constitutes an employee and/or an employer under ERISA. Accordingly, the Sixth Circuit held in *Johnson v. City of Saline, 151 F.3d 564* (Aug. 6, 1998), that the plaintiff, under common law agency principles, was not a city employee and thus, his ADA claims were properly dismissed by Eastern District of Michigan Judge John Corbett O'Meara. Among the factors considered by the court in determining that the plaintiff was not an "employee" were the facts that Johnson hired and fired his own staff, was paid irregularly by the city, was provided no employee benefits by the city, and the fact that Johnson listed himself as "self-employed' on his tax return.

ADEA: FAILURE TO TRANSFER CLAIM REINSTATED

In *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (August 31, 1998), the Sixth Circuit upheld a lower court ruling that the elimination of plaintiff's position was unlawfully based on his age. However, the court reversed the district court's finding that the employee had failed to meet his prima facie burden to prove that the company's failure to transfer him to another position was based on his age. The court held that although the employer was not under any obligation to transfer the plaintiff when his position was eliminated, the fact that it transferred other younger employees to new positions when their jobs were eliminated was sufficient to create a jury question on the issue of pretext. The Sixth Circuit rejected the employer's argument that plaintiff's comparables were not similarly situated since they did not perform the same job activities.

FMLA CONTAINS A RIGHT TO A JURY TRIAL

In *Frizzell v. Southwest Motor Freight*, 154 F.3d 641 (Sept 10. 1998), the Sixth Circuit determined that because the FMLA provides for the recovery of "damages," a right to a jury trial exists with regard to FMLA claims.

FMLA: DEFINITION OF ELIGIBLE "EMPLOYEE"

A Tennessee Wilson County School District employee, who had previously worked for the Wilson County government, was not an "eligible employee" under the FMLA because she worked for the school district for less than 12 months, and since she was no longer employed by the County. Plaintiff's previous employment with the Wilson County Finance Department could not be tacked to her employment with the school district to impose liability on the Wilson County government because, under Tennessee law, school systems are separate entities from county governments. *Rollins v. Wilson County Government*, 154 F.3d 1639 (Sept. 9, 1998).

(Continued on page 18)

SIXTH CIRCUIT ADDRESSES SUSPICIONLESS DRUG TESTING, FMLA AND SUCCESSOR LIABILITY

(Continued from page 17)

REMOVAL IMPROPER WHERE EMPLOYER EMPLOYED LESS THAN 50 BUT ADOPTED THE FMLA

The Sixth Circuit has held that a woman who worked for an employer who employed less than 50 employees but who voluntarily agreed to abide by the FMLA did not state a claim under the FMLA and thus removal of her lawsuit based on federal question jurisdiction was improper. The court stated that parties to a lawsuit cannot agree to confer subject matter jurisdiction on the federal courts. Although the employee may have stated a state law breach of employment contract claim, since the defendant was not an "employer" within the meaning of the FMLA, the district court erred in granting summary judgment to the defendant. The lower court had granted summary judgment to the employer because the employer offered the plaintiff an equivalent position after her return from leave, thus, satisfying FMLA requirements. The Sixth Circuit vacated the district court's decision and dismissed the case for lack of subject matter jurisdiction. D*ouglas v. E.G. Baldwin & Assoc., Inc.*, 150 F.3d 604 (Aug. 4, 1998).

NLRA: SIXTH CIRCUIT LIMITS SUCCESSOR LIABILITY

The Sixth Circuit refused to extend successor liability obligations enunciated in *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973) to the situation where a predecessor in receivership is purchased. In *Golden State*, the Supreme Court required a successor employer to remedy its predecessor's unfair labor practices. In that case, the successor bought its predecessor's business after the NLRB had ordered the predecessor to reinstate an employee with back pay.

In *Peters v. NLRB*, however, the Sixth Circuit held that unlike the bargained-for acquisition price in *Golden State*, New Specialty bought Western's assets through a receivership, a transaction that did not allow it to negotiate an indemnity clause or bargain for a price that would capture the risk associated with any unfair labor practices. The court also held that requiring New Specialty to remedy its predecessor's labor violations might require it to comply with the terms of an old bargaining agreement, thereby impeding the successor's efforts in instituting changes to make the company profitable. The court noted that without the successor's efforts in this case, the employees might very well have been out of a job. The court therefore refused to impose successor liability on New Specialty because it might inhibit the reorganization of the failing business. *Peters v. NLRB*, 153 F.3d 289 (Aug. 10, 1998).

NLRA: EMPLOYER LAWFULLY MADE UNILATERAL CHANGES AFTER 8(F) CONTRACT EXPIRED

In *NLRB v. Wehr Constructors, Inc.*, No. 96-5358 (Oct. 26 1998), the Sixth Circuit denied enforcement of an NLRB order requiring an employer to rescind unilateral changes in its subcontracting practices. Wehr, a construction contractor, was party to a Section 8(f) contract with the union from 1986 to 1989 which restricted subcontracting. Wehr timely notified the union that it would no longer recognize the union upon expiration of the agreement. The court held that after the 8(f) contract expired, the union no longer enjoyed the presumption of majority status and Wehr was relieved of any obligation to bargain with the union. However, the union was eventually certified in August of 1989. In the interim period between expiration of the 8(f) contract and certification of the union, the employer began subcontracting. The court refused to enforce the NLRB's finding that Wehr had unlawfully refused to bargain with the union, finding that there was no evidence to support the NLRB's conclusion that Wehr changed its subcontracting procedures after certification.

ERISA CLAIM FORM NOT SUBJECT TO DOCUMENT DISCLOSURE PROVISIONS

In *Allinder v. Inter-City Products Corp.*, 152 F.3d 544 (Aug. 10, 1998), the Sixth Circuit upheld the district court's refusal to grant an employee compensatory and punitive damages on account of the alleged misdeeds of her former employer and its vice-president concerning the administration of an ERISA plan. In this case, although plaintiff eventually received the full amount of benefits due under a company-sponsored long-term disability policy, she sued for refusal to supply information and for breach of fiduciary duty. Among the misdeeds plaintiff claimed was the allegation that the company failed to complete its portion of the long-term disability claim form which delayed the receipt of benefits. The plaintiff argued that pursuant to ERISA's information disclosure provision, Section 1132(c), the delay of the administrator in completing the claim form entitled her to a 100 dollar per day penalty. The Sixth Circuit rejected this argument, finding that ERISA's document disclosure provisions do not cover claim forms.

Secondly, the court held that the plaintiff's claim for compensatory and punitive damages did not constitute a claim for equitable relif within the meaning of ERISA; accordingly the Sixth Circuit upheld the dismissal of her breach of fiduciary duty claim since it did not seek equitable relief within the meaning of Section 1132(a)(3)(B). ■

ATTAIN WISDOM!

Plan to attend the 24th Annual Labor and Employment Law Seminar, scheduled for Thursday and Friday April 22 and 23, 1999 at the Michigan State University Management Education Center in Troy. The annual seminar is co-sponsored by the Institute of Continuing Legal Education, the State Bar of Michigan Labor and Employment Law Section, and the Federal Mediation and Conciliation Service. The seminar will include updates, panel discussions, plenary sessions and a choice of tracks based on specialized practice areas, a distinguished luncheon speaker and a distinguished luncheon. Details and registration information will be provided in the next *Lawnotes* and ICLE mailings. Mark your calendar and stay on the cutting edge.

EASTERN DISTRICT UPDATE

Valerie L. MacFarlane
Van Suilichem & Associates, P.C.

Medical Restriction Prohibiting Overtime is Not an ADA Disability

In *Muthler v. Ann Arbor Machine Inc.*, 1998 WL 525522 (1998), Judge Gerald Rosen ruled that a medical restriction prohibiting overtime is not a substantial limitation of a major life activity. Muthler was a former owner of a company that built, fabricated and installed broach machines. In 1995, Muthler had a heart attack and took a three-month paid leave of absence. When he returned to work, his doctor restricted him from working more than 32 hours per week. After a month, this limitation was reduced and he was allowed to work 40 hours per week. A year later, Muthler was laid off and then terminated. Muthler sued under the ADA claiming he had been fired because he was unable to work overtime. Judge Rosen granted defendant's motion for summary judgment ruling that the inability to work overtime is not a substantial limitation of a major life activity and, therefore, that the plaintiff was not disabled.

RIF Does Not Violate Discrimination Laws

Where plaintiff was terminated during a company-wide reorganization and failed to show that her termination was a result of discriminatory intent, defendant is granted summary judgment. *King v. Healthrider,* 1998 WL 516088 (1998). King was employed as a store manager with Healthrider in Texas. When her husband was transferred to Michigan, she asked about similar positions in Michigan. There were no store manager positions but she accepted an assistant regional manager position. During an interview for a regional manager position, she was asked whether there were any conflicts. She asked whether the interviewer was referring to her husband and children and he replied he was. King was promoted to the regional manager position.

Healthrider was later purchased by ICON. Although ICON was profitable, Healthrider was not. ICON consolidated Healthrider's Michigan and Ohio operations, eliminating one regional manager position. King and the Ohio regional manager, a man, were both interviewed, and the man was given the position. King was offered a store manager position, but she refused. King resigned and sued for discrimination. Although Judge Paul Gadola found that King had proven a *prima facie* case of discrimination, defendants had a legitimate non-discriminatory reason. King claimed there was no economic necessity because the parent company was not in economic difficulty. Because ICON and Healthrider were separate entities, the success of ICON could not be attributed to Healthrider.

Evidence of Disparate Treatment is Sufficient to Avoid Summary Judgment

In *Hall v. State Farm Insurance Co.*, 1998 WL 677036 (1998), Judge Julian Cook ruled that the plaintiff's race discrimination claim goes to the jury. Hall worked for State Farm for almost twenty years before she was fired in 1996. Hall claimed she was treated differently because of her race. Hall provided evidence that she was reprimanded, for the first time in her career, when three Caucasian employees who worked for Hall complained about her to Hall's new supervisor. State Farm did not investigate before issuing the reprimand. Hall filed a grievance. The following day, her supervisor criticized the timeliness of her reports. Hall was given three more disciplinary memos about other infractions within the next four weeks. Hall was singled out for a special audit of her files. Although State Farm claimed that improprieties were discovered during the audit, Hall's evidence showed that her actions had been consistent with prior practice. Finally, Hall provided evidence that a similarly-situated individual, who admitted to engaging in sexual harassment, was not terminated. ■

RULE 56 DISPOSES OF ADA, RACE AND FREE SPEECH CASES IN THE WESTERN DISTRICT

John T. Below
Kotz, Sangster, Wysocki & Berg, P.C.

***Celotex* Rules.** Heeding the Supreme Court's *Celotex* decision and progeny, summary judgment motions are alive and well in the Western District. In five labor and employment cases, Chief Judge Richard Enslen, Senior Judge Wendell Miles and Judge Robert Holmes Bell granted summary judgment to the defendant/employer.

1. *Miller v. MESC,* No. 1: 96-CV-982 (August 18, 1998) (Enslen, J.) (dismissing retaliation claim and finding plaintiff's vague and general request for a "lighter workload" could not support ADA accommodation claim.)
2. *Sherrills v. Meijier,* No. 1: 97-CV-555 (August 13, 1998) (Miles, J.) (dismissing race discrimination claim where plaintiff's imprisonment, when unable to post bond, causing her to miss work, among other factors, confirmed she was not "similarly situated" under disparate treatment theory.)
3. *Sullivan v. River Valley School District,* No. 4: 97-CV-54 (September 8, 1998) (Holmes, J.) (ADA and Handicappers' Civil Rights Act not violated where the employer sought medical examination of plaintiff for a legitimate business justification.)
4. *Gomez v. Courtesy Dodge,* No. 1: 97-CV-680 (September 29, 1998) (Holmes, J.) (hostile work environment race/national origin claims dismissed where evidence consisted of isolated and generalized remarks.)
5. *Debruyn v. Dep't of Corrections,* No. 5: 97-CV-189 (October 13, 1998) (Holmes, J.) (section 1983 claim based upon free speech dismissed against public employer where speech was not established to be a matter of "critical importance.")

Lessons Learned. These cases emphasize that "conclusory statements" and "generalities" *(Gomez)* and "personal beliefs, conjecture" *(Sherrills)* or a "plaintiff's conclusory statements" respecting alleged protected action *(Debruyn)* are insufficient to create factual disputes under Rule 56. As to substantive issues, the retaliation allegations did not survive summary judgment in either *Debruyn* or *Miller* where no linkage was established between the protected action and the transfer to a different facility in *Debruyn* or the employer's refusal to return the plaintiff to work in *Miller.* ■

MICHIGAN SUPREME COURT UPDATE

David A. Rhem
Varnum, Riddering, Schmidt & Howlett, LLP

Food Service Employer Can Require AIDS Testing

The court, ruled 6-1, in *Sanchez v Lagondakis*, 458 Mich 704 (1998), balanced an employer's obligations under the Handicappers' Civil Rights Act (HCRA) and the Michigan Public Health Code provisions dealing with communicable disease transmission issues in food service settings. The court ruled that a "severely compromised immune system" resulting from HIV infection is related to an employee's ability to perform a food service industry job when it is "(1) accompanied by an opportunistic infection that is a communicable disease transmissible in a manner described under § 3-101 of the 'Food-service Sanitation Manual' and (2) reasonable accommodation to remove the likelihood of such transmission is not possible." The court held that "where a food-service employer has a reasonable suspicion that an employee has AIDS, the employer has the right to ask that employee to undergo testing to determine whether an opportunistic infection in a communicable form is, in fact, present." The employer in this case met the "reasonable suspicion" test because the involved employee was the source of the rumor that she had AIDS. The employer's suspension of the employee until she could prove that she did not have AIDS was, therefore, not discriminatory under the HCRA. Justice Boyle wrote the majority opinion. Justice Kelly dissented. 455 Mich. Ct 727.

MEA Guilty Of Unfair Labor Practice

In *St. Clair Intermediate School District v Intermediate Education Assn/Michigan Education Assn*, 458 Mich 540 (1998), the MEA announced that it was adopting a new MESSA insurance program which provided increased benefit levels to its members. It did not bargain the new program with the school district. The court ruled 5-2 that the MEA's announced change resulted in a unilateral midterm change in the parties' collective bargaining agreement. The MEA's failure to bargain this change with the school district constituted an unfair labor practice. Justice Boyle wrote the majority opinion. Justice Kelly, joined by Justice Cavanaugh, dissented. 458 Mich. at 574.

Workers' Compensation Magistrates Are The Proper Finders Of Fact

The court ruled in *Layman v Newkirk Electric*, 458 Mich 494 (1998), affirmed the fact finding authority of workers' compensation magistrates under the Workers' Disability Compensation Act. The court found that the Workers' Compensation Appellate Commission (WCAC) exceeded its limited authority by making a factual determination on an issue not addressed by the magistrate. The case should, instead, have been remanded to the magistrate to make that determination.Justice Kelly wrote the majority opinion. Justice Boyle wrote a concurring opinion, 458 Mich. at 510, and Justice Weaver, joined by Justice Taylor, dissented. 458 Mich. at 493.

Workers' Compensation Payments Constitute "Compensation" During Four-Year Period For Retirement Calculation Purposes

The court ruled 4-3 in *Adrian School District v MPSERS*, 458 Mich 326 (1998), that workers' compensation payments received by injured employees between March 13, 1992, and June 12, 1996, constitute "compensation" for purposes of the Public School Employees Retirement Act (PSERA). At issue was the proper calculation of pension benefits. While this case was pending before the court, the Michigan Legislature amended the PSERA to expressly include workers' compensation benefits within the definition of "compensation."Justice Kelly wrote the majority opinion. Justice Taylor joined by Justice Brickley and Weaver, dissented, 458 Mich. at 338. ■

LABOR RELATIONS YIN AND YANG ON THE WEB

Scott G. Hornby
Esordi, Hornby & Sawicki

Perspective is a quality all labor relations and employment practitioners must possess when representing business and labor clients. The adage that "there exists two sides to every story," is prevalent in this field of the law and is easily demonstrated through related web sites. I recently used two such web sites fueled by opposite perspectives: 1) *Fair Measures, Keep Managers Out of Court, http://www.fairmeasures.com*; and 2) *Labornet, Connecting the People Who Are Changing the World, http://www.igc.org/igc/labornet/* .

I find that the most useful and interesting labor and employment related web sites are those offering both current events information and reference to associated web sites or links. These two web sites have at least these things in common; however, the similarities end there.

Fair Measures provides practitioners with current events, model document access, case law and news developments with a distinctive management-side tone; it also guides the user to related labor and employment links. The tone, if you will, of the web site is somewhat conservative. Conversely, *Labornet* clearly is a web site for the union-side. Like *Fair Measures*, *Labornet* offers practitioners with current events and labor relations news (domestic and international) and developments; users can also access links related to any domestic and foreign union. This web site has an activist tone.

Labor and employment practitioners on both sides of the collective bargaining table will find the web sites useful, for they provide perspective on the labor and management philosophy — something required in order to meet the challenges of peaceful co-existence and cooperation which are the cornerstones of positive labor and employment relations. ■

PUBLIC SECTOR LABOR LAW CONFERENCE SCHEDULED

Become enlightened at the 1999 Public Sector Labor Law Conference, co-sponsored by the Michigan Employment Relations Commission and the Labor and Employment Law Section.

The conference will be on Thursday and Friday, May 13 and 14, 1999 at the Kellogg Conference Center on the Michigan State University campus in East Lansing. The conference will offer a comprehensive treatment of developments in public sector labor law. For details and registration information, call MERC at (313) 256-1111.

MICHIGAN COURT OF APPEALS UPDATE

Karl Brevitz
Education Director, Institute of Continuing Legal Education

Obligation to Reimburse Employer for Training or Remain Employed for Six Years Is Not Remuneration or Consideration as Condition of Employment Prohibited by Michigan Payment of Wages Statute.

Sands Appliance Services v. Wilson. When 19 years old, defendant Wilson was hired by plaintiff as an appliance repairman. Prior to being hired, defendant was required to sign a "tuition contract" which obligated him to pay plaintiff $50 per week over a three year period (a total of $7,800 assuming completion of the entire three year term) in consideration for job training. However, the obligation could be reduced by $50 per week for every week that defendant worked for plaintiff following completion of the three year training period. Thus if defendant remained in plaintiff's employ for six years, the obligation would be totally forgiven. If defendant's employment ended for any reason before six years any "tuition payments" due at that time were to be paid in full.

Defendant stopped working for plaintiff after approximately 30 months, and was then sued by plaintiff for $6,500 based on the tuition contract. The lower court dismissed plaintiff's suit, holding the tuition contract a violation of the Michigan Payment of Wages Statute, MCL 408.478.1. The statute states in pertinent part: "An employer . . . shall not demand or receive . . . from an employee, a fee, gift, tip, gratuity or other remuneration, as a condition of employment or continuation of employment."

The Court of Appeals reversed, reasoning that the tuition contract was not a bond or requirement of remuneration as a condition of employment or continued employment because under the contract only a former employee (i.e., one leaving prior to six years) would be obligated to pay any money to plaintiff. Plaintiff would receive no money from prospective or current employees under the tuition contract, only from ex-employees.

Comment: Although the majority notes that in reviewing statutes the legislature is presumed to have intended the meaning it plainly expressed, it is the dissent that is more faithful to this precept of statutory construction, noting that "the broad statutory language . . . evidences a legislative intent that the prohibition should apply to any occasion where an employee must, in any fashion, make payment or provide some sort of consideration to an employer for the privilege of employment. [Defendant] had to make a payment to plaintiff for each week he was employed, or alternatively, provide a benefit to plaintiff by continuing to work an additional three years beyond the three year training period . . . [I]f defendant would not have so promised, he would not have been hired. The statute clearly applies[.]" *No. 190270, decided August 28, 1998; Markey and Hoekstra; Bandstra (dissenting).*

Receipt of Social Security Disability Benefits Will Not Bar Subsequent MHCRA Suit.

Tranker v. Figgie International. Plaintiff Tranker sued defendant alleging handicap discrimination under the Michigan Handicappers Civil Rights Act (MHCRA). At the time of the suit, Tranker was receiving social security disability benefits. On remand from the Michigan Supreme Court, the court of appeals held that receipt of social security disability benefits will not by itself bar a subsequent claim under MHCRA.

Citing several ADA decisions by various federal appeals courts, the court noted that the two acts have different objectives and utilize different standards to determine disability. A person can be eligible to receive social security disability yet still be able to state a claim under MHCRA because the Social Security Act does not require an inquiry as to whether claimants could perform work with reasonable accommodation. Therefore, the court held that the doctrine of judicial estoppel, which forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding, will not apply *automatically* to bar the MHCRA claim.

The court cautioned, however, that statements by claimants in support of their claims for social security disability benefits could still be used by employers in subsequent MHCRA litigation to prove the claimants were not in fact qualified handicapped applicants. As a result, counsel for plaintiffs applying for social security disability benefits while seeking to preserve a possible MHCRA or ADA claim should try to ensure that their client's application for benefits and supporting statements and testimony are framed as narrowly as possible in order to qualify for benefits without adding unnecessary material which may jeopardize chances for success in any subsequent handicap discrimination suit. *No. 21056, decided August 11, 1998. Hood, Neff and Gage, JJ.*

Arbitrator Acting Under Collective Bargaining Agreement and AAA Rules Lacks Authority to Issue Subpoenas.

Michigan State Employees Association v. Michigan Liquor Control Commission. Plaintiff and defendant were parties to a collective bargaining agreement which provided that arbitrations under the agreement were governed by the rules of the American Arbitration Association (AAA). In connection with an arbitration under the agreement, the arbitrator issued subpoenas to command the presence of certain witnesses. The AAA rule governing subpoenas states "[a]n arbitrator *authorized by law* to subpoena witnesses and documents may do so. . . ." (emphasis supplied by court). The trial court enforced the subpoenas issued by the arbitrator and defendant appealed.

The court of appeals reversed, holding that the arbitrator was bound to follow the guidelines set forth in the four corners of the contract and therefore was not authorized by law to issue subpoenas for documents or witnesses. The court rejected plaintiff's argument that since statutes governing arbitrations in other contexts (such as the Federal Arbitration Act, the Uniform Arbitration Act, and the Mediation of Labor Disputes Act) provide subpoena authority for arbitrators, subpoena authority under the collective bargaining agreement should be inferred as necessary to promote the goals of certain sections of the Michigan constitution guaranteeing plaintiffs a grievance procedure and fair hearings (Const. 1963, art. 11, sec. 5 and art. 1, sec. 17). While acknowledging that the arbitrator's fact-finding ability might be enhanced by subpoena authority, the court ruled that plaintiffs had signed an agreement that did not provide for that authority and could not now claim it was inadequate to protect their constitutional rights. Moral: if the parties want arbitrators to have subpoena power, they should specifically provide for it in their collective bargaining agreement. *No. 199949, decided October 6, 1998. Bandstra, Griffin and Young, Jr., JJ.* ■

NLRB ISSUES MORE THAN 200 NEW DECISIONS

George M. Mesrey
Clark Hill, P.L.C.

In a press release issued on October 7, 1998, the NLRB reported that it issued 136 decisions in September — the highest monthly total in five years. In addition, the NLRB announced that it issued 92 decisions in August. It is safe to say that the last few months have been extremely busy at the NLRB. The following are summaries of 52 of the most notable decisions issued during this period categorized by subject headings.

ACCESS TO EMPLOYER PREMISES

1. *Farmfresh, Inc.*, 326 NLRB No. 81 (August 27, 1998). The NLRB overruled precedent and denied non-employee union organizers the right to solicit in a food service establishment on an employer's premises.

ALJ BENCH DECISIONS

2. *Dynatron/Bondo Corp.*, 326 NLRB No. 107 (September 30, 1998). The NLRB rejected sufficiency of an ALJ bench decision.

3. *Forrest City Machine Works, Inc.*, 326 NLRB No. 88 (September 24, 1998). The NLRB rejected sufficiency of an ALJ bench decision.

BARGAINING TACTICS

4. *Telescope Casual Furniture, Inc.*, 326 NLRB No. 60 (August 27, 1998). Analysis of legality of regressive bargaining proposals.

BECK ISSUES

5. *Teamsters Local 688*, 326 NLRB No. 74 (August 27, 1998). Remedies for a *Beck* violation.

6. *Automotive, Petroleum & Allied Industries Employees Local 618*, 326 NLRB No. 34 (August 24, 1998). The Board determined that, under *Beck*, a union need not account for its representational expenses on a unit-by-unit basis.

CONTRACT BAR

7. *United Health Care Services, Inc.*, 326 NLRB No. 144 (September 30, 1998). Application of contract bar doctrine.

DISCRIMINATION

8. *Communications Workers Local 13,000*, 326 NLRB No. 158 (September 30, 1998). The union (as the employer) violated §8(a)(3) of the NLRA by discharging a employee who attempted to organize the clerical staff.

9. *Beta Steel Corp*., 326 NLRB No. 126 (September 30, 1998). Discharge of employee for attempting to enforce health and safety provisions of a collective bargaining agreement.

10. *Dravo Lime Co*., 326 NLRB No. 118 (September 30, 1998). The NLRB found that the employer violated §8(a)(3) of the NLRA by discharging an employee in the absence of a specific finding of union animus.

11. *J.O. Mory, Inc.*, 326 NLRB No. 61 (August 27, 1998). The NLRB General Counsel failed to establish that employer refused to consider or hire job applicants for anti-union reasons.

DUTY TO BARGAIN

12. *Show Industries, Inc*., 326 NLRB No. 76 (August 27, 1998). Effects bargaining requirements for closing a warehouse.

HOT CARGO/SECTION 8(e)

13. *Hotel and Restaurant Employees Local 274*, 326 NLRB No. 95 (September 21, 1998). Analysis of issues under §8(e) of the NLRA.

14. *Carpenters District Council of New York City and Vicinity (Manufacturing Woodworkers Assoc. of Greater New York)*, 326 NLRB No. 31 (August 26, 1998). Analysis of issues under §8(e) of the NLRA.

INDEPENDENT CONTRACTORS

15. *Dial-a-Mattress Operating Corp.*, 326 NLRB No. 75 (August 27, 1998). Analysis of independent contractor status under the NLRA and adoption of new legal test.

16. *Roadway Package System, Inc.*, 326 NLRB No. 72 (August 27, 1998). Analysis of independent contractor status under the NLRA and adoption of new legal test.

INFORMATION REQUESTS

17. *Reno Sparks City Lift.*, 326 NLRB No. 155 (September 30, 1998). The employer failed to provide requested information to the union.

18. *California Nurses Assoc.*, 326 NLRB No. 142 (September 30, 1998). The union failed to provide requested information to the employer.

19. *Gary's Electrical Service.*, 326 NLRB No. 98 (September 29, 1998). Request for information/§8(f) relationship.

INTERFERENCE/INTERROGATION

20. *Alltel Kentucky, Inc.*, 326 NLRB No. 140 (September 30, 1998). Coercive interrogation of employees.

21. *Atwood Mobile Products*, 326 NLRB No. 115 (September 30, 1998). The employer violated §8(a)(1) of the Act by maintaining and communicating to employees a policy requiring employees to keep disciplinary matters confidential.

JURISDICTIONAL DISPUTES

22. *IBEW Local 363 (U.S. Information Systems)*, 326 NLRB No. 145 (September 30, 1998). Jurisdictional dispute between the IBEW and the Communications Workers regarding the installation of burglar and fire alarms. Work was awarded to Communications Workers.

23. *Electrical Worker's IBEW Local 125 (Loy Clark Pipeline)*, 326 NLRB No. 111 (September 29, 1998). Jurisdictional dispute between the IBEW and the Laborers' Union regarding electrical apparatus work. Work awarded to Laborers' Union.

24. *District 15 International Association of Machinists (Hudson General Corp.)*, 326 NLRB No. 15 (August 14, 1998). Jurisdictional dispute between the Machinists and Teamsters regarding mail sorting and transportation work. Work assigned to the Machinists.

MAIL BALLOT/REPRESENTATION CASE PROCEDURES

25. *Nouveau Elevator Industries, Inc.*, 326 NLRB No. 149 (August 27, 1998). Analysis of appropriateness of mail ballot election.

26. *Masiongale Electrical/Mechanical, Inc.*, 326 NLRB No. 51 (August 27, 1998). Direction of mail ballot sustained based on largely scattered work sites and a need to conserve agency resources.

27. *North American Plastics Corp.*, 326 NLRB No. 70 (August 27, 1998). Analysis of appropriateness of mail ballot election.

28. *North American Plastics Corporation*, 326 NLRB No. 70 (August 27, 1998). The Board upheld a Regional Director's decision to conduct a mail ballot election.

29. *Laidlaw Medical Transportation, Inc.*, 326 NLRB No. 79 (August 27, 1998). Analysis of requirements under the *Excelsior* rule.

30. *M&N Mail Service, Inc.*, 326 NLRB No. 43 (August 27, 1998). Direction of mail ballot upheld by NLRB.

31. *Community Affairs, Inc.*, 326 NLRB No. 24 (August 25, 1998). Challenge to showing of interest.

OBJECTIONABLE CONDUCT

32. *Indiana Hospital, Inc.*, 326 NLRB No. 152 (September 30, 1998). No objectionable conduct by offering payment to and paying off-duty employees as a reward for coming to NLRB election.

33. *Chicago Tribune*, 326 NLRB No. 94 (September 21, 1998). Employer who held brunch for bargaining unit employees three days before decertification election interfered with employees' free choice and a new election was ordered.

34. *Andel Jewelry Corp.*, 326 NLRB No. 53 (August 27, 1998). Analysis of the 24- hour rule under *Peerless Plywood.*

35. *Jo-Del, Inc.*, 326 NLRB No. 27 (August 24, 1998). Objectionable conduct setting aside a mail ballot election.

36. *Renco Electronics, Inc.*, 325 NLRB No. 222 (July 28, 1998). NLRB rejected objection based on conduct of Board-appointed interpreter during the election.

PROTECTED CONCERTED ACTIVITY

37. *Darphin Beute France*, 326 NLRB No. 104 (September 29, 1998). Analysis of discharge based upon protected concerted activity.

38. *Myth, Inc.*, 326 NLRB No. 28 (August 20, 1998). The NLRB General Counsel urged a return to the *Alleluia Cushion* theory of protected concerted activity but the NLRB rejected General Counsel's theory.

REMEDIES

39. *Acme Bux Corp*, 326 NLRB No. 157 (September 30, 1998). Analysis of the mitigation doctrine.

40. *Reno Hilton Resorts.*, 326 NLRB No. 154 (September 30, 1998). Imposition of a broad cease and desist order.

41. *Hoffman Plastic Compounds, Inc.*, 326 NLRB No. 86 (September 23, 1998). Undocumented worker deemed entitled to limited back pay.

42. *Alwin Mfg. Co., Inc.*, 326 NLRB No. 63 (August 27, 1998). The employer was ordered to reimburse the union for all costs and expenses incurred in the preparation and conduct of collective bargaining negotiations and in connection with an unfair labor practice strike; and to reimburse the union and NLRB General Counsel for all litigation costs, including attorneys' fees.

43. *Beverly California Corp.*, 326 NLRB No. 29 (August 27, 1998). Imposition of a corporate-wide remedy.

44. *Iron Workers Local 377*, 326 NLRB No. 54 (August 26, 1998). Remedy for breach of the duty of fair representation.

STRIKE ISSUES

45. *Aelco Corp*, 326 NLRB No. 125 (September 30, 1998). The employer failed to reinstate strikers in the proper sequence.

46. *Detroit Newspapers Agency*, 326 NLRB Nos. 64 and 65 (August 27, 1998). Analysis of unfair labor practice strike issues.

47. *Silverstate Disposal Service*, 326 NLRB No. 25 (August 19, 1998). Analysis of the scope of a no-strike provision in a collective bargaining agreement.

SUPERVISORY STATUS

48. *Millard Refrigerated Services, Inc.*, 326 NLRB No. 156 (September 30, 1998). The NLRB found that "leadmen" were not supervisors under §2(11) of the NLRA.

49. *Ryder Truck Rental, Inc.*, 326 NLRB No. 149 (September 30, 1998). The NLRB found that a "technician-in-charge" was not a supervisor under §2(11) of the NLRA.

UNION INTERFERENCE

50. *Transport Workers Union (Johnson Controls World Services, Inc.)*, 326 NLRB No. 3 (July 31, 1998). Union acted illegally by threatening to get a worker fired for failure to pay dues after he was expelled for supporting a rival union.

WITHDRAWAL OF RECOGNITION

51. *Tocco, Inc.*, 326 NLRB No. 128 (September 30, 1998). Analysis of appropriateness of withdrawal of recognition.

52. *Wire Products Mfg. Corp.*, 326 NLRB No. 62 (August 27, 1998). Unfair labor practices tainted decertification petition which employer relied upon to withdraw recognition. ■

LITIGATOR'S UPDATE

Joseph R. Furton, Jr.
Keller, Thoma, Schwarze, Schwarze, DuBay & Katz, P.C.

ALLOWING PLAINTIFF TO AMEND COMPLAINT DURING CASE IN CHIEF IS REVERSIBLE ERROR.

In *Cremonte v Michigan State Police*, Michigan Court of Appeals Case No. 195669 (October 20, 1998), the court reviewed a case in which the trial court allowed the plaintiff to amend his discrimination claim. After five days of trial, the plaintiff moved to amend his complaint to allege race and gender discrimination, in addition to the pending age discrimination and retaliation claims.

The court of appeals starkly contrasted the burden of amending a complaint after the opening of trial with before trial. While it recognized that Michigan courts grant leave freely prior to trial, it held that no such liberal stance should be taken after the opening of proofs. In fact, it called the trial court's statement on the record that MCR 2.118(C)(2) takes a liberal approach towards amendment, as "clearly incorrect as a matter of law." Instead, the court noted that MCR 2.118(C)(2) has "strict" requirements that "must" be met, and that the rule "places that burden entirely on the party requesting amendment." After reviewing the record, the court held that the trial court had abused its discretion in allowing the amendment.

Important to the court's analysis under 2.118(C) was the trial attorney's "vigorous objection" to the admission of evidence relating to gender or race discrimination.

SECOND TRIAL JUDGE MAY RE-HEAR MOTION FOR SUMMARY DISPOSITION

In *Quill v Williams International Corp, et al.*, Michigan Court of Appeals Case No. 194412 (October 20, 1998), the court reviewed a case in which the defendant had moved for summary disposition of plaintiff's claims based on the applicable statute of limitations. The judge granted the motion in part, and denied it in part. The case was subsequently reassigned to another judge. The defendants filed a "Motion in Limine," and the court granted the motion and dismissed the plaintiff's remaining claims. The plaintiff appealed, arguing that the dismissal was improper under MCR 2.613(B). The court of appeals disagreed. It held that this particular situation was not covered by 2.613(B) because it did not constitute "judge shopping," which (according to the court) is the evil the rule was intended to prevent. Furthermore, the court reasoned, that the "efficient administration of justice" would be thwarted if a reassigned judge did not have complete authority to dispose of a case.

DEFAULT MAY BE PROPER EVEN IF COMPLAINT IS TECHNICALLY DEFICIENT

In *Schafer v Feagin*, Michigan Court of Appeals Case No. 200009 (October 23, 1998), the court reviewed an order of default entered by a Wayne County Circuit Court judge, after a defendant failed to file a proper answer. The defendant argued, *inter alia*, that the summons and complaint in the matter were defective. The court held that *even though* the complaint was technically deficient, the default nonetheless was proper. It reasoned that defects in service were cured because the defendant had actual notice of the complaint and had formally responded to it.

One final note: the defendant had filed an answer, but had failed to serve it on the plaintiff. The court held that the trial court was correct in entering the default when the answer had been filed but not served.

A LESSON IN THE PROPER USES OF A LEARNED TREATISE AT TRIAL

In *Miller v William Beaumont Hospital*, Michigan Court of Appeals Case No. 192167 (August 28, 1998), the plaintiff alleged that her daughter was paralyzed by an improperly performed medical procedure known as a lumbar puncture. The court reviewed the defendant's use of learned treatises at trial in light of MRE 707. The court stated that: (1) a treatise could be used only for impeachment rather than substantive evidence; and (2) it was acceptable for an expert to testify that he had reviewed medical literature and could find no support for the theory that lumbar punctures cause paralysis. The court reasoned that the latter was merely an explanation of how an expert arrived at his own opinion, and not inpermissive use of learned treatises as substantive evidence. Finally, with respect to learned treatises, the court held that it was improper for an expert to read directly from a treatise to prove "the truth of the matter asserted" in the treatise, rather than for impeachment.

COURT OF APPEALS HOLDS PLAINTIFF MAY DISMISS APPEAL AT HIS LEISURE, WITH PAYMENT OF COSTS.

In *Buzas v Buzas*, Michigan Court of Appeals Case No. 200870 (October 2, 1998), the appellant, after filing an appeal, moved for a dismissal of his appeal. The appellee objected, arguing that it was entitled to attorney fees incurred as a result of the filing of the appeal. The court disagreed. It held that the appellant could unilaterally withdraw its appeal upon the payment of taxable costs pursuant to 7.219. The court also ruled that even though the claim was being voluntarily withdrawn, that did not mean it was necessarily pursued for an improper purpose or was frivolous.

SIXTH CIRCUIT HOLDS TITLE VII EXHAUSTION REQUIREMENTS ARE CLAIM SPECIFIC

In *Davis v Sodexho Cumberland College Cafeteria*, 6th Cir. Case No. 97-6078 (October 6, 1998), the plaintiff filed an EEOC charge of race discrimination. She later attempted to sue in federal district court, alleging age discrimination. The defendant argued that the plaintiff had failed to exhaust her administrative remedies because she had not raised age discrimination before the EEOC. The Sixth Circuit agreed with the trial court's decision to dismiss the plaintiff's claim. It did leave some creativity for counsel, however. It held that a plaintiff's federal claim "may include claims limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." Notably, the court did not rely *exclusively* on whether plaintiff had checked the appropriate "box," but instead looked to the text of the charge to determine if the applicable type of discrimination was fairly subsumed within the charge.

MICHIGAN COURT OF APPEALS LIMITS USE OF SUBPOENAS IN ARBITRATION

In *Michigan State Employees Association v Michigan Liquor Control Commission*, Michigan Court of Appeals Case No. 19949 (October 6, 1998), the court reviewed the issuance of subpoenas

by an arbitrator. The parties had agreed to AAA arbitration. AAA had a rule that stated that "an arbitrator *authorized by law* to subpoena witnesses or documents" may do so. The defendant argued that the arbitrator had exceeded his authority by issuing subpoenas. The plaintiff conceded that no law specifically granted the arbitrator subpoena power, but argued instead that the subpoena authority was necessary to promote the goals of the Michigan Constitution and to ensure a meaningful hearing and grievance procedure. The court held: (1) that plaintiff's argument was in direct contravention of its express agreement with the defendant; and (2) that the power to issue a subpoena must be expressly conferred by statute.

MICHIGAN COURT OF APPEALS APPLIES BROAD *RES JUDICATA* PRINCIPLES

In a pair of recent cases, the Michigan Court of Appeals examined the doctrine of *res judicata* and held that it barred claims in situations that at first blush do not appear to be in *res judicata* territory. In *Perez-Delcon v Department of Social Services*, Mich Court of Appeals Case No. 195892 and 197040 (July 24, 1998), the court held that the time-honored *res judicata* requirement that the two lawsuits involve the "same claim" *does not* mean that the claims are necessarily "identical." Instead, the claims must be "substantially" the same. The court held that the plaintiff's Consumer Protection Act claim filed in Oakland Circuit Court was "substantially" the same as his FOIA claim previously dismissed because "resolution of either action will require examination of the same operative facts." Thus, *res judicata* applied, and the claim was properly dismissed. And from *Rapanos v City of Midland*, Michigan Court of Appeals Case No. 199909 (July 24, 1998), we learn that "Michigan follows a 'broad rule of res judicata,' that bars not only all claims actually litigated in the prior action, but every claim arising out of the same transaction which the parties exercising reasonable diligence, could have raised, but did not." In *Rapanos*, the claimant attempted to litigate constitutional claims after an action to enforce a zoning ordinance had concluded. The court held the claims barred because they could have been brought as defenses or counterclaims in the first action. Defendants take note. Sue now, or *res judicata* may force you to forever hold your peace.

MICHIGAN LAW APPLIES TO COVENANT NOT TO COMPETE "CHOICE OF LAW" ISSUE

In *Samuels v Nelson*, Western District Case No. 1:98 CV 126 (August 26, 1998), U.S. District Court Judge Richard Enslen examined the issue of which law — Michigan or Tennessee — applied to a claim brought by a Tennessee resident who had a contract to sell bibles for a Michigan corporation. The contract contained a covenant not to compete. The contract was entered into (i.e., signed by the last signor) in Tennessee. The court applied the *Restatements 2nd, Conflicts of Laws*, test to determine the applicable law. The court held that law of Michigan should be applied because Michigan had a strong public policy (at that time) of non-enforcement of such an agreement. Thus, Michigan had a special interest in the contract, because the contract violated the public policy of the state. The court then held that the particular covenant not to compete was void and unenforceable under Michigan law. The opinion is interesting because it allows the court to take into account substantive law in answering a "choice of law" question. ■

MERC ADDRESSES BARGAINING AND CONFIDENTIAL EMPLOYEE ISSUES

Douglas V. Wilcox
White, Przybylowicz, Schneider & Baird, P.C.

COLLEGE DID NOT VIOLATE PERA BY UNILATERALLY REDUCING OVERLOAD HOURS

In *Grand Rapids Community College -and- Grand Rapids Community College Faculty Association*, MERC Case Nos. C96 A-21 & C96 F-143, MERC adopted ALJ Kurtz's decision dismissing the union's charge. The union alleged the college unilaterally reduced the amount of overload hours that each faculty member may work. The term "overload" refers to those hours voluntarily assumed by faculty members during a given semester in addition to their normal teaching load.

MERC ruled that overload hours are overtime and that the college had no duty to bargain over the reduction of those hours after the contract expired. MERC has historically held that overtime is a permissive topic of bargaining under PERA. *See, Branch ISD*, 1994 MERC Lab Op 163, *et al*,; *see also, Organization of School Administrators and Supervisors v Detroit Board of Ed*, 229 Mich App 54, 69 n 5 (1998) *lv pending*. Interestingly, while the contract was in effect, an arbitrator concluded the college violated the parties' agreement by unilaterally limiting overload hours.

MERC declined to follow various decisions arising under the NLRA, which held that overtime is a mandatory bargaining subject, claiming it is not bound to follow the NLRB's every turn and twist. *Northpoint Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 537. MERC rejected the association's reliance on *CMU Faculty Association v CMU*, 404 Mich 268 (1978), for the proposition that the college had a duty to bargain before implementing the limitation on overload hours.

MERC also rejected the association's claim that the college illegally changed a term and condition of employment while the parties were actively engaged in fact-finding and mediation, contrary to *Village of Constantine*, 1991 MERC Lab Op 467. When a permissive subject of bargaining is at issue, such as the number of overload hours a member may work, the employer may unilaterally change it upon expiration of the contract.

SCHOOL DISTRICT VIOLATED ACT BY REFUSING TO PROVIDE RELEVANT INFORMATION TO UNION

In *Plymouth-Canton Community Schools -and- Plymouth-Canton Administrators Association*, MERC Case No. C97 E-109, MERC affirmed ALJ Lynch's decision that the district committed an unfair labor practice by refusing to provide the union with information relevant to the administration and enforcement of the contract and by failing to bargain over the allocation of costs for the documents.

This case arose from the demotion of an administrator. The union requested from the district copies of all letters submitted to the central office relating to the employee. The district did not formally respond to the union's request for over two months. Ultimately, the district provided the union with redacted copies of letters from students and parents, and unilaterally charged the union $25.58 for the documents. It refused to provide copies of letters from staff members, claiming they were exempt under the Freedom of Information Act. The union continued to make information requests.

MERC held that an employer must supply in a timely fashion requested information which would permit the union to engage in collective bargaining and police the administration of the contract.

The employer also erroneously relied on *Bullard-Plawecki* and the *Family Educational Rights and Privacy Act* (FERPA) to withhold certain documents and redact others. Regarding the former, PERA, not *Bullard-Plawecki*, controls what information an employer must supply to a union. Regarding the latter, the employer's argument was rejected because it did not rely on FERPA when it initially failed to comply with the union's information request. Finally, when an information request is made, an employer must bargain in good faith over the cost of duplication or compilation of the requested information.

ADMINISTRATIVE SECRETARY IS NOT CONFIDENTIAL EMPLOYEE

In *Lapeer County and 40th Judicial Circuit Court (Friend of the Court) -and- Teamsters State, County and Municipal Employees, Local 214*, MERC Case No. UC 96 G-27, MERC granted the union's request to add the newly created position, entitled administrative secretary, to the bargaining unit, ruling she was not a confidential employee.

MERC noted that a "confidential employee" is one who assists and acts in a confidential capacity to person(s) who formulate, determine and effectuate management policies with regard to labor relations. "Confidential labor relations work" involves information relative to the collective bargaining process to which the union should not have access. The number of confidential exclusions is limited to those employees necessary to perform the required confidential duties. The parties previously agreed to exclude two confidential employees from the bargaining unit.

MERC concluded that the administrative secretary was not a confidential employee. Although the administrative secretary had access to information which might impact on a grievance, any department head or lower-level supervisor might have his or her secretary type personal notes of this sort. Were MERC to find this to be confidential work, the rights of a substantial percentage of all clerical employees to participate in collective bargaining might be impaired. ■

HELP WANTED!

***Lawnotes* Columnist**

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THE JOY OF LABOR LAW

Law and Literature. Seventh Circuit Chief Judge Richard S. Posner explores the relationship between *Law and Literature* in his excellent 1988 book of the same title. His judicial opinions show he practices what he preaches. In a "direct threat" ADA case, Judge Posner, finding the plaintiff's threats unprotected, drives home his point by quoting from Hamlet. *Palmer v. Circuit Court of Cook County*, 117 F.3d 351, 352 (7th Cir.1997), *cert. denied*, 139 L.Ed.2d 879 (1998) ("The cause of the threat was, we may assume, her mental illness – as when Hamlet said, apologizing to Laetres, was Hamlet wrong'd Laertes? Never Hamlet ... His madness.'") Judge Posner is not alone. In an otherwise boring Teamsters' ERISA collection case, the dissenting judge invoked *Macbeth* in rejecting an argument: "The Fund's claim of reliance therefore amounts to an argument aptly described, in the words of the Immortal Bard, as 'full of sound and fury and signifying nothing.'" *Central Pennsylvania Teamsters Fund v. McCormick Dray Line, Inc.*, 85 F.3d 1098, 1110 (3rd Cir. 1996). At the Supreme Court, Justice Scalia prefers song lyrics, recently borrowing exemplars of excellence (e.g., "the *ne plus ultra*," "the Napoleon Brandy...") from Cole Porter's, "You're the Top" in *County of Sacramento vs. Lewis*, 140 L.Ed.2d 1043, 1067 (1998).

Meanwhile at the NLRB, due to budgetary problems we assume, old movies are the medium. An ALJ invoked movie imagery in describing a union referral system, noting that "some aspects of this case presents eerie flashbacks to certain scenes in *On The Waterfront*." *International Longshoremen's Assn*, 323 NLRB No. 190 (1997). While upholding the ALJ, the Board disavowed the "references to, or comparison between" the case and "fictional works of literature or motion pictures."

The Primary Source. While legislative history is interesting, a lawyer should never forget to read the statute. As one Justice purportedly said to an attorney who during oral argument kept referring to legislative history for support : "When the legislative history is unclear, shouldn't we look at the text of the statute?" So explained the Third Circuit, in so many words, rejecting the EEOC's view that legislative history demonstrated that predispute arbitration-clause waivers of a judicial forum are illegal under the 1991 Civil Rights Act. *Seus v. John Nuveen & Co.*, 77 FEP Cases 751 (3rd Cir. 1998). The EEOC argued that while the Civil Rights Act encourages the use of alternative dispute resolution, including arbitration, the legislative history confirms that the statute precludes pre-dispute waivers of a judicial forum. The court rejected this argument. Since the "text adapted by the full Congress" encourages arbitration, isolated comments by individual legislators do not justify disregard of the text. The court also rejected plaintiff's argument that the arbitration clause is "analogous to the `yellow dog contracts' of the nineteenth century." The one *small* problem with this dog analogy — Congress outlawed yellow dog contracts by statute, in the Norris-La Guardia Act of 1932, 29 U.S.C. 103. Not to diminish the forces of history, it still pays to have the statute on your side.

Likewise, the Supreme Court ruled on November 3, 1998 that a union does not breach its duty of fair representation by negotiating a union security clause that "tracks the language" of Section 8(a)(3) of the National Labor Relations Act. *Marquez v. Screen Actors Guild*, 159 LRRM 2641 (1998). Justice O'Connor, writing for the Court, concluded "that it may be perfectly reasonable for a union to use terms of art in a contract." The courts in both cases could have paraphrased James Carville: It's the statute, stupid!

Mirandizing ADA: You Have The Right To A Reasonable Accommodation. In my last column I endorsed Rumpole of the Bailey, the fictional criminal attorney who has some lessons for labor attorneys ("Never plead guilty." "Crime pays."). It appears that life imitates art in a case applying the ADA in a criminal law context. In *Gorman v. Bartch*, 8 AD Cases 751 (1998), the Eighth Circuit held that ADA rights apply during the arrest of a paraplegic man in a wheelchair who police arrested for trespass after he was thrown out of a bar and demanded to be let back in. The police were accused of tying him to a bench in the police van without adequate support, causing him injury. What next, the ADA-version of the *Miranda* warning? "You have the right to counsel and to a reasonable accommodation. You have the right to consult with a lawyer and an ADA counselor and if you cannot afford an ADA counselor, one will be provided at the employer's expense."

John G. Adam

INSIDE *LAWNOTES*

- Camille Stearns Miller, Cylenthia LaToye Miller and Elizabeth Hardy review the practical implications of the U.S. Supreme Court's sexual harassment decisions.
- John Adam analyzes *Wright,* the Supreme Court's latest decision on arbitration of federal statutory claims.
- Stuart Israel opposes the State Bar's proposal for mandatory continuing legal education.
- George Nicolau responds to Erwin Ellmann's discussion of the use of the *functus officio* doctrine in labor arbitration, and Ellmann gets the final word.
- EEOC Regional Attorney Adele Rapport reports on the regulations governing waiver of ADEA claims.
- Information on upcoming events and LELS business: the Section's mid-winter dinner and CLE program on January 29 and 30 in Ypsilanti; the LELS-ICLE-FMCS 24th annual labor and employment law seminar on April 22 and 23 in Troy; the 1999 LELS-MERC public sector labor law conference on May 13 and 14 in East Lansing; and more.
- Labor and employment law 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; the Joy of Labor Law; Monicagate and depositions in employment cases; *Jones v. Clinton* on the web; and more.
- Authors John G. Adam, John T. Below, Karl Brevitz, Janet C. Cooper, Erwin Ellmann, Gary S. Fealk, Joseph R. Furton, Jr., Elizabeth Hardy, Scott G. Hornby, Stuart M. Israel, Russell S. Linden, Valerie L. MacFarlane, Timothy O. McMahon, Camille Stearns Miller, Cylenthia LaToye Miller, George M. Mesrey, George Nicolau, Adele Rapport, David A. Rhem, William C. Schaub, Jr., Sheldon J. Stark, Kendall B. Williams, Douglas V. Wilcox and more.

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

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