LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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NLRA REMEDIES

Patricia Fedewa, *Trial Attorney, NLRB Region 7*

Section 10(c), 29 U.S.C. 160(c), of the National Labor Relations Act states in part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act; *Provided,* That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: . . . Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order.

The Supreme Court has stated with respect to remedies that "Congress has invested the Board, not the courts with broad discretion: to fashion remedial orders. *NLRB v. Food Store Employees Union, Local 347,* 417 U.S. 1, 8 (1974). Section 10(c) leaves the Board with "broad discretion to devise remedies . . . subject only to judicial review." *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 898-99 (1984). The Supreme Court has further stated that it will not disturb a remedy ordered by the Board "unless it can be shown that the order is a patient attempt to achieve ends other than those which can fairly be side to effectuate the policies of the Act." *Virginia Elec. & Power Co. v. NLRB,* 319 U.S. 533, 540 (1943). The Supreme Court has also stated that Congress could not define "the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration." *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941).

In that regard, the Board has assumed its full authority over remedial aspects of its decisions regardless of whether remedies are requested by the General Counsel. *Kaumagraph Corp.,* 313 NLRB 624 (1993).

During his tenure as General Counsel, Leonard Page pursued a remedial initiative which included seeking: access remedies described in *Fieldcrest Cannon,* see *infra.;* the use of plain language in notices; frontpay in situations where reinstatement is not feasible; consequential damages for such situations as loss of cars, homes and credit ratings; daily compounding of interest of monetary awards; not requiring status of work authorization as a condition of reinstatement; and notifying all union-represented employees of their rights under *Communications Workers of America v. Beck,* 487 U.S. 735, 745 (1988).

Over the years, the Board has developed policies regarding typical remedies that are sought. A general overview of the current state of some of these remedies follows:

1. Notices and Special Access Remedies

Notices are generally ordered to be posted on the respondent's bulletin boards for 60 days. Notices "are intended to inform the employees of their statutory rights and the legal limits on the employer's conduct, and to reassure them that further violations will not occur." *Teamsters Local 115 v. NLRB,* 640 F.2d 392, 399-400 (D.C. 1981). Notices generally encompass all the violations remedied in a given settlement and describe how the respondent is remedying the violations. If a respondent has multiple locations, or the affected employees no longer work for it or are no longer members, the respondent may be required to post at multiple locations or send the notices to charging parties' or discirminatees' homes. See e.g. *Labor Ready, Inc.,* 327 NLRB 1055, fn. 1 (1999) (nationwide posting of notice ordered when employer maintained overbroad solicitation rule at all of its facilities); *Jo-Del, Inc.,* 326 NLRB 296, fn. 4 (1998) (Board ordered mailing of notice to employees because or work being performed at multiple and changing job sites); *Indian Hills Care Center,* 321 NLRB 144 (employer required to mail notices to employees when employer had gone out of business or closed its facility).

The Board's customary remedial notice language provides, in narrow fashion, that the employer will not "in any like or related manner" violate the Act. See e.g. *Behring International, Inc.,* 252 NLRB 354, fn. 5 (1980); *Jack Thompson Oldsmobile, Inc.,* 256 NLRB 24, fn. 4 (1981). However, in more egregious cases where a respondent has shown a proclivity to violate the Act or has engaged in such egregious or widespread misconduct so as to demonstrate a general disregard for employees' fundamental rights, the notice will state as a broad remedy, that the respondent will not violate the Act "in any other manner." *Hickmott Foods, Inc.,* 242 NLRB 1357 (1979).

In *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 614 (1969), the Supreme Court approved the Board's use of bargaining orders in situations where a majority of the employees in the bargaining unit signed union authorization cards and the traditional remedies will not eliminate the effects of the unfair labor practices. The Board may issue bargaining orders when the employer commits unfair labor practices that so disrupt the work place that they make "the holding of a fair election unlikely." *Id.*

Since *Gissel,* the Circuit Courts of Appeals have at times reversed the Board's use of bargaining orders because of the substantial time it takes for the bargaining order to be implemented.

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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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Because of this problem, the board has at times failed to issue a bargaining order and instead ordered alternative remedies. The Board has ordered that if a union loses the election after challenges were counted, the employer would be ordered to provide the union with names and addresses of all current unit employees. See *Regal Recycling, Inc.*, 329 NLRB 355 (1999) (seven-year gap between Board order and unfair labor practices) and *Comcast Cablevision of Philadelphia*, 328 NLRB 487 (1999) (responding to D.C. Circuit Court remand five years after unfair labor practices committed).

In *Fieldcrest Cannon, Inc.*, 318 NLRB 470 (1995), enfd. in relevant part 97 F.3d 65 (4th cir. 1996), the three-member panel concluded that the employer was engaged in particularly egregious conduct during an organizing drive. The Board described the unfair labor practices as "so numerous, pervasive, and outrageous that special notice and access remedies are necessary to dissipate fully the coercive effects of the unfair labor practices." At 473. The Board concluded that Respondent had committed numerous unfair labor practices at several facilities where both represented and unrepresented employees worked. The Board ordered a new election and traditional remedies and special notice remedies as well as what have frequently been labeled "access remedies":

(1) publish the notice in Spanish and English, the Respondent's internal newsletter and mail copies to all employees on Respondent's payroll going back to the onset of the unfair labor practices;

(2) convene its employees during working time and have Respondent's vice president read the notice to them;

(3) publish the notice in a local newspaper of general circulation twice weekly for four weeks;

(4) supply the union with names and addresses of its unit employees;

(5) allow the union reasonable access to its bulletin boards and all places where notices to employees are customarily posted;

(6) grant the union access to nonwork areas during the employees' nonwork time;

(7) give the union notice of, and equal time and facilities for the union to respond to any address made by the Respondent regarding the issue of representation;

(8) afford the union the right to deliver a 30-minute speech to employees on working time prior to any Board election in a time frame of not more than 10 working days before, but not less than 48 hours before, the election.

(9) with regard to the conduct of a rerun election, the Board ordered that it be conducted at a neutral, off-premises site deemed suitable by the Regional Director.

The Board in the following cases has adopted similar notice and access remedies: *Three Sisters Sportwear Co.*, 312 NLRB 853 (1993); *Monfort of Colorado, Inc.*, 298 NLRB 73 (1990), enfd. in relevant part, *sub nom Food & Commercial Workers v. NLRB*, 965 F.2d 1538 (10th Cir. 1992) (president to read notice, reasonable

access to bulletin boards and non-work areas, equal time to respond to employer speeches, and 30 minute speech before election); *United States Service Industries*, 319 NLRB 231, enfd. 107 F.3d 973 (D.C. Cir. 1997) (notice read by employer representative or by Board agent with employer representative present and union awarded access to bulletin boards for two years or until proper certification after fair election occurs); *S.E. Nichols*, 284 NLRB 556 (1987), enfd. 862 F.2d 952 (2nd Cir. 1988) (access remedies); *Avondale Industries*, 329 NLRB 1064 (1999) (special mailing and publication of notice required as well as access remedies). In *Avondale*, the Board chose not to require the notice to be read by the president where he did not directly commit any of the unfair labor practices.

See also, *Dynatron/Bondo Corp.*, 324 NLRB 572 (1997), enfd. without discussing remedies at 176 F.3d 1310 (11th Cir. 1999) (plant manager or human resources or a Board agent in their presence read the notice to employees, publish the notice in local newspapers, and mail copies to each employee); *Harbor Cruises Ltd.*, 319 NLRB 822 (1995) (read the notice to employees and mail it); *Reno Hilton*, 319 NLRB 1154 (1995) (employer required to publish notice in employer publication); *Domsey Trading Corp.*, 310 NLRB 777 (1993) (manager to read notice).

2. Backpay

The Board has consistently held that backpay is to be reduced by the employee's interim earnings as computed quarterly. *F.W. Woolworth Co.*, 90 NLRB 289 (1950). That is, if an employee earns more from his interim employer than he would have earned if he continued working for the respondent employer during a quarter, the additional income that he earned will not reduce his net backpay for other quarters.

In addition to vacation pay, bonuses, earnings from profit-sharing programs, employer pension contributions, employee discounts on purchases, backpay calculations can include car allowances and per diem, *Garment Workers*, 300 NLRB 507, fn. 2 (1989), and sometimes moving, travel and other job-seeking expenses, *Carpenters Local 953*, 272 NLRB 70 (1984) (charging party had to travel to a different local to obtain membership in that local).

The duty to mitigate is not constant if a charging party had received vacation pay from his or her employer. *Iron Workers Local 15*, 298 NLRB 445 (1990). In this case the Board found that the charging party's backpay was not tolled for the three weeks he was on his honeymoon (and presumably not mitigating his damages) because he presumably would have used his vacation time for his honeymoon.

Regarding consequential damages, the NLRB Casehandling Manual (Part Three), Section 10530.1 also addresses backpay. It states:

> Backpay awards do not include punitive damages nor do they include compensation for collateral losses, such as from stress or credit problems. The backpay award should leave the discriminatee compensated as though the unlawful action had not occurred.

Two ALJs have cited the manual's provision and stated that backpay does not include reimbursement for collateral losses resulting from distress sales of a home, automobile, tools, or similar personal assets. In *Minette Mills, Inc.*, 316 NLRB 1009, 1011 (1995), the discriminatee sustained permanent losses when he had to pawn personal items. In *Laborers Local 38 (Hancock-Northwest)*, 268 NLRB 167, 170 (1983), modified 748 F.2d 1001 (5th Cir. 1984), the ALJ concluded that capital losses are not recoverable in compliance proceedings.

Neither the Board nor the courts have adopted frontpay as a remedy.

3. Medical and Life Insurance

The Board has held that employers can be held liable for medical and rehabilitative expenses. In *Freeman Decorating Co.*, 288 NLRB 1235 (1988), the ALJ found that the employer violated Section 8(a)(1) and (3) of the Act by forcibly removing from the workplace and causing injury to employee Pruitt when it discharged Pruitt because of his union activities. The ALJ ordered the employer to offer Pruitt reinstatement and backpay. In addition, the ALJ noted that if Pruitt showed that he suffered loss because of his injuries caused by the employer, i.e., a nexus between the unfair labor practices and the employee's injuries and medical expenses, the employer should offer Pruitt backpay for periods of his disability and "costs for medical and rehabilitation treatment." The Board affirmed, but stated that the employer is only required to reimburse Pruitt for medical and rehabilitative expenses "that were incurred due to lack of insurance coverage resulting from Pruitt's unlawful discharge." Thus, because the employer had provided medical insurance, there was a nexus between Pruitt's unreimbursed medical and rehabilitative expenses and the employer's unlawful discharge.

Similar to *Freeman Decorating Co.*, in *Sioux Falls Stock Yards Co.*, 236 NLRB 543 (1978), the Board ordered an employer who provided life insurance to reimburse employees for monies paid in order to maintain their life insurance coverage. See also, *IATSE Local 644*, 272 NLRB 1234 (1984); *Plasterers' Local 90*, 252 NLRB 750 (1980) (medical expenses covered even if it is uncertain whether employee would have participated in non-mandatory plan). *December 12, Inc.*, 282 NLRB 475 (1984) (respondent responsible for reimbursing for medical insurance premiums even though paid by employee's mother).

However, the Board has refused to order certain types of compensation because relief was available in other forums. In *Operating Engineers Local 513 (Long Construction Co.)*, 145 NLRB 554 (1963), the Board found that the union violated Section 8(b)(a)(A) by causing several employees injury and rendering them unable to work, thereby interfering with the employees' right of ingress to the workplace. The Board decided that it would not effectuate the policies of the Act to award backpay or other compensatory relief in such situations. The Board noted that it is within the power of the State to enjoin and remedy the consequences of such conduct. The Board reasoned that the lack of a Board order would "not leave such employees without redress against those responsible for their injuries." See similarly, *Service Employees Local 87*, 279 NLRB 168 (1986) (union was not required to pay medical bills of employee struck in the head by union picket).

Similarly, in *Graves Trucking*, 246 NLRB 344, 345 n. 8 (1979) enfd. as modified 692 F.2d 470 (7th Cir. 1982), where the Board found the employer violated 8(a)(1) when its supervisor

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injured employee and union steward Nash. The Board ordered the employer to pay Nash backpay for as long as Nash's injury precluded him from performing his former or substantially equivalent job. The Board noted that the backpay award is not "reparation for the physical injury suffered by Nash, but a necessary remedy to vindicate the purposes of the Act," and reiterated that Nash could obtain compensation for his personal injuries in other forums.

4. Records Production

In *Ferguson Electric Co., Inc.*, 335 NLRB No. 15 (2001), the Board altered its traditional "make records available" remedy. The Board will now order respondents to:

> Preserve and, within 14 days of the request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payroll records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

The Board reasoned that requiring respondents to provide the records, rather than make them available as was previously required, will "promote prompt, accurate and full compliance" with backpay orders. *Id.*, at slip at p. 2. The Board further noted that the reasonable place would not invariably be the Regional Office, but that the Regional Offices and the respondents cooperate to find a suitable place for production of the records. *Id.*

5. Interest

Interest on Board-ordered monetary awards is computed quarterly and is not compounded. Interest is computed at the short term Federal rate for the underpayment payment of taxes. *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The rate for the fourth quarter of 2001 was 7%.

6. Duty of Fair Representation Remedies

Unions can be required to remedy their unfair representation of employees in grievances by permitting and paying for those employees to have their own counsel at future grievance proceedings. See *Steelworkers Local 1870*, 332 NLRB 92 (2000); *Communications Workers Local 3410*, 328 NLRB 920 (1999); *American Postal Workers Union*, 327 NLRB 759, 770 (1999); *Iron Workers Local 377*, 326 NLRB 375, 380-81, 396 (1998).

However, in *Henry J. Kaiser Co.*, 259 NLRB 1 (1981), the Board declined to impose an independent-representation remedy because it concluded that other aspects of its remedial order provided "adequate incentive" for the union to "responsibly represent grievant." The Board in *Kaiser* ordered the union to make the charging party whole for all lost earning from the date of his discharge until the union "secures consideration of his grievance and pursues it with due diligence." *Id.* at 2. See similarly, *Laborers Local 324 (Miller Brewing)*, 234 NLRB 367, 368 (1978).

"Effective remedies."

Also, in *Teamsters Local 186*, 220 NLRB 35, 36 (1975), the Board concluded after remand to require an attorney to represent the grievant rather than a paraprofessional due to the complicated nature of the grievance.

In *Iron Workers Local 377, supra.*, the Board modified the standard for determining when a union is obligated to make a charging party whole and provide representation when it has been found to have violated its duty of fair representation. In *Rubber Workers Local 250 (Mack-Wayne Closures)* (referred to as *Mack-Wayne II*), 290 NLRB 817 (1988), the Board held that the General Counsel needed to prove that the grievance was not clearly frivolous. However, the Board in *Iron Workers* reasoned that providing this relief could possible result in a windfall being granted to the charging party because he could be made whole for a grievance that was not meritorious. The Board concluded that if the General Counsel could prove that the grievance is meritorious, the union would then be required to provide a make whole remedy for damages caused by the mishandling of the grievance, possible including independent representation. The Board stated that ordinarily this process should take place in compliance proceedings unless agreed to by the charging party and the General Counsel, rather than as determined by the union in *Mack-Wayne II.*

The Board further concluded, citing *Vaca v. Sipes*, 386 U.S. 171 (1967), that a union is only responsible for additional damages the grievant sustained by the union's failure to process the grievance; that is, if the employer has unlawfully disciplined the grievant, the employer continues to be liable for that conduct. *Iron Workers* at 378. Previously, the Board had held that the union was responsible for making whole the charging party for the consequences of the underlying wrong for which the union failed to represent him. The majority explained that this may indeed require the charging party to file suit against the employer in federal court under Section 301 of the Labor-Management Relations Act to be made whole for the employer's illegal conduct.

In *Lake Pilots Assn., Inc.*, 320 NLRB 168, 173 (1995), the Board concluded that a make whole remedy was not necessary because the contract did not have a time limit for the filing of grievances, and thus the union was still capable of obtaining a remedy from the employer.

In *Sheet Metal Workers Local 355*, 254 NLRB 773 (1981), enfd. in part at 716 F.2d 1249 (1983), affirming the Board, the court held that a union which causes an employer to unlawfully discharge an employee is liable for wages until the employee is either reinstated or finds substantially equivalent work. This decision reverses the old "five-day rule" which ended the union's liability five days after it notified the employer that the employee should not be discharged.

7. Litigation and Bargaining Costs and Expenses

Where a respondent asserts frivolous defenses, the Board has held that it may assess litigation expenses for the charging party and the General Counsel. *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enfd. only as to payment of negotiation fees under sub nom. *Unbelievable Inc. v. NLRB*, at 118 F.3d 795 (D.C. Cir. 1997). Before F*rontier Hotel & Casino*, there had been a series of cases with vary-

ing standards for use in awarding litigation and bargaining expenses. The Board requires that its findings that a defense is frivolous must not be based on the credibility of the respondent's witnesses because that would render the respondent's defenses debatable rather than frivolous. *Id.* at 862-63. Thus, if a respondent presents no serious issue, the Board may order the respondent to pay all costs associated with the investigation, preparation and conduct of the proceeding. The D.C, Circuit concluded that the Board had exceeded its authority when ordering litigation expenses be paid. Despite the D.C. Circuit Court's failure to enforce *Frontier Hotel & Casino,* the Board continues to award litigation expenses in situations where the respondent asserts frivolous defenses that are not debatable. See e.g. *Teamsters Local 122 (August A. Busch & Co.),* 334 NLRB No. 137 (2001) (respondent to pay litigation and negotiation expenses because it engaged in conduct that violated Sections 8(b)(4)(i) and (ii)(B) during negotiations and failed to put on a defense to the 8(b)(3) allegations at trial).

Also, in *Frontier Hotel & Casino,* a surface bargaining case, the Board awarded to the charging party union costs and expenses incurred in the preparation and conduct of the collective bargaining negotiations. The Board reasoned the such remedies were necessary in order to eliminate the effects of the respondent's surface bargaining. Thus, the litigation and bargaining costs and expenses are not viewed as punitive, but rather as a make-whole remedy. See e.g., *Teamsters Local 122,* supra at slip at 6. *Alwin Manufacturing Co., Inc.,* 326 NLRB 646 (1998) (negotiation and unfair labor practice strike expenses awarded as well litigation expenses).

The Board will award litigation fees when a respondent unlawfully sues a charging party. See e.g. *Dahl Fish Co.,* 299 NLRB 413 (1996), enfd. 813 F.2d 1254 (D.C. Cir. 1987). Unions are liable for legal and other expenses that are incurred by their members when defending against retaliatory intra-union charges. *Operating Engineers Local 150,* 313 NLRB 659 fn. 3 (1994).

In *Lake Holiday Manor,* 325 NLRB 469 (1999), the Board ordered a partial award of litigation costs and attorney fees after the respondent reneged on two settlements and fired its attorney in order to delay proceedings.

In *K-Mart Corp.,* 313 NLRB 50 (1993), the respondent was ordered to notify police and a municipal court that the Board had determined the arrest of the union's consultant violated the Act. The respondent was ordered to pay attorney fees and expenses.

8. Remedies to Require Employers to Reinstitute Business Functions

In cases where an employer relocates its operations in violation of Section 8(a)(3), the Board will order the employer to relocate only where it will not be unduly burdensome. *Lear Siegler, Inc.,* 295 NLRB 857 (1989). When determining whether to order a facility to re-open that was closed in violation of Sections 8(a)(3) and (5), the Board will order the facility to be re-opened if the cost of re-establishment is not unreasonably high, a location could be obtained — even if original site is unavailable — and the employer sold the facility when restoration of the facility was being sought. *Westchester Lace,* 326 NLRB 1227 (1998). See also, *G&T Terminal Packaging,* 326 NLRB 114 (1998). These issues can be litigated at the compliance stage.

— END NOTE —

The views in this article are the author's and are not intended to be official statements of the National Labor Relations Board. ■

EEOC DECISION ON COVERAGE OF CONTRACEPTION

Adele Rapport
***Regional Attorney, EEOC*[1]**

On December 14, 2000, the Equal Employment Opportunity Commission issued a decision finding reasonable cause to believe that two employers violated Title VII of the Civil Rights Act of 1964, 42, U.S.C. § 2000e *et seq.* by excluding prescription contraceptives from their health insurance plans.[2]

Charging Party A is a registered nurse who wishes to use oral contraceptives for birth control, to alleviate symptoms of certain medical conditions, and to prevent the development of ovarian cancer. Charging Party B, also a registered nurse, works for a related company and has the same health coverage. She wishes to use an injectable prescription contraceptive for birth control purposes.

The health insurance coverage available to these women does not provide benefits for the contraceptive drugs they desire, regardless of the purpose for which they are prescribed. However, the same health care plan does provide coverage for other medical treatments and prescription drugs, including treatments and drugs used for preventative care. For example, the covered benefits include vaccinations, pap smears and routine mammograms, cholesterol thinning and blood pressure control medications, weight loss drugs, physical examinations and preventative dental care. Additionally, the plan covers some forms of birth control such as vasectomies and tubal ligations.

The Charging Parties alleged that the failure to provide the prescription drug coverage they seek is discrimination based on sex and pregnancy in violation of Title VII. The Commission agrees with their position. This article will explain the Commission's rationale for its decision and will discuss recent case law supporting the Commission's position.

A. The Commission's Rationale

In analyzing the health care plan in question, the Commission initially notes that there are a variety of birth control methods available to the public. However, prescription contraceptives are only available to women. Moreover, prescription contraceptives are widely used for treating certain female medical conditions and to avoid ovarian cancer. The plan in question excludes prescription contraceptives regardless of the purpose for which they are prescribed. The Commission concludes that such exclusion violates Title VII. *Decision* at 2.

The Pregnancy Discrimination Act, 42 U.S.C. § 2000e (k) ("PDA") prohibits employers from discriminating against women because of pregnancy, childbirth or related medical conditions. The Supreme Court has held that the PDA also prohibits discrimination based on a woman's potential for pregnancy. *Int'l Union, UAW V. Johnson Controls,* 499 U.S. 187, 199 (1991). Women cannot be discharged because they use contraceptives. Nor can they be denied benefits for prescription drug coverage when benefits are provided for comparable drugs and devices used for other medical conditions.

Respondent argued that the prescription contraceptive exclusion was justified because the plan only covered "abnormal" mental or physical health conditions. The Commission rejected this argument, noting that the medical community has recognized that pregnancy also poses risks and health consequences for women. *Decision* at 3. Moreover, the plan did in fact cover many normal conditions such as routine vasectomies and tubal ligations and covered other preventative treatments such as physical exams. *Decision* at 4.

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Respondent also asserted that the Charging Parties' claims were preempted by ERISA. The Commission rejected this argument, essentially stating that the statutes are not in conflict and the employer must comply with both. *Id.*

Finally, Respondent asserted that it excluded contraceptive coverage for financial reasons. This argument was likewise rejected. There is no "cost" defense to a pregnancy discrimination claim. H.R. Rep No. 948, 95th Cong. 2d Sess. 5 (1978). *See also* 29 C.F.R. § 1604.9(e) (cost of benefits is not a defense to sex discrimination claim under Title VII) and *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 716-717 (1978).

Finally, Respondent asserted that the exclusion does not constitute sex discrimination because it does not explicitly distinguish between men and women. The Commission disagreed, noting that prescription contraceptives are only available to women, so the exclusion is necessarily sex-based.

In making its reasonable cause determination, the Commission found that the Charging Parties were entitled to reimbursement of the costs of their prescription contraceptives for the applicable back pay period and any other appropriate damages, e.g., interest and compensatory damages. Respondent was also advised that in order to avoid unlawful conduct in the future, it must cover the expenses of prescription contraceptives to the same extend and on the same terms that they cover comparable treatments and prescriptions. It must cover all of the available options for contraception and must include such coverage in all of the health plans it offers.

B. Case Law Concerning Contraceptive Coverage

In June 2001, a federal district court examined the issue of contraceptive coverage under Title VII and ruled consistently with the Commission's position. In fact, the court cited the above decision favorably. Thus in *Erickson v. Bartell Drug Company*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001) the plaintiffs claimed that their and employers' prescription benefit plan unlawfully excluded prescription contraceptives and devices.[3] *Bartell* was self insured and covered many prescription drugs under the plan, including preventative drugs and devices like blood-pressure and cholesterol lowering drugs, hormone replacement therapies, prenatal vitamins and drugs to prevent allergic reactions, breast cancer and blood clotting. The plan excluded other drugs including weight loss drugs, infertility drugs, smoking cessation drugs, growth hormones and experimental drugs.

The court examined the legislative history of Title VII and the PDA and the relevant case law including *Johnson Controls* and *Manhart*, and held that the plan did discriminate against women in violation of the PDA. It specifically noted that the mere facial parity of coverage does not excuse or justify an exclusion which carves out benefits that are uniquely designed for women. *Id* at 1271. The court noted than an employer need not offer prescription drug coverage. However, if it does so it cannot exclude coverage based on sex-based characteristics and must offer a plan that provides equally comprehensive coverage for both sexes.

The court rejected a number of arguments raised by the defendant. Specifically, the defendant argued that the exclusion was appropriate because prescription drugs are voluntary and preventative, do not treat or prevent an illness and therefore are not a health care issue. The court disagreed, noting that unintended pregnancies are very common in this country and "carry enormous costs and health consequences for the mother, the child and society as a whole." *Id.* at 1273. The fact that contraceptives are preventative is irrelevant because the defendant covered many preventive drugs under its plan. Moreover, while being pregnant is a natural state, it is not desired by all women at all points in their lives. Prescription contraceptives (like cholesterol thinning drugs) help women avoid unwanted physical changes. *Id.* at 1273.

The defendant also asserted that controlling fertility is not a pregnancy, child birth or related condition as defined in the PDA. 42 U.S.C. § 2000e(k). The court acknowledged that the legislative history does not suggest that Congress intended to require prescription contraceptive coverage when it enacted the PDA, but the court felt that regardless of whether the drugs fell within the definitional terms of the statute, the passage of the act itself suggested that Title VII precludes the exclusion of prescription contraceptives.

The defendant further asserted that employers must be permitted to control the costs of employment benefits by limiting the coverage. The court, like the Commission, noted that cost is not a defense to a Title VII discrimination claim, citing *Manhart.* The defendant simply cannot penalize female employees in an effort to keep health care costs down. *Id.* at 1274.

Additionally, the defendant asserted that exclusion of all family planning drugs is a facially neutral policy. The court pointed out that there is no family planing exclusion in the plan. In fact some family planning drugs are covered, such as prenatal vitamins. In any event, the coverage is discriminatory because exclusion of prescription contraceptives makes the coverage less comprehensive for women.[4]

Finally, the defendant asserted that no court has found that exclusion contraceptive coverage is sex discrimination and that this issue should be addressed by the legislature. The court acknowledged that no other court had considered the lawfulness of the contraception exclusion. It favorably cited the EEOC's decision on this issue. *Id.* at 1275-76. While some legislatures are considering bills that would require insurance plans to cover prescription contraceptives, that did not mean that the court could not also find that Title VII prohibits this type of discrimination as well. *Id.* at 1276.

C. Conclusion

The implications of the decision by the Commission and the *Bartell* opinion are quite significant, as many employer-provided health insurance plans similarly exclude coverage for prescription contraceptives. Such plans arguably create fertile ground for class sex discrimination litigation like the claim at issue in *Bartell.* Plaintiff's attorneys should consider adding such claims to sex discrimination actions and should consider expanding such claims to include class allegations. Defense counsel should advise their clients of this development and suggest that they consider revising their plans to include such coverage. In that regard it should be noted that this author has spoken to several employer groups about the decision and the general reaction has been favorable ("It's about time"). There have been occasional concerns expressed about cost of covering contraceptives and whether the Commission's decision would encourage employers to drop prescription coverage entirely. These same types of concerns were raised when the PDA was enacted, but the parade of horribles never came to pass. The decision by the EEOC and the *Bartell* court may be of first impression, but they are analytically sound and well supported by related Supreme Court case law. Perhaps it is "about time" we grappled with this issue.

— END NOTES —

[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]The decision as well as questions and answers concerning it can be found at the EEOC web site, www.eeoc.gov.

[3]The *Bartell* case is a class action on behalf of all female employees enrolled in the plan while using prescription contraceptives.

[4]The court noted that the terms of the plan did not necessarily exclude Viagra even though the parties apparently conceded that it was excluded. The court suggested that such an exclusion may violate male employees' rights under Title VII. ■

TRUE LIES

Shel Stark, ***Education Director, Institute of Continuing Legal Education***

Litigators need to be tenacious and alert. Evidence in a case can surface anywhere, and no avenue of information should be ignored.

As a young lawyer, I represented an individual injured in a taxi-cab accident. The driver-tortfeasor was working a double shift and was too tired to drive safely. At some point he slammed on his brakes without warning, causing my client to fly forward and strike her face on the plastic shield that kept the driver safe from passengers like my 60 year old housewife. She received several facial injuries, some of them serious. My client had the presence of mind to get the license number of the cab and the cab number, but she was out of the cab before she thought to get the driver's name. He drove off, cursing, leaving her to get herself home injured and alone.

As part of a background investigation, I wrote the secretary of state for ownership of the license plate supplied by my client. When the name came back, it was "John Brown." (The names have been changed to protect the innocent and the guilty.)

I sent a claim letter to the cab company, the Black & Blue Cab of Dearborn. I laid out the facts of the case, noting that the cab was driven by John Brown on a certain date. I described the circumstances of the accident and the injuries sustained. I urged the company to have its lawyer contact me. Black & Blue answered directly with a letter signed by the general manager. He wrote:

> Dear Mr. Stark:
>
> Black & Blue does not own cab #36. Nor do we have a driver named John Brown. In addition, we have no report of an accident on the date specified. I'm sorry we cannot be of further help. Your claim is denied.
>
> Very truly yours,
>
> Robert Smith, General Manager

I was crushed. What do I do now? My client must not have accurately recorded the information she provided to me. Three days later, still wondering what to do, I returned to my office in the Ford Building after lunch. Looking up, I suddenly noticed a Black & Blue cab letting off in front of the building. That's interesting, I thought, then, "My God!" It was Cab #36! Moreover, the license plate matched the one provided by my client! I ran to catch the driver, but he got away. I couldn't believe it! They had *lied* to me!

I filed suit. I immediately noticed up the deposition of the general manager. "Do you have a driver named John Brown?" I asked. "No," he said with a smug smile. "Do you know who John Brown is?" I persisted. "Yes," he said, no longer smiling. "Who is he?" I demanded. "One of the owners of Black & Blue. Each owner employs his own drivers. His drivers don't work for the company." Beginning to understand what was going on, I asked, "Does each owner register his cabs in his or her own name?" "Yes."

Once I knew who John Brown was, I deposed him. He identified the driver on duty when my client was injured. The driver was no longer employed. He never filed an accident report, having left the scene of the accident while my client was still bleeding and trying to figure out how to get home. Turning in an accident report would have caused him to be disciplined, so he had said nothing in the belief that the passenger would never figure out who to contact with her claim.

So there you have it: Black and Blue did not own cab #36 because John Brown owned it. John Brown was NOT a driver of the cab, he was an owner. John Brown was also one of the owner's of Black & Blue and the employer of General Manager Smith. Black & Blue had no report of an accident because the driver had not filed one. Black & Blue had a policy which clearly discouraged drivers from reporting accidents where no property damage occurred to the cab. The general manager was thus able to deny my claim letter allegations in total, but "truthfully." But for noticing the cab in front of my office building, I have always wondered if I would have recovered adequate compensation for my client. Being alert helps. So does not giving up too easily.

A VIEW FROM THE CHAIR

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

The horrific suicide hijackings that killed almost 5,000 people in New York, Virginia, and Pennsylvania on September 11 will be forever etched in our memories. Since then we have repeatedly heard the mantra, "United We Stand." Flags are everywhere. There are large ones that hang from the sides of tall buildings, medium-size ones attached to the antennas of cars and trucks, and small ones pinned on lapels. Replicas of flags that appear to flutter in the wind have replaced some billboards that once displayed ads for major corporations. Even some all-news television network sets were adorned with flags immediately after the attacks. According to a September *Washington Post* poll, trust in the government reached the highest level since 1966, when the poll was created. Sixty-four percent of Americans trusted the government to do the right thing "most of the time" or "just about all the time." A September 28 Time/CNN poll found that to defend against future attacks, sixty-one percent of those polled would allow the federal government to jail any non-citizen terrorist suspect with a hearing; fifty-nine percent favored holding suspects without bail for unlimited amounts of time; and thirty-one percent would allow the internment in camps of Arabs who are U.S. citizens.

After the U.S. air strikes began in Afghanistan, people that expressed anti-war sentiment were viewed as being unpatriotic. In Ann Arbor, a city known for liberalism and tolerance, a citizen's bedroom window was smashed that had displayed a sign that read, "War is also terrorism." Bill Maher, the host of "Politically Incorrect," was chided by a White House spokesman for saying that "we have been cowards for lobbing cruise missiles from 2,000 miles away." The spokesman suggested that Americans should watch what they say not only during this time but also at all times. According to some reports, under a broad immigration crack down, more than 1,100 people have been taken into custody. Most have not been identified or charged with criminal activity. A broad coalition of organizations and some members of Congress who fear that the detainees' basic constitutional safeguards are being circumscribed have criticized their detention. On October 25, with little debate or dissent, anti-terrorism legislation was enacted that, among other things, gives police unprecedented ability to search, seize, detain or eavesdrop on suspected terrorists. Similar bills are being considered by various states, including Michigan.

Fifty years ago the nation was engaged in a Cold War involving a clash of competing ideologies. The dissolution of the alliance between the United States and the Soviet Union shortly after World War II resulted in the enactment of drastic measures to stem the spread of Communism. Widespread blacklist hysteria abounded and holding office or employment with any labor organization was denied to members affiliated with Communist-oriented organizations. The McCarran-Walter Act (Immigration and Nationality Act of 1952) tightened restrictions on aliens, heavily reduced immigration from nonwhite countries, allowed for the denaturalization and deportation of citizens deemed "subversive," as well as for the deportation of resident aliens for political activity. Deportation cases were removed from the courts by setting up boards unhampered by due process restrictions. Two years earlier, the enactment of the McCarran Act (Internal Security Act of 1950) set forth as its thesis a Communist conspiracy to establish a "totalitarian dictatorship in the countries throughout the world." Concentration camps were established for use in national emergencies. In February 1952, when the House Committee on Un-American Activities came to Detroit to investigate Communists, Coleman Young, a noted union organizer and mayor of Detroit twenty years later, was applauded for his defiant testimony. Unlike many who appeared before the Committee and fingered their colleagues to save their own careers, Young refused to provide information about members of the national Negro Labor Council.

During the 1952 annual meeting of the Michigan State Bar, amid this atmosphere of attacks on labor organizations and their members, the creation of the Labor Relations Law Section, the predecessor of the labor and Employment Law Section, was authorized by the State Bar's Committee on labor Relation law. The organization of the Section was completed on December 15, at a meeting in the State Bar's office in Detroit. The Section's leadership included Russell A. Smith, chairperson; Robert G. Howlett, vice-chairpersons; Jerry S. McCroskey, secretary-treasurer; Harold A. Cranefield; malcolm L. Denise; K. Douglas Mann; Albert E. Meder; Hyman Parker; Harry A. Platt; Douglas E. Whiting; Ernest Goodman; Rosemary Scott; and Boaz Siegel. These pioneers and their successors have made immense contributions to the development of labor and employment law and have been long-time advocates for the just and fair administration of justice. For example, a "Google" internet search revealed that the late Harold Cranefield, was a member of the legal team that represented the petitioner, a UAW organizer, in *Watkins v. United States*, 354 U.S. 178 (1957). The Court overturned the petitioner's conviction for "contempt of Congress" and found that he was not required to answer questions during his 1954 appearance before the HUAC about the Communist activities and associations of persons other than himself. The late Ernest Goodman, known for his advocacy on behalf of African-Americans, unionists, illegal aliens and Communists, is the subject of the recently released docudrama, *The Killing Yard.* The film tells the story of Goodman's successful advocacy of Shango, an inmate charged in death of a prison guard during the 1971 prison uprising at Attica, and the government's decision to drop similar charges against other inmates.

Robert Howlett served as chairman and member of the Federal Service Impasse Panel of the Federal Labor Relations Authority and annually each chapter of the Society of Professional in Dispute Resolution awards the Robert G. Howlett Memorial Scholarship to a member. Malcolm L. Denise, who died in 1999, pioneered labor relations at Ford Motor Company in its contract negotiations with the UAW. Boaz Siegel, 86, was recently honored by Local 636 of the Pipefitters Union for his efforts on behalf of working people. He served as legal counsel for local union pension and SUB funds. Siegel remains an active Section member. The Section has also recognized the outstanding achievements of other members by presenting its Distinguished Service Award to practitioners for their exemplary service and professionalism. The award established in 1998, has been presented to William Saxton, George Roumell, Theodore Sachs, Erwin Ellmann, and Theodore St. Antoine for their contributions to labor and employment law. The 2002 recipient, James E. Tobin, a lawyer for more than 50 years, negotiated the first labor contract between the Detroit Board of Education and the Detroit Federation of Teachers. He will receive the award on January 25, 2002, during the Section's annual mid-winter dinner.

For the past year, a committee of past Section Chairs has been exploring ways to commemorate the Section's half-century milestone and document the contributions of other Michigan lawyers in developing Michigan's labor and employment law.

I look forward to the opportunity to serve as Section Chair and will use my best efforts to follow the tradition of excellence exhibited by those who preceded me. As the first year of the 21st century comes to a close, we must remain vigilant to protect our liberties from attacks from abroad and at home. Even as the nation responds to the events of September 11, there are many crucial issues — a weakened economy, unprecedented layoffs, the spread of AIDS and other infectious diseases, world hunger, global warming, racism and racial profiling, social security, and police brutality — that still need to be addressed. In October alone, more than 400,000 jobs were eliminated when the nation's unemployment rate reached 5.4 percent, the biggest one-month increase in more than twenty-one years. In December, the University of Michigan and minority interveners, with the support of dozens of Fortune 500 companies, defended two affirmative action lawsuits in the 6th Circuit Court of Appeals. The outcome of the case is expected to have a far-reaching impact on the admissions policies of colleges and universitie throughout the country.

As lawyers, will we strive to promote justice, human rights and industrial peace and prevent the erosion of our constitutional freedoms? Will we do our part to form a society where our progeny can live in peace and prosperity? I am confident that we will.

FIFTY YEARS OF SECTION CHAIRS

LABOR RELATIONS LAW SECTION

1952-1953:	Russell A. Smith
1953-1954:	Robert G. Howlett
1954-1955:	Boaz Siegel
1955-1956:	Harry H. Platt
1956-1957:	Malcolm L. Denise
1957-1958:	Jerry S. McCroskey
1958-1959:	David A. Wolff
1959-1960:	Charles A. Rogers
1960-1961:	A. L. Zwerdling
1961-1962:	Louis A. Crane
1962-1963:	Joseph A. O'Reilly
1963-1964:	Harold A. Cranefield
1964-1965:	Hyman Parker
1965-1966:	Richard F. Hooker
1966-1967:	Theodore Sachs
1967-1968:	Jerome Brooks
1968-1969:	James D. Tracy
1969-1970:	John A. Fillion
1970-1971:	Gabriel N. Alexander
1971-1972:	O. K. Petersen
1972-1973:	Sheldon L. Klimist
1973-1974:	Bernard Gottfried
1974-1975:	Aubrey V. McCutcheon, Jr.
1975-1976:	Gordon A. Gregory
1976-1977:	Robert Pisarski
1977-1978:	Thomas H. Schwarze
1978-1979:	Harvey Isaac Wax
1979-1980:	Theodore J. St. Antoine
1980-1981:	Robert J. Battista
1981-1982:	J. Douglas Korney
1982-1983:	Barry C. Brown
1983-1984:	Robert W. Sikkel
1984-1985:	Leonard R. Page
1985-1986:	James W. Statham
1986-1987:	Robert M. Vercruysse
1987-1988:	Samuel C. McKnight
1988-1989:	Michael G. Nowakowski
1989-1990:	Thomas J. Barnes
1990-1991:	Eileen Nowikowski

LABOR AND EMPLOYMENT LAW SECTION

1991-1992:	Robert A. McCormick
1992-1993:	John P. Hancock, Jr.
1993-1994:	Mary H. Job
1994-1995:	Paul E. Glendon
1995-1996:	Paul M. Kara
1996-1997:	Ronald R. Helveston
1997-1998:	Sheldon J. Stark
1998-1999:	Janet C. Cooper
1999-2000:	Virginia F. Metz
2000-2001:	Arthur Przybylowicz
2001-2002:	Roy Roulhac

E-MAIL AND THE INTERNET IN THE WORKPLACE

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

CASE LAW

Workplace Computer Injury Is Not A Disability. In *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789 (9th Cir. 2001), Jacalyn Thornton, a features reporter for the *Fresno Bee* was terminated because she suffered from repetitive stress injuries ("RSI") from computer use which prohibited her from typing or writing for extended periods of time. Rejecting her claim under the Americans with Disabilities Act, the Ninth Circuit concluded that Thornton was not limited in the major life activity of performing "manual tasks," despite impairments that significantly limited her ability to type or write. "Manual tasks" include a broad range of activities and, according to the court, because she could perform those tasks, she could perform other jobs. The evidence demonstrated that Thornton could grocery shop, drive, make the beds, do laundry and dress herself. "That Thornton could perform certain manual tasks for only a limited amount of time does not present a triable issue that she was 'substantially limited' in a broad range of manual tasks."

Indiana Supreme Court Enjoins Web Site And Acts Of Former Professor. In *Felsher v. University of Evansville,* Case No. 82S04-0008-CV-477 (Ind. S. Ct. Oct. 1, 2001), a university and three officials brought an invasion of privacy action against a former professor who created web sites containing information critical of them, and who used e-mail addresses containing their names to send messages to other universities directing the reader to the critical web sites. Siding with the plaintiffs, the Indiana Supreme Court held that the university officials' rights were violated by the former professor's conduct and permanently enjoined him from, among other things, using the names and likeness of the plaintiffs or any employee of the university, from using e-mail addresses that incorporated the names of the plaintiffs or any individual associated with the university, and from setting up web sites with addresses that included the names of any of the plaintiffs or any university employee. On the issue of whether the university, as a corporate entity rather than a natural person, could maintain an action for misappropriation — an issue of first impression in Indiana — the court found that only individuals could maintain such a cause of action.

Search Of Public Employee's Computer Didn't Violate Fourth Amendment. When can a public employer search the contents of a public employee's office computer? In *Leventhal v. Knapek,* 2001 WL 1159812 (2d Cir. 2001), supervisors conducted a search of a public employee's computer after receiving an anonymous letter identifying the employee by pay grade, gender and job title and accusing him of serious attendance problems, doing primarily non-office related work and always discussing personal computers with coworkers. The search uncovered tax preparation programs that the employee, an accountant in the state's Department of Transportation, was using for his private tax business in violation of the agency's policy prohibiting improper use of State equipment for personal business. Applying the balancing test set forth in *O'Connor v. Ortega,* 480 U.S. 709 (1987), the Second Circuit found that the contents of the anonymous letter were sufficient to overcome the employee's reasonable expectation of privacy in the contents of his office computer. As such, the court concluded that the search was reasonably related to the agency's investigation of the workplace misconduct allegations and was not excessively intrusive in light of the nature of the misconduct.

France: Romance, Art, Jerry Lewis and now, Workplace E-mail Privacy. In a stunning victory for those who advocate workplace privacy, France's Supreme Court ruled that employers do not have the right to read their employees' e-mail or other personal computer files. The case, *Nikon France v. Onos,* Cass. soc., Arrêt No. 41-64 (Oct. 2, 2001), was a wrongful termination suit by an engineer who was fired after his employer determined that he was using company computer equipment to carry out unauthorized freelance activities during his working hours. According to France's top court, the employer's search was a clear violation of both his personal privacy rights and the secrecy of correspondence: "The employee has a right, even during and at his place of work, to privacy." "This implies in particular the right to secret correspondence." While not explicitly striking down the right of employers to ban personal use of computers or e-mail, the court imposed limits on employers' capacity to gather evidence of wrongdoing: "[T]he employer cannot, without violating fundamental freedoms, discover personal messages emitted and received by an employee on computer equipment at his disposal, . . . even in the case where the employer has forbidden non-professional use of the computer."

Update: Ninth Circuit Withdraws Decision in Konop v. Hawaiian Airlines. As reported in the Summer 2001 edition of *Lawnotes,* in *Konop v. Hawaiian Airlines,* 236 F.3d 1035 (9th Cir. 2001), the Ninth Circuit found that an employer may have violated federal wiretap laws when it accessed a private Internet site that criticized management. In August, the Ninth Circuit withdrew its decision, in lieu of granting a rehearing, *see Konop v. Hawaiian Airlines,* 262 F. 3d 972 (9th Cir. 2001), with a new opinion forthcoming.

GOVERNMENTAL ACTIONS IMPACTING PRIVACY ISSUES

- **Judges Will Be Monitored.** In September, after considerable debate, the Judicial Conference, which oversees federal courts, approved a compromise Internet policy that permits tracking of Internet usage of federal court employees, including approximately 1,800 judges. The policy approved by the Judicial Conference, comprised of a panel of 27 judges headed by Chief Justice William H. Rehnquist, allows the implementation of software to prohibit employees from accessing several web sites, including Napster. The compromised policy does not permit monitoring of employee e-mail. Initially, the Judicial Conference's Committee on Automation and Technology issued a unanimous recommendation that federal courts monitor all employee e-mail and Internet usage for signs of inappropriate use, including downloading music or pornography, or playing games on-line. Vociferous opponents of that recommendation included federal judges from the Fifth and Ninth circuits.

- **Other Countries Respond To Inappropriate Use Of E-mail And Internet.**
  - The Civil Service Commission in the Philippines has passed a resolution, effective August 5, 2001, prohibiting all government officials from sending sexist jokes, pornographic pictures and lewd letters or mails through electronic devices, including mobile phones, fax machines and e-mails.
  - After discovering that 12% of its employees were logging onto pornographic web sites, Bermuda's government installed software on its computers to crack down on such inappropriate conduct.
  - A new bill, called the *Interception and Monitoring Bill*, has been introduced in South Africa, which, if enacted, provides for state monitoring of all telecommunications systems, including mobile phones, internet and e-mail, once permission has been granted by a judge or, in some instances, a police or army officer of a particular rank. Meanwhile, a South African arbitrator has upheld Energizer's decision to terminate several employees for e-mail abuse, including sending other staff pornographic material and jokes. The arbitrator also rejected the former employees' claims that Energizer violated their privacy by monitoring their e-mail activities, finding that none of the material investigated was personal and that the personal dignity of the former employees was not disturbed.
  - According to the Institute of Management, a United Kingdom management group, monitoring staff e-mail and phone calls, as well as phoning employees at home, may be viewed as an invasion of privacy under the Human Rights Act of 1998. The Institute's comments were in response to legislation introduced in October of 2000 which allows companies to tap phone calls or open e-mails sent by their employees.
- **After Three Strikes, Are Privacy Rights Initiatives For Employees Out?** In October, for the third time in as many years, Governor Gray Davis vetoed a bill that would have prevented employers in California from reading their employees' electronic communications in many situations. While Davis supports employees' rights to privacy, he opined that he is not interested inputting a regulatory burden on businesses.

NEWS & TRENDS

- As a follow-up to its annual survey of employee surveillance, the American Management Association, in collaboration with *U.S. News & World Report* and the Epolicy Institute, recently released the *Electronic Policies and Practices Survey.* Highlights of the survey include almost 10% of companies reporting receiving a subpoena for employee e-mail and 25% reporting performing key word or phrase searches, usually looking for inappropriate language. The survey also confirmed that many companies could limit potential liability triggered by employee e-mail and Internet use by implementing written policies governing employee electronic access on business equipment.
- **Keystroke Monitoring Makes News In Michigan.** Spectorsoft's "eBlaster" is at the center of recent criminal charges filed by the Michigan Attorney General against a husband who was "e-snooping" on his estranged wife's computer. The software is advertised as a way to monitor computers, including employees' computers, while away. Every thirty minutes, the husband was receiving an e-mail to his computer containing all of his estranged wife's e-mail messages and Internet activity. Another way of tracking keystrokes is a newly introduced device called "KeyKatch." Manufactured by Codex Data Systems, KeyKatch is about the size of a double-A battery, clips onto the keyboard cable in less than 10 seconds, requires no external power source and preserves the last 65,000 keystrokes.
- **My Sweet Lord!** A Northwestern University employee was recently terminated from her secretary position for storing 2,000 MP3 music files on her work computer. The University was tipped off by ex-Beatle George Harrison's music publishers who traced downloads to the secretary's computer.
- **Anti-Arab E-Mail Leads To Termination of Police Officer.** Just days after the September 11 attacks, a police officer in Atlanta, Georgia, wrote the following message on a workplace e-mail discussion list that he created for law enforcement officers: "I think 1,000 Arabs must die for each American killed. If they continue their attacks we will simply eliminate the entire Arab world. It doesn't bother me a bit." He further advocated starving the people of Afghanistan to death and bombing Mecca so Muslims would forced to pray "at a crater 25 miles across." As a result, the officer was terminated from his job.
- **Should Employers take a "cyber time-out"?** In his recently published article, "In Defense of the Hard Drive," Judge Rosenbaum, chief judge of the United States District Court for the District of Minnesota, criticizes the widely accepted proposition that employees have no rights in the face of employer searches of their computers. Attempting to balance the competing interests of employer and employees, Judge Rosenbaum proposes that employers with a "definable reason" take a "cyber time-out" before searching an employee's computer. Under this theory, an employer would give an employee notice of its concerns 72 hours before searching. During this "cyber time-out," the employee can seek legal redress, if any, seek to limit the search, or even attempt to resolve matters.
- **IT Department or Cyber Police?** Expanding on a law requiring photo finishers to report to police if film they develop contains images of child pornography, a new South Carolina law requires computer technicians in the state to report potential child pornography to police if they see it on someone's computer. Under this legislation, employees in a company's Information Technology department have an affirmative duty to blow the whistle on their co-workers. Interestingly, the law does not provide for penalties for technicians who do not report what they see.
- **Trade Secret or Free Speech?** Nash Finch, a Minnesota grocery distributor, has joined a growing number of companies that are suing anonymous writers — usually employees or individuals working in concert with employees — for divulging company trade secrets while participating in an on-line forum. Nash Finch, like the other companies, argues that the anonymous poster may be liable for breach-of-contract because he/she posted confidential, proprietary financial information belonging to the company and has subpoenaed Yahoo for the identity of the poster. Opponents of these types of lawsuits and subpoenas argue that many efforts to prohibit posters from communicating ideas or thoughts runs afoul of the First Amendment. Divulging trade secrets, however is generally a violation of law that is not protected by the First Amendment.
- **Anti-Union E-mail Results in $75,000 Fine.** Telstra, an Australian telecommunications company, was fined $75,000 for sending an e-mail to its executive staff which encouraged them to favor employees on individual workplace agreements over unionized workers. The e-mail was the catalyst in finding that Telstra breached the Workplace Relations Act. ■

NLRB PRACTICE AND PROCEDURE

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

On October 18, 2001 the Region hosted the 9th annual Bernard Gottfried Labor Law Symposium. Our featured speaker was NLRB General Counsel Arthur Rosenfeld who spoke about recent casehandling developments at the General Counsel's office and the many problems a new General Counsel is faced with. Also in attendance was former NLRB General Counsel Leonard Page who accepted a gift commemorating his service to Region Seven's Practice and Procedure Committee. Committee member Thomas Barnes made the presentation to Leonard and noted that he had purchased the gift over a year ago, but had to wait until after Leonard left his government position to made the presentation. I was also pleased that we were able to present our fifth scholarship to a Wayne law student. This year's scholarship went to Jeff Canfield who has accepted a position with the Varnum law firm.

Region Seven's Practice and Procedure Committee met during the State Bar meeting in Lansing and spent considerable time discussing the implications of the Supreme Court's recent decision in *NLRB v. Kentucky River Community Care,* 121 S. Ct. 1861 (2001). In *Kentucky River,* the Court agreed with the Board's allocation of the burden of proof on the party asserting the supervisory status of an individual, but rejected the Board's test for determining whether the professional or technical judgment of an individual in directing the work of other employees constitutes the exercise of "independent judgment" under Sec. 2(11) of the Act.

Currently, the region has filed motions with the Board in several cases seeking to revoke the certification of a union and remand the proceeding for further appropriate action where the cases involved issues addressed by *Kentucky River.*

The Committee discussed the role of regional office hearing officers in pre-election representation hearings when supervisory issues are raised. Committee members were in unanimous agreement that hearing officers should continue to be proactive in questioning witnesses and eliciting evidence of supervisory status. The Committee concluded that the region's need for a full and complete record on the elements of supervisory status should override burden of proof considerations when it comes to making a record. Generally, Committee members believed that a party's counsel would not have a problem with the hearing officer asking questions of their witnesses during or after completion of their direct examination, as long as it does not significantly interfere with the presentation of testimony. The Committee concluded that the hearing officer's role should be no different in pre-election hearings on the issue of supervisory status than in any other situation where a party raises an issue for determination by the Regional Director.

The Committee also discussed the Board's recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (August 24, 2001), which modifies the standard order concerning the production of records to calculate backpay. Previously, Board orders only required the respondent to make such records "available" to the Board, but now Regional Directors have the discretion to have records produced "at a reasonable place." This typically may be the regional office unless the respondent can show that the production of records at the designated location is unduly burdensome. The respondent will bear the costs of producing the records at the designated location.

The Committee discussed the related issue of pre-complaint subpoenas under Sec. 11 during the investigation of unfair labor practice charges. Currently, the practice of the region is to subpoena records or testimony of witnesses only where the respondent has failed to cooperate or the evidence is necessary to make a determination on the merits of a charge. Subpoenas are not used where the evidence is cumulative or available by other means.

Lastly, based on an episode related by a Committee member, the Region's practice regarding the presence of representatives during affidavit sessions with witnesses was further explained. Thus, where counsel for an employer or union files a charge for the benefit of an individual employee, a designation of representative or notice of appearance will typically be necessary from the individual before counsel, or any other representative designed by counsel, may be present for an affidavit from the individual or any other non-agent discriminatee or witness.

The next meeting of the Practice and Procedure Committee will be in January 2002. I invite any of you who have questions or issues concerning practice or procedure at the regional office level to submit those questions to the undersigned or any member of the Committee. ■

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 or (248) 559-2110 or israel@martensice.com.

LITTLE THINGS MEAN A LOT

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

September 11 forced us to see that we have enemies so hateful, self-righteous, and nihilistic that they threaten civilization. They are not out to address political, religious, or economic grievances, so-called "root causes." It is not what we do, or have done; it's who we are. They are after *us.*

In *Catch-22*, Yossarian explained to Clevinger why World War II was personal.

"They're trying to kill me," Yossarian told him calmly.

"No one's trying to kill you," Clevinger cried.

"Then why are they shooting at me?" Yossarian asked.

"They're shooting at *everyone*," Clevinger answered. "They're trying to kill everyone."

"And what difference does that make?"

Yossarian took it personally. He did not think it "funny" that "strangers he didn't know shot at him with cannons every time he flew up in the air to drop bombs on them."

We've got to take it personally, too. Strangers we don't know fly hijacked planes into skyscrapers and blow up our embassies every time we resist the invasion of Kuwait, or protect Muslims in the Balkans, or try to stabilize Somalia, or send billions to Egypt, or support the only democracy in the Middle East, or let women out of the house, even if it's just to appear on *Baywatch.*

But you don't need me to show you the big picture. Most of the 24-hour cable news stations are pretty much all-terrorism-news, all-the-time. The *New York Times* devotes a whole section — "A Nation Challenged" — to our new reality, seven days a week. Geraldo and Dan Rather are in Afghanistan. The big picture is well-covered.

"Perfume bottle smuggler."

What about the little picture, the changes in our daily lives, stuff that's not covered in the *New York Times?*

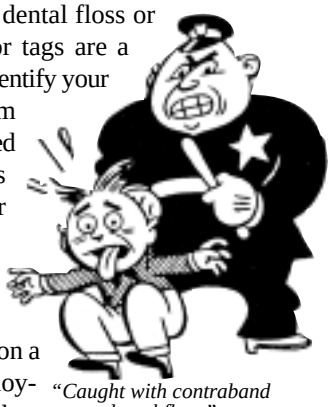
Take day-to-day security, for example. It used to be that when you wanted to go to Wayne County Circuit Court you merely had to (1) arrive an hour early to accommodate the perpetual elevator crush and (2) leave your guns and knives at home, to avoid delays at the metal detector. Those innocent times are gone. Now you have to leave a whole new list of *verboten* items in your car.

My law partner, who has no criminal record or terrorist ties as far as I know, brought contraband to the City-County Building. Eagle-eyed security personnel nipped *that* in the bud. They went through her purse and confiscated two miniature perfume bottles. Maybe they thought the bottles contained some chemical or biological threat to the public safety. Better safe than sorry. I sure don't want some bin Laden crony smuggling anthrax into circuit court motion day in an Obsession bottle.

I admit I was skeptical when I first read the mid-September list of newly-banned items posted in the City-County Building. The list included dental floss. After consulting an ex-Delta Force commando, however, I have new appreciation for the dangerous nature of dental floss. It can be used as a death-dealing garotte, and then quickly converted into an escape device. In comes in those easily-concealed dispensers that contain 200 yards, a length sufficient for rappelling from upper-story heights to ground level, where reliable public transportation is readily available. I'm told that the mint, waxed floss is favored by rappellers as easiest on the hands.

I'm not for restricting the sale of dental floss — that's going too far — but I can't complain about banning floss in government buildings. You can't argue with success. To date there have been no reported security incidents involving dental floss — or perfume, for that matter — at the City-County Building.

Security has been tightened at the State Office Tower, too. A few weeks ago you couldn't get into the building unless you (1) waited in a very long line to get a self-adhesive visitor tag after (2) telling a security guard your destination in the building. You didn't have to show identification, or pass through a metal detector, or give up your dental floss or perfume, but self-adhesive visitor tags are a start. I suppose you could falsely identify your destination, but no security system is 100% effective against determined terrorists. And the long line gives potential evildoers lots of time for self-reflection, which may lead to redemption.



"Caught with contraband dental floss."

As I write, I'm reading one of those self-adhesive tags obtained on a recent visit to the Michigan Employment Relations Commission. It authorizes access to "MURK." Is this commentary on the clarity of Commission decisions or an indicator of deficiency in the training of security personnel?

Again, better safe that sorry. Self-adhesive tags seem to work. To date, MERC and the State Office Tower have been terror-free.

The new emphasis on security has affected my own office building. After-hours visitors must sign in and out at the front lobby security desk. There are some bugs in this system, however. It relies on the visitor to sign his or her *real* name. Unfortunately, many terrorists are willing to lie.

Don't get me wrong. Tough measures are essential. We will not dissuade those out to destroy us by giving them understanding, Rodney King platitudes, psychotherapy or *Baywatch* reruns. Still, we should approach security rationally. If we overreact — if we casually sacrifice our free access to dental floss — the dentists will have won. ■

SIXTH CIRCUIT ADDRESSES TITLE VII, NLRA AND FLSA ISSUES

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

From August through October 2001, the Sixth Circuit published approximately 22 cases dealing with a variety of labor and employment issues. The full text of Sixth Circuit decisions are available on the Internet at: "http://pacer.ca6.uscourts.gov/opinions/main.php".

TITLE VII – EVIDENCE OF PRETEXT

In *Logan v. Denny's, Inc.*, 259 F.3d 558 (6th Cir. 2001), the Sixth Circuit reversed a district court's grant of summary judgment on the plaintiff's race discrimination claims because the plaintiff had alleged sufficient evidence to create a genuine issue of material fact as to whether the employer's reason for discharging the plaintiff was pretext for discrimination. Plaintiff was fired for poor performance because she could not keep up with the company's fast-paced environment. Plaintiff had received several favorable performance appraisals during her tenure with the company. In March of 1996, plaintiff transferred to a faster-paced Denny's restaurant that was managed by a person who had previously supervised the plaintiff. It was not disputed that this manager said he would be honored to have the plaintiff transferred to his restaurant. The court found that the following constituted evidence of pretext: (1) management did not allege that plaintiff, one of two African-American servers employed in that restaurant, could not keep up with the pace until after she transferred and other employees complained that their hours should not be cut to accommodate the plaintiff, and (2) plaintiff had a ten-year work history with Denny's, but within two weeks of transferring, Denny's decided that she was not performing satisfactorily and that she would not be allowed to work as a server.

NLRA – CHALLENGE TO CERTIFICATION BASED ON RACIAL SLURS

In *NLRB v. Foundry Division of Alcon Industries, Inc.*, 260 F.3d 631 (6th Cir. 2001), the Sixth Circuit rejected the employer's contention that the certification of the union as the bargaining representative should be overturned because of the union's appeals to racial prejudice in the organizational campaign. According to the court, if an employer can prove that the union engaged in a deliberate attempt to exacerbate racial feelings prior to the election, and that those efforts were likely to have had an appreciable effect on the employees' freedom of choice, the NLRB's certification of an election will be vacated. In this case, however, the court held that the union's use of racial epithets alone was not enough to set aside the election. There was no evidence that any employees were or could have been influenced in their choice of whether to vote for the union by use of the racial slurs.

TITLE VII – HARASSMENT "BECAUSE OF SEX"

In *EEOC V. Harbert-Yeargin, Inc*, Docket Nos. 00-5150/5232 (Sept. 21, 2001), a split Sixth Circuit upheld the employer's contention that summary judgment was improperly denied by the district court because the plaintiff failed to show that he was subject to harassment because he was male. The employer argued that "horseplay" that occurred among male employees who worked in the field was not harassment "because of sex." The plaintiff alleged that he was grabbed, pinched or poked in the nipples, genitals and buttocks by other male employees. The employer argued that because only men worked in field positions, the plaintiff could not show that he was treated different than female employees. The Sixth Circuit concluded that women who worked in the employer's office were not comparable employees and that plaintiff could not rely on the fact that those female employees were not subjected to the alleged harassment.

LMRA – HYBRID 301 CLAIM BARRED BY STATUTE OF LIMITATIONS

In *Martin v. Lake County Sewer Co.*, Docket Nos. 00-3716 (Oct. 17, 2001), the Sixth Circuit reaffirmed that claims alleging breach of a collective bargaining agreement under Section 301 of the Labor-Management Relations Act and the union's duty of fair representation are governed by a six-month statute of limitations. The Sixth Circuit upheld the grant of summary judgment to the defendants because the plaintiff failed to file his lawsuit within six-months of the time when he discovered, or should have discovered, that the union was not pursing his grievances.

FLSA – EXECUTIVE EMPLOYEES

In *Ale v. Tennessee Valley Authority*, Docket No. 99-6642 (Oct. 17, 2001), the Sixth Circuit denied the employer's appeal of the lower court's order finding that it willfully failed to pay overtime compensation. The employer argued that its shift supervisors were exempt from the overtime compensation provisions because they were bona fide executive employees. The court of appeals agreed with the lower court in holding that shift supervisors were not executive employees because "management" was not their primary duty. The Sixth Circuit held that the mere fact that shift supervisors were "in charge of their shifts" did not mean that management was their primary duty. Instead, courts must look to the specific duties of the employees in question to determine if they meet the definition of executive employees for the purpose of the Fair Labor Standards Act. ■

U.S. SUPREME COURT UPDATE

Andrew M. Mudryk
The Law Offices of Andrew M. Mudryk

The U.S. Supreme Court has not issued any new opinions between the last and current deadlines for submitting articles to *Lawnotes*. However, on October 10, 2001, the court heard oral argument in *EEOC v. Waffle House, Inc.*, No. 99-1823. In *Waffle House*, the court will decide whether the EEOC may pursue an enforcement action against an employer for victim-specific remedies, such as back-pay, reinstatement, and damages, even though the employee has agreed to arbitrate employment-related disputes. The case follows the court's decision last term in *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105 (2001), in which it held that the Federal Arbitration Act, 9 U.S.C. 1, applies to most contracts of employment.

EASTERN DISTRICT UPDATE

Jeffrey A. Steele
Brady, Hathaway, Brady & Bretz, P.C.

NLRA Does Not Preempt State Law Claim that Union Negotiated a Discriminatory Pay Scale

Bredesen v. Detroit Federation of Musicians, Local No. 5, 168 LRRM 1530 (E.D. Mich. 2001). The plaintiff claimed that her union negotiated a discriminatory pay rate in violation of state anti-discrimination law. Judge Rosen rejected the union's contention that the NLRA preempted the state law claim. Noting that "the Supreme court and the Sixth Circuit have repeatedly retreated from earlier decisions which had held various state law claims preempted under various aspects of federal labor law" Judge Rosen found no preemption because there was no "'actual conflict' between federal labor law regarding a union's duty of fair representation and the Michigan Elliott-Larsen Act such that enforcement of the Michigan statute would 'effectively prevent the union from performing its function.'" Judge Rosen dismissed the plaintiff's case, however, due to her failure to exhaust her internal union remedies.

Defendant Should Receive Fees if Review of the Merits Shows that the Case Should Have Been Abandoned

Cicero v. Borg-Warner Automotive, Inc., ___ F.Supp.2d___ (2001 WL 1117552 (E.D. Mich.)). After granting summary judgment for the employer in an age discrimination case, Judge Cleland ordered the plaintiff and his attorneys to show cause why they should not be sanctioned for prosecuting a meritless case. Because the defendants prevailed on their motion for summary judgment and the plaintiff did not contest the reasonableness of the defendant's stated costs, Judge Cleland ordered the plaintiffs to pay the defendants $10,140.05 in costs under *Fed. R. Civ. Pro. 54(d).* Judge Cleland decided not to sanction the plaintiff under *Fed. R. Civ. Pro. 11*, however, because the defendant failed to invoke the "safe harbor" provision of the court rule and did not specifically request Rule 11 sanctions. Judge Cleland did, however, make several noteworthy statements about the filing and continued prosecution of a meritless employment case.

Judge Cleland began by striking the affidavits of two individuals, a law professor and an experienced practicing attorney, which the plaintiff had offered to support the reasonableness of his decision to file suit. Judge Cleland concluded that professorship at a law school "does not, by itself, make one an expert at anything" and that a lengthy list of publications is insufficient to satisfy ***Daubert*** absent proof that the publications were subjected to peer review. Similarly, Judge Cleland questioned but did not decide whether experience in the practice of employment law, selection for inclusion in the *Best Lawyers in America* publication, or membership on several employment-related committees qualifies one as an expert.

Judge Cleland proceeded to rule that even where there was legal justification to file a complaint, attorneys must "maintain an active awareness of the validity of their clients' claims" and "refrain from prosecuting [cases] once it becomes clear that they are without merit." Judge Cleland rejected the argument that all employment discrimination cases have potential merit simply because the analysis is fact-intensive. Furthermore, because employment in Michigan is "at will," the fact that the employer failed to give the employee warnings or a chance to improve cannot, by itself, justify the filing or continued prosecution of an employment case. Because undertaking a "fishing expedition" cannot justify the filing or continued prosecution of a lawsuit, Judge Cleland also rejected the plaintiff's position that a lawsuit is justifiable simply because the plaintiff disagrees with or does not understand why his employer terminated him. Judge Cleland stated that, to justify the filing or continued prosecution of an employment discrimination lawsuit, the plaintiff must have "rational reasons that could reasonably support a conclusion that he was terminated *because* he was a member of the protected class, not just dissatisfaction at being fired, confusion as to the reason, and a hope that discovery will pull something out of the water that could be 'spun' as evidence of invidious discrimination."

Johnson v. International Hardcoat, Inc., 2001 WL 1218561 (E.D. Mich.). Judge Zatkoff dismissed the plaintiff's Title VII suit because she did not obtain a "right to sue" letter from the EEOC. Judge Zatkoff noted that the plaintiff had no authority for her claim that she did not need one under the circumstances. However, Judge Zatkoff refused to award the defendant its attorney's fees under Section 200e-5(k) because he could not determine whether the case was frivolous without hearing it on the merits.

Employers Have a Qualified Privilege to Inform a Terminated Employee's Co-workers that the Employee Was Fired for Alleged Sexual Harassment; Employer Misrepresentations and Confusing Literature Cannot Sustain an Equitable Tolling Claim

Minnis v. McDonnell Douglas Technical Services Co., 162 F.Supp.2d 718 (E.D. Mich 2001). The plaintiff worked for a temporary staffing agency. The agency terminated his employment, which resulted in his removal from Caterpillar, the business where the plaintiff had been placed. Plaintiff sued the temporary staffing agency within 90 days of receiving his "right to sue" letter, but waited more than six months after receiving the letter to sue Caterpillar.

Caterpillar moved to dismiss due to the plaintiff's failure to file his lawsuit within the 90-day jurisdictional period. The plaintiff responded by contending that the filing period should be equitably tolled because Caterpillar falsely claimed during the EEOC proceedings that it played no role in the plaintiff's termination. Judge Rosen rejected the plaintiff's equitable tolling argument, reasoning that "if it were true that a defendant's denial of involvement or liability in the EEOC proceeding were a basis to toll the ninety-day provision, the limitations period would in most cases be tolled endlessly and would be rendered meaningless." In the alternative, Judge Rosen dismissed Caterpillar because there was no employer-employee relationship between plaintiff and Caterpillar and "neither Title VII nor the Elliott-Larsen Civil Rights Act applies to independent contractors."

(Continued on page 16)

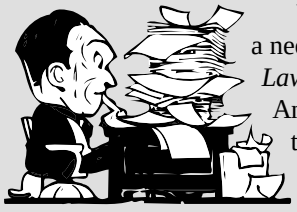
EASTERN DISTRICT UPDATE

(Continued from page 3)

Judge Rosen then dismissed the plaintiff's claim that the temp agency defamed him by telling the plaintiff's former co-workers that he had been fired for committing sexual harassment. Judge Rosen acknowledged that the qualified interest-duty privilege does not generally extend to statements made to the plaintiff's co-workers. He noted, however, that "Michigan courts have never been called upon to determine the scope of the privilege where the statements communicated to the plaintiff's co-workers concerned allegations of sexual harassment in the workplace against him." Relying in part on case law from other states, Judge Rosen ruled that Michigan would extend the interest-duty privilege to such situations because employers should have the right "to communicate to employees the reasons for Plaintiff's termination as a means of enforcing [the company's] sexual harassment policy as well as reinforcing that sexual harassment is a serious offense that will not be tolerated in the workplace."

Davis v. Henderson, 2001 WL 1218571 (E.D. Mich). A former postal worker sued her employer for alleged employment discrimination. The post office moved to dismiss because the plaintiff failed to seek pre-complaint EEO counseling within 45 days of the allegedly discriminatory act. The plaintiff claimed that the limitations period should be equitably tolled because the employer distributed a document suggesting that most employees have 180 days to file an EEOC charge. Judge Roberts rejected the argument because the employer had posted several posters notifying employees of the 45-day requirement and because the EEO pamphlet that articulated the 180-day rule clearly stated that there were special rules for postal workers. ■

WRITER'S BLOCK?



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

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

In a typical labor arbitration, the following things happen in order. First, joint exhibits are offered, marked and entered. Then opening statements are presented. I want to argue that this is backwards.

As an arbitrator, I typically don't know anything about the case when we begin. If joint exhibits are presented first, then it is from those exhibits that I get my first sense of what the case is about. I usually read the grievance and scan the other documents. I pick up a sentence here, a phrase there and I form an impression. Then I sit back and listen to opening statements.

What I have discovered is that my first impression is often wrong. Most often it is wrong in relatively subtle ways, but sometimes is is *quite* wrong. Subtle or not, I have to spend some of my mental energy during opening statements un-learning what I though I had just learned. That can't be right. The parties are entitled to an arbitrator whose attention is not distracted and divided.

I suppose I could avoid reading the joint exhibits until after the openings. But that seems odd. Why admit them if I am going to avoid reading them? Or I could make everyone wait while I read everything carefully to avoid taking things out of context. But I doubt many people would be happy about that. Instead, why not just reverse the order? First openings, then exhibits.

I realize this creates an extra wrinkle for people who like to reserve their opening statement until after the other side presents its case. But those people are accustomed to making strategic decisions. I don't see that this radically affects that decision.

If opening statements are presented first, the people hired to present the case are the ones who create the first impression in the mind of the arbitrator. This, it seems to me, is as it should be.

I suggest we open with the openings. I welcome your comments. Contact me at bagman@csi.com or send your viewpoint to *Lawnotes.*

Editor's Note: For those of you not familiar with the conventions of labor arbitration, the title of Barry Goldman's column is the rule universally applied by labor arbitrators to govern the admissibility of evidence, as in "I'll admit it for what it's worth." ■

DEFENDANTS WIN 2-1 AT THE WESTERN DISTRICT

John T. Below and Danielle N. Mammel
Kotz, Sangster, Wysocki and Berg, P.C.

Sloppy Navy Technical Manual Writer Fails To Support Complaint Of Race, Retaliation And Disability Discrimination.

Sanchez v. Caldera, Secretary Dep't of the Army, Case No. 5:00-CV-123 (September 19, 2001). Judge Gordon J. Quist granted defendant Department of the Army's motion for summary judgment with respect to plaintiff's race, retaliation and disability discrimination claims. Plaintiff was a technical manual writer for the U. S. Army from 1988 until her discharge on August 24, 1995. The plaintiff was placed on a performance improvement plan prior to her discharge based on repeated performance problems with respect to typographical and other text errors in the technical manuals which she was charged to produce. Based on her failure to perform, plaintiff was fired. Plaintiff engaged the administrative process with respect to some of her claims, to no avail. In February 2000, she filed a complaint with the district court alleging race and disability discrimination and retaliation, and she appealed the administrative decision affirming her discharge.

The court granted the defendants' motion for summary judgment. The plaintiff withdrew her claim of race discrimination from the administrative process and, thus, dismissal of the claim was proper for the plaintiff's failure to exhaust administrative remedies. With respect to plaintiff's claim for unlawful retaliation, the court found plaintiff's claim failed for lack of proof of "a casual connection between her engagement in a protected activity and the adverse employment actions taken against her. To meet this requirement, Plaintiff must produce, 'sufficient evidence from which an inference could be drawn that the adverse action would not have been taken had the plaintiff not filed a discrimination action.' *Nguyen v. City of Cleveland,* 229 F.3d 559, 563 (6th Cir 2000) (citing *EEOC v. Avery Dennison Corp.,* 104 F.3d 858, 861 (6th Cir 1997)." Significantly, plaintiff could not raise an "inference of causation" because the adverse employment action about which she complained was taken *prior* to any engagement in alleged protected activity. "[T]he problem with Plaintiff's argument here is that her poor evaluations began well before her filing of the EEO complaint. . . ." Lastly, the court stated plaintiff could not establish she was "disabled" for purposes of a claim under the Rehabilitation Act. While the plaintiff had suffered minor injuries in a car accident in April 1993, she returned to work with only minor restrictions. Because the injuries "did not significantly affect her work" and may have only affected a single, particular job duty, plaintiff was not "disabled." Accordingly, the court granted summary judgment on the disability claim. The court also found that the administrative decision was not arbitrary or capricious, nor was there any abuse of discretion.

Plaintiff's First Amendment Retaliation Claim Survives Defendant's Motion to Dismiss and Statute of Limitations and Qualified Immunity Defenses.

Nemetz v. Price, et al., Case No. 1:00-CV-702 (August 10, 2001). Judge Robert Holmes Bell granted in part and denied in part defendants' motion to dismiss. Plaintiff worked for the Handlon Michigan Training Unit, operated by the Michigan Department of Corrections. According to plaintiff, he was denied two promotions because he is a white male. After plaintiff shared his opinion with Williams, a black female employee, a disciplinary investigation ensued and plaintiff was suspended for failing to turn in a questionnaire he received as part of the investigation. Plaintiff was subsequently suspended for harassing Williams. Plaintiff filed his complaint alleging reverse discrimination in violation of the Equal Protection Clause and a First Amendment retaliation claim.

The Court dismissed plaintiff's reverse discrimination based on the statute of limitations defense. As for plaintiff's retaliation claim, defendants argued the claim failed because plaintiff merely made statements to a fellow employee about a private employment matter. However, racial discrimination and speech about affirmative action are inherently matters of public concern. *Connick v. Myers,* 461 U.S. 138, 148 91983); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 584-85 (6th Cir. 2000). "Whether or not Plaintiff expressed his views on racial discrimination by his supervisors or affirmative action to his superiors in the form of an official or unofficial grievance, or they received the information from other employees, does not change the character of the protected speech and is irrelevant for purposes of a First Amendment retaliation claim." *Rankin v. McPherson,* 483 U.S. 378, 381-83 (1987). Plaintiff defeated defendants' statute of limitations defense based on the continuing violation theory that applies if: "(1) there is some evidence of present discriminatory activity, [or] (2) when there has occurred a longstanding and demonstrable policy of discrimination." *Dixon v. Anderson,* 928 F.2d 212, 216-217 (6th Cir. 1991). Since defendants' adverse employment actions continued until September 15, 1997, plaintiff's claim, filed on August 25, 2000, was within the three-year statute of limitation. Defendants also asserted the defense of qualified immunity which "covers those government officials performing discretionary functions when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Because defendants should have known that suspending plaintiff for making statements regarding discrimination was a violation of his constitutional rights, the court did not accept this defense. Therefore, the plaintiff's First Amendment retaliation claim survived the motion to dismiss.

Denying Lateral Transfer Does Not Constitute A Materially Adverse Employment Action.

Reese v. State of Michigan Family Independence Agency, Case No. 4:00-CV-135 (August 6, 2001). Judge David W. McKeague granted defendant's motion for summary judgment after finding plaintiff failed to establish a *prima facie* case for race discrimination under Title VII. Plaintiff claims defendant discriminated against him by denying his application for a lateral transfer to the Jackson office and filling the positions with three females (two white and one Hispanic). Defendant countered plaintiff's allegations reasoning plaintiff had the lowest interview scores for the position.

Defendant's motion questioned whether plaintiff had suffered a material adverse employment action. The court applied the following test established by the Sixth Circuit:

> [A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 461-62 (6th Cir. 2000) (quoting *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999)).

(Continued on page 18)

FROM THE EDITOR

LAWNOTES ON LINE

We know that (1) you carefully save each and every issue of *Lawnotes*, so when a legal question comes across your desk that was covered in one of *Lawnotes'* insightful, thorough, authoritative articles, you'll be able to retrieve the article and be way ahead of the game; and (2) that you never can find that on-point article in your piles of *Lawnotes*, *Michigan Bar Journals*, *ABA Journals*, Christmas catalogs, the months of advance sheets that you'll get around to one of these days, and the other stuff stacked on your window sill, client chairs, bookcase, and on the back seat of your car.

No, we do not have you under surveillance, but we know how you operate. Anyway, don't worry. *Lawnotes* from 1997 to date is available on-line at http://www.icle.org/sections/labor/lawnotes/index.htm.

The Labor and Employment Law Section has other useful stuff posted at www.icle.org/sections/labor/index.htm, including frequently asked questions and answers prepared by Tom Brady, addressing Michigan and federal discrimination law, the NLRA, the Whistleblower Protection Act, The Bullard-Plawecki Employee Right To Know Act, the Polygraph Protection Act, and the WARN Act. In addition, posted at www.icle.org/lawlinks/practice/labor.htm you'll find a useful set of links to other websites of interest to labor and employment lawyers. You might not read all there is on these sites, but it's comforting to know they're there — and they don't clutter up your office.

Stuart M. Israel

DEFENDANTS WIN 2-1 AT THE WESTERN DISTRICT

(Continued from page 17)

In a similar case, the Sixth Circuit ruled a transfer "was not a materially adverse employment actin, in that the plaintiff enjoyed the same or greater rate of pay and benefits, her duties were not materially modified, and she suffered no loss of prestige in her new position." The Sixth Circuit recognized an exception to the general rule for lateral transfers involving conditions "objectively intolerable to a reasonable person, thereby amounting to a constructive discharge." *Strouss v. Michigan Dep't of Corr.*, 250 F.3d 336, 342 (6th Cir. 2001). In this case, no one disputed the transfer was lateral. Apparently, plaintiff wanted the transfer to shorten his commute, however, a longer commute is not a job-related attribute. In light of defendant's non-discriminatory reason for denying plaintiff's transfer request and the fact plaintiff did not suffer a materially adverse employment action, the court granted defendant's motion. ■

MICHIGAN COURT OF APPEALS UPDATE

John W. Smith, Esq.
Dykema Gossett PLLC

The court of Appeals Tailors the Hostile Environment Sexual Harassment Analysis Following *Chambers v. Trettco: Sheridan v. Forest Hills Public Schools* (Zahra, P.J.) No. 215572 (September 25, 2001)

In one of its first, published, in-depth looks at hostile environment sexual harassment since *Chambers v. Trettco, Inc.*, 463 Mich 297 (2000), the court of appeals has set out a more workable framework for analyzing the *respondeat superior* element of the claim.

Sheridan was a custodian for the defendant school district where she worked with defendant Knapp. Taking the facts in the light most favorable to plaintiff, the court found that Knapp had entered a pool building on the school's property and raped her in April 1990. Sheridan admitted that she did not report the rape to anyone. She then alleged that Knapp then repeatedly harassed her by loitering outside the pool building while she worked. Sheridan also claimed that Knapp had entered the pool building and kissed and touched her inappropriately during 1991. She informed the Building And Grounds Director, as well as the head custodian, that she did not feel safe working nights and requested security. She did not, however, complain to anyone of Knapp's harassment.

Later in 1991, Sheridan met with the Director of Community Education and the Pool Building Administrator to discuss job-related problems including her security concerns and her conduct of bringing her children to work. During this meeting, Sheridan expressed that it was Knapp who was lurking outside the pool building and calling her pager while she worked. Sheridan stated that she die not want anything done, however, and that she would "take care of it herself." She admitted that she had not told them about the rape, and that she did not provide them with specifics about the assault in the boiler room.

In the summer of 1991, Sheridan met with the Assistant Superintendent for Personnel and a union representative. The Assistant Superintendent for Personnel focused on Sheridan's allegations because Knapp had been previously disciplined in 1988 for sexual harassment of another employee. In responding to inquiries about Knapp's behavior, Sheridan stated that it was none of their business and that she and Knapp were friends. Nevertheless, the Assistant Superintendent met with Knapp and reminded him that, in accordance with his 1988 discipline, any further acts of harassment would mean immediate termination.

In late 1991, Sheridan transferred to another school within the district. Shortly thereafter, Knapp applied for and received a position with the same school. Sheridan claimed that she told the head custodian at the new school that Knapp had better leave her alone and that what had happened between them in the past "was bad." The head custodian informed Sheridan that if anything happened, "we'll take care of it."

In 1993, Knapp reportedly rubbed up against Sheridan. Sheridan reported this incident to the head custodian who confronted Knapp. No one reported the incident any further and Sheridan was told she could work in a different area.

On August 26, 1993, and in a follow up meeting on August 31, Sheridan informed the Assistant Superintendent of Personnel that Knapp had propositioned her and physically exposed himself to her on August 23. Sheridan never mentioned the previous incidents. After an investigation, Knapp was terminated on October 4, 1993. Shortly after Sheridan made these reports, however, she went on a medical leave from which she never returned.

In 1996, Sheridan filed her suit claiming hostile environment sexual harassment under Elliott-Larsen based upon all of the events since 1991, including the rape. The trial court granted summary disposition in favor of the school district on the basis that there was no notice.

The Court of Appeals focused their analysis exclusively on the respondeat superior element of sexual harassment. Initially, the Court established that the required notice can be established in two ways. First, the employee can show that the employer had actual notice of harassment by showing that she complained to higher management. Alternatively, the pervasiveness of the harassment can be such that, by an objective standard, a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring.

In analyzing whether the school district had actual notice, the Court had to determine whether Sheridan complained to higher management. The Court, after deciding that the term had not been adequately defined under Elliott-Larsen, explained that the term "higher management" means "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing and administering discipline over the offensive employee." The Court held that only higher management (defined the same as "supervisors" under the Act) are the only persons vested with actual authority to effectuate changes in the workplace making the knowledge they possess imputed to the employer. The Court held that the "head custodian" did not meet this definition.

Interestingly, the Court noted that an employer can enhance its relationship with its employees by its policies. The school district had a policy instructing employees with sexual harassment concerns to contact an appropriate supervisor. Although the Court did not reach the issue, because neither party asked, it noted that instructions to contact an "appropriate supervisor" were not inconsistent with the definition of higher management it used in evaluating rights under the Act. Sheridan also admitted that she did not view the head custodian as her supervisor.

The Court also found that the incidents of specific harassment, including the rape in 1990 or 1991, the assault in 1991, the "rub up against" in 1993, and the final incident in 1993, were not so severe or pervasive as to impute notice. The Court based this holding on the limited number of incidents during the three-year period. Finally, the Court held that Knapp's prior alleged incidents of sexual harassment of female employees in 1985 and 1988, did not serve to impute notice as to Sheridan's sexual harassment. The Court found that by asking Sheridan if everything was all right in her working relationship with Knapp, the school district did all that it was reasonably required to do under the circumstances.

Public Policy Encouraging Arbitration not applicable for Forum Shopping Parties: *Madison District Public Schools v. Myers*, Docket No. 219872 (Gage, P.J.), September 25, 2001.

The Court of Appeals, like many courts across the country, have extolled the virtues of arbitration as "an inexpensive and expeditious alternative to litigation." *See Rembers v. Ryan's Family Steak Houses, Inc.*, 235 Mich. App. 118, 123 (1999). This policy has led to presumptions favoring the enforceability of arbitration clauses and, similarly, presumptions against the waiver of contractual agreements to arbitrate. *See Salesin v. State Farm Fire & Cas. Co.*, 229 Mich. App. 346, 356 (1998).

In spite of these policies, however, the Court of Appeals found that such provision had been waived in *Madison District Public Schools v. Myers.* Jack Myers resigned from the school district as superintendent in exchange for a severance package which entitled him to certain benefits. The severance agreement contained an arbitration clause. Six months after Myers' resignation, the school district brought suit against him challenging his entitlement to benefits in light of over $30,000.00 in cash advances which Myers allegedly never returned.

Myers filed a counterclaim for his benefits under the agreement and raised the affirmative defense that his severance agreement contained an arbitration clause. After a lengthy litigation, Myers moved for summary disposition on the basis that the severance agreement's release provision barred plaintiff's claims. The trial court granted the motion.

In June 1998, the school district then filed a demand for arbitration with the American Arbitration Association asking for reimbursement of benefits contained in the severance agreement. Myers moved the trial court to stay any arbitration based upon the prior order dismissing those claims. The trial court denied the motion finding that the dismissal was not on the merits and that "'Plaintiff's prior conduct of litigation was not inconsistent with the right to arbitrate' and that the defendant would suffer no prejudice resulting from arbitration proceedings."

The Court of Appeals, acknowledged that waiver of a contractual right to arbitrate is disfavored. Nevertheless, in this matter the Court reversed the trial court and found that the school had waived its rights to arbitration. The Court noted three factors in deciding whether there was a waiver, including: (1) whether the party acts inconsistently with the right to arbitration; (2) whether the party had knowledge of their right to arbitration; and (3) whether the parties are prejudiced by the inconsistent acts.

In determining whether the school district acted inconsistently, the Court noted that the district had litigated the issue in court for a year and six months. The school district argues that it was not seeking to enforce the agreement, but rather was seeking a judicial determination as to the validity of the agreement. Myers countered that the district's trial court complaint sought only damages for defendant's alleged receipt of benefits beyond those contemplated within the severance agreement, and that plaintiff's

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MICHIGAN COURT OF APPEALS UPDATE

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attempt to institute arbitration seeking the same relief constitutes "an attempt to take a second bite of the apple." The Court of Appeals agreed with Myers and found the district's characterization of its lawsuit, presented for the first time on appeal, to be disingenuous.

The Court also found the second and third criteria above justified a finding of waiver by finding that the district clearly knew about its own arbitration provision and that Myers would be prejudiced by the maintenance of the action. This prejudice, the Court of Appeals explained, resulted from the fact that dismissals because of release or settlement are dismissals "on the merits" contrary to the findings of the trial court. Because the Court found that the District had waived its right to arbitration, it did not reach Myers' res judicata defenses.

Court Of Appeals Rules on Alternative Method for Enforcing Employee Loan, Leaving Employee Without Even a Day in Court: *USA Jet Airlines, Inc. v. Schick,* docket No. 223077 (O'Connell, P.J.), September 11, 2001.

Employers frequently provide training, tuition, etc. to employees in the form of loans which are gradually forgiven provided that the employee remains in his employer's employ for a minimum period of time. When Jay Schick went to work for USA Jet Airlines, however, the employer went one step further and had Schick sign a "cognovit" or, as it is also known, a "confessed judgment."

In the space below Schick's employment agreement was a section entitled "Cognovit Note" which stated:

> [I]n the event of default of payment for monies owed to USA Jet Airlines, Inc., I hereby authorize any attorney at law to appear in any court of record in the United States and waive the issuing of service of process and confess a judgment against me in favor of the holder thereof, for the principal amount then appearing due with interest thereon . . .

Schick sought to have the agreement set aside because Michigan's confessed judgment statute states that such a document must be differentiated and distinct from the underlying contract. The trial court agreed with Schick and USA Jet appealed.

The Court of Appeals ruled that the "separate and distinct" requirement was satisfied by having the employment contract spaced apart from the cognovit on the same document when, as here, they were separately titled. The Court went on, contrary to the dissent, to hold that one signature does suffice for both agreements. The Court held, "Defendant signed a clearly labeled cognovit that was separate and distinct from the accompanying employment contract . . . In our view, allowing the defendant to circumvent the clear language of the distinct cognovit would undermine its important role in the commercial context of providing a 'measure of security' for creditors." ■

MERC UPDATE

Michael M. Shoudy
White, Schneider, Baird, Young & Chiodini, P.C.

Since the previous issue of *Lawnotes*, the Michigan Employment Relations Commission has issued 16 decisions and orders in a variety of cases. A brief summary of some of those cases follows. Of the 16 decisions, nine were unfair labor practice hearings, five were representation hearings and/or unit clarification hearings, one was a compliance hearing, and one was a duty of fair representation hearing. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations' website at www.cis.state.mi.us/ber.

Unfair Labor Practices.

Oakland Community College
Case No. C99 F-111 (October 24, 2001).

Teamsters State, County, and Municipal Workers alleged that Oakland Community College (OCC) unlawfully declared impasse and engaged in surface bargaining in violation of PERA. The ALJ agreed with the Union and ordered OCC to return to the bargaining table.

On exception, OCC argued that the ALJ erred in finding that it had unlawfully declared impasse. OCC also argued that the ALJ's determination that it engaged in surface bargaining was erroneous and based upon her own dissatisfaction with OCC's bargaining proposals. The Commission agreed with the ALJ's conclusion that the parties were not at impasse when OCC declared its intent to implement its last best offer. Further, the evidence established that OCC insisted upon various proposals which would have effectively required the Union to forfeit its role as the exclusive representative of the bargaining unit. The ALJ's finding of surface bargaining was also supported by the record.

City of Oak Park
Case No. CU00 H-28 (September 26, 2001) (No Exceptions).

On August 4, 2001, the City of Oak Park filed unfair labor practice charges against the Oak Park Public Safety Officers Association and Police Officers Association of Michigan (Union), alleging that it had violated PERA by circulating a flier to residents of Oak Park and sending a letter to a City of Berkley council member. The City asserted that the Union bypassed and refused to utilize the mandatory contractual grievance procedure, thereby repudiating the collective bargaining agreement between the parties.

On April 7, 2000, the Union filed a grievance alleging that the City had violated the collective bargaining agreement by allowing a platoon to work without the required minimum number of firefighters on duty. Employer asserted that it had conformed with the standards set forth by OSHA. A public campaign began in which a letter was sent by the business agent of the Union to a Berkley council member to advise of the alleged dangerous situation regarding the decrease of firefighters on duty. The City of Berkley and the City of Oak Park had a contractual mutual aid agreement.

A letter was also mailed by the Union to all registered voters in Oak Park, objecting to the decreased number of on-duty firefighters. During this time, the Union also notified the City that it intended to take the grievance to arbitration.

The Employer argued that the Union repudiated the collective bargaining agreement by sending the flier and the letter to the council member and the residents of Oak Park. The City argued that the contract required grievance arbitration to settle all grievances or dis-

putes. The Union responded that a grievance had been filed and pursued, and that nothing in PERA prevents a Union from communicating with the public about matters of mutual concern.

The ALJ agreed with the position of the Union. The activity of publicizing a union-management dispute is protected concerted activity. The communication by the Union did not constitute knowingly false statements, and the record did not support a repudiation of the contract by the Union as defined by the Commission. Therefore, the charge was dismissed.

University of Michigan
Case No. C00 H-140 (September 20, 20001) (No Exceptions).

On August 10, 2000, the Michigan Regional Council of Carpenters filed an unfair labor practice charge against the University of Michigan alleging that the Employer violated its duty to bargain and unlawfully dominated the Washtenaw County Local Building Trades Board of Directors, University Division.

On November 17, 1967, the Labor Mediation Board certified a unit consisting of all of the Employer's skilled trades employees. Over the years, the bargaining agent changed its name and eventually delegated its responsibilities for collective bargaining and contract administration to a University Division (UD) it created.

On June 27, 2000, a representative of Charging Party sent the University a letter stating that the certified union was disclaiming any interest in negotiating on behalf of the carpenters. The University replied that it would not agree to change the original certification. The University continued to bargain with the UD, and an agreement was eventually reached.

The ALJ found that there was no "carpentry unit" and that the Charging Party had no grounds for demanding that the University bargain with it as a separate entity. Since 1967, the University had recognized and bargained with the unit as originally certified or its successors or delegates. There was no evidence that the certified bargaining agent ever agreed to create a separate unit of employees performing carpentry work. Further, the ALJ found that Charging Party's domination claim was not supported by the facts. Therefore, the charge was dismissed in its entirety.

City of Detroit (Water and Sewerage Division)
Case No. C00 B-18 (September 14, 2001) (No Exceptions).

Senior Accountants, Analysts and Appraisers Association (Union), filed an unfair labor practice charge on February 4, 2000, alleging that the City of Detroit violated PERA by unilaterally imposing on some members of the bargaining unit an additional five hours per week of unpaid work time.

The dispute related to an ongoing controversy which started in 1971 when several unions, including Charging Party, filed an unfair labor practice charge challenging the City's action in unilaterally increasing the workweek for certain employees from 35 to 40 hours. The Commission found that the City violated PERA.

The employees at issue in this case had been members of the Municipal Engineering Draftsmen Association (MEDA) which merged into Charging Party. The City and the Union entered into a memorandum of understanding which provided that the collective bargaining agreement with the Union would apply to the former MEDA members.

The Union subsequently learned that nutritionists in the Health Department and drafting technicians in the Water and Sewerage Treatment Department were working a 40 hour week. The Union wrote to the City objecting to this different schedule for these particular employees. When the City failed to respond to the Union's letter, this charge was filed.

Charging Party maintained that a 35 hour workweek for bargaining unit members is mandated by the collective bargaining agreement between the parties and the Commission's earlier decision regarding the 35 hour workweek. The City argued that the issues in this case are contractual and properly before an arbitrator.

The ALJ found that the Charging Party failed to demonstrate that the City had made a change in working hours without giving notice to and bargaining with the Union. The evidence demonstrated that the employees at issue had previously worked a 40 hour week. This fact distinguished this case from the earlier Commission decision, which had been based on past practice. The ALJ noted that the dispute in this case is essentially a good faith contract dispute, and therefore, the charge was dismissed.

City of Detroit (Department of Public Works)
Case No. C99 C-58 (September 13, 2001).

Service Employees International Union filed an unfair labor practice charge alleging that the City of Detroit violated PERA by unilaterally instituting a requirement that environmental control inspectors (ECI) drive their own vehicles in the field, thereby removing an existing benefit of their employment.

In 1999, the City revised job specifications for the ECIs to require that they "provide their own motor vehicles for transportation on a reimbursed mileage basis." The ALJ concluded that by requiring the ECIs to drive their own vehicles, the City had altered the terms of their employment by removing an existing job benefit.

On exception, the Commission noted that where a contract is ambiguous or silent on a subject for which a past practice has developed, there need only be a "tacit agreement" for the practice to continue. In this case, the Commission found that the language in the contract between the parties was capable of only one interpretation, that employees may be "required" or "assigned" to use their own vehicles. Therefore, the ALJ erred in finding that the City unilaterally changed the contract in violation of PERA.

St. Clair County Intermediate School District
Case No. C99 I-168 (August 17, 2001).

St. Clair County Education Association, MEA/NEA, appealed the ALJ's recommended order for summary dismissal. The charge alleged that the Employer, St. Clair County Intermediate School District, violated its duty to bargain in good faith by unilaterally eliminating bargaining unit work through subcontracting.

From 1997-1998, Employer authorized the creation of two public school academies. Union argued that the Employer transferred bargaining unit work out of the unit by subcontracting this work to the newly created public academies without bargaining in violation of PERA.

The Commission held that the ALJ erred in holding that the transfer of unit work to a public school academy was a prohibited topic for bargaining pursuant to subsection 15(3) and (4) of PERA. Section 15(3)(e) prohibits bargaining over only two areas: a public school employer's decision to authorize a public school academy, and the granting of a leave of absence to an employee of a school district to teach at such an academy. In finding an unexpressed legislative intent to prohibit bargaining over the transfer of unit work to a public school academy, the ALJ erred by ignoring the plain text of Section 15(3)(e) and improperly substituting her own judgment for that of the Legislature.

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MERC UPDATE

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A public employer has the duty to bargain over subcontracting bargaining unit work where "(1) the subcontracting does not alter the employer's basic operation; (2) there is no significant capital investment or recoupment; (3) the public employer's freedom to manage would not be significantly abridged by a bargaining obligation; and (4) the dispute is amenable to resolution through the collective bargaining process." Therefore, the Commission remanded the case to the ALJ for the purpose of determining whether the Employer's decision to "transfer" bargaining unit work to the public school academies constituted subcontracting in violation of PERA.

Mid-Michigan Community Fire Department
Case No. C00 A-5 (August 16, 2001) (No Exceptions).

On January 19, 2000, an unfair labor practice charge was filed by Ken Smith, an individual, against his former employer, the Mid-Michigan Community Fire Department. Smith alleged that he was terminated because of his efforts to organize a union among the Employer's firefighters.

The ALJ found that the Employer decided to terminate Smith before it learned of his union activity, and the union activity did not influence the final decision. Employer's officers felt that Smith was spreading dissatisfaction with the management of the department. The ALJ credited the Employer's finding of a lack of respect for authority on the part of Smith. Further, the ALJ noted that the case was devoid of any direct evidence of union animus. The timing of Smith's discharge in relation to his union activity was adequately explained by the record. Therefore, the charge was dismissed in its entirety.

Bloomfield Township
Case No. C99 K-203 (August 9, 2001) (No Exceptions).

Bloomfield Township Association of Professional Firefighters filed unfair labor practice charges against Bloomfield Township alleging that Employer had violated PERA by posting notices to employees in the bargaining unit which the Union maintained contained material misrepresentations regarding the status of contract negotiations and mediation. The Union also alleged that the Employer unilaterally reduced four employees in status and pay because the Union would not approve and execute a letter of understanding, amending the collective bargaining agreement.

The ALJ found that the Employer was posting and circulating information already given to the Union in an attempt to keep employees updated with respect to the status of bargaining which is permissible pursuant to MERC decisions. The ALJ also found that the Union's claim that the information was misleading was not supported by the record.

As to the reduction of status in pay for the four firefighters, the ALJ found no violation of PERA. The record revealed that the Employer discovered it was improperly paying four firefighters without a fire science certificate at a higher rate. The ALJ noted that the Employer proceeded to act in conformance with its interpretation of the agreement. At best, the record reflects a good faith contractual dispute which is a matter for the contractual grievance procedure. Therefore, the charges were dismissed.

City of Grosse Pointe Park
Case No. C00 C-49 (August 9, 2001) (No Exceptions).

Police Officers Labor Council filed an unfair labor practice charge against the City of Grosse Pointe Park alleging that the City violated its duty to bargain by unilaterally instituting a "signing bonus" for newly hired public safety officers.

In an attempt to recruit new public safety officers, the City informed prospective candidates that if they passed the psychological exams, physical exams, and the background check, they would be eligible for a one-time payment of $2,000 as a signing bonus. The City had three vacancies to fill, and it offered the $2,000 signing bonus to each applicant before being sworn in by the Director of Public Safety.

The ALJ noted that an employer's duty to bargain over the payment of a "signing bonus" to either applicants or new employees is a question of first impression for the Commission. The City argued that since the applicants received their signing bonuses before they were formally sworn in as public safety officers, they were not employees, and thus there was no duty to bargain. The Union argued that the swearing-in of an applicant is merely a ministerial act.

The ALJ agreed with the Union, finding that by the time the applicants became eligible to receive the signing bonuses, they were employees of the City. Therefore, the signing bonuses were an aspect of employee compensation, and the City violated PERA when it unilaterally instituted these bonuses.

Compliance Hearing.
University of Michigan
Case No. C92 A-12 (October 24, 2001).

This case arises from a 1994 Commission decision finding that the University of Michigan violated PERA by unlawfully removing 10 animal aide positions from the collective bargaining unit represented by Charging Party, Michigan AFSCME Council 25. The parties filed exceptions to the ALJ's decision and recommended order on compliance.

The Commission found that the ALJ's recommended order was inconsistent with its original findings in this case. The Commission ordered the following:

1. That the University restore the duties previously performed by the position titled animal aide to the bargaining unit represented by Charging Party, and bargain with Charging Party over the terms and conditions of employment of employees now performing that work.
2. That the University arbitrate the grievance filed by Charging Party over the discharge of an employee.
3. That the University make whole Charging Party for the loss of dues/fees resulting from the unlawful removal of the animal aide position from the bargaining unit.

Duty of Fair Representation.
International Union of Operating Engineers
Case No. CU00 A-5 (October 25, 2001).

On January 24, 2001, the ALJ issued a decision and recommended order finding that Charging Party, Ronald Diebel, failed to demonstrate that Respondent, International Union of Operating Engineers, violated its duty of fair representation. Charging party filed exceptions to the decision and recommended order of the ALJ.

Charging party alleged that Respondent breached its duty of fair representation by failing to process and/or file grievances on his behalf regarding wage issues. The Commission found no merit to Charging Party's challenge to the ALJ's factual findings or application of the law. A union satisfies the duty of fair representation so long as its decision is within the range of reasonableness. The record did not support a finding that the failure to file grievances over Charging Party's pay claims was impulsive, irrational, or unreasoned. Therefore, the charges were dismissed in their entirety. ■

THE JOY OF LABOR LAW

War of 911. The 911 attacks have distracted me from the joy of labor law and caused me to cover up my Gore bumper sticker, refrain from chanting "Reelect Gore in Four,"and attacking the *Bush v. Gore* reversal of the 2000 election. Like Pearl Harbor 60 years ago, the 911 attacks have united most Americans and provided the necessary broad mandate to fight the extensive terroristic networks and their state supporters. To the chagrin of some colleagues, I even praise the president's creation of a war tribunal and the temporary detainment of over 500 persons by the Attorney General. I praise the freezing of the assets of suspected terrorist groups masquerading as charities. I praise the hawks in the Bush administration that reject appeasement and who seek to strengthen the powers of law enforcement and the intelligence services. This is no time for misplaced 60ish activism or Orwellian "peace rallies."

This is no time fixate on the "due process" rights of suspected terrorists or foreign"visitors"and "students" on expired visas while al-Qaeda plots murder and the destruction of our freedom and economy. We must use our government's awesome power to destroy terrorists, punish states that support them, and expose their fascist, antisemitic and misogynist ideologies, with no hands tied behind our back. We must trust our government officials *and* monitor their actions, but pre-emptive "due process" hysteria by opponents of tribunals, FBI interrogations and the detainments is unwarranted. Because war (even undeclared war) strikes at the foundation of our country, acts of terrorism cannot be treated with the same level of due process accorded O. J. Simpson.

We cannot afford illusions. We cannot afford to blur the distinction between right and wrong. We cannot afford to excuse or "understand" our enemies in service to misguided utopian ideas about "due process" or multiculturism. There are real people with real weapons out there who want to destroy America and who kill Americans. President Lincoln told a special session of Congress in 1861: "Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?" As Justice Robert Jackson said in his dissent in *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949), the Constitution is not a "suicide pact."

Virus. I knew the warnings *Do not open an attachment to an email unless you know and trust the sender.* Well, I forgot. My client has a common name, Joe Smith. So when Joe Smith sent me an email, as he often did, asking me to review an attached document, I tried to open it. Fortunately for my computer, I could not open it. Unfortunately, I asked a secretary to open it. Her computer got infected.

Lessons learned: (1) Always ask someone else, preferably not your own secretary, to open an attachment so you save your computer and files. (2) Do not assume you know the sender, especially when the sender has a common name, e.g., Joe Smith. (3) Always check the sender's email address, not just the name, before you open any attachment. (4) When in reasonable doubt, call the sender to verify.

Government Employees as Spies and Their Pensions. Speaking of functional problems, in throwing out a prison guard's civil rights case, a court invoked the case of spy/federal employee Alger Hiss: "As James Gooden tells the story, the truth was more than the warden could bear . . . As Warden Neal tells the story, James Gooden was more than anyone could bear. Promotion to a desk job left Gooden at sea, edgy, and defensive, a textbook example of the Peter Principle. He was wrongdoing in the most innocuous events and committed the bureaucrat's cardinal sin of barging into another employee's jurisdiction despite a direct order to respect the division of authority. He got so overwrought that he couldn't take a joke. Another guard circulated a memo in Gooden's name canceling Christmas. Gooden became livid and started testing all of the prison's typewriters in an attempt to identify the prankster — as if he were trying to use the Pumpkin Papers to find out whether Whittaker Chambers was telling the truth about Alger Hiss, a high level state department official in the 1930s and 1940s." *Gooden v. Neal*, 17 F.3d 925, 927 (7th Cir. 1994).

As for the Chambers-Hiss case, the VEONA documents released by the United States reaffirmed that federal employee Hiss was a spy and perjurer. Turns out that then-Congressman Richard Nixon was dead right about Hiss! Despite his espionage and conviction, Hiss got his government pension after his release from prison when a court ruled that the so-called federal Hiss Act — government employees convicted of certain crimes forfeit their pensions — could not be applied retroactively: *ex post facto*. *Hiss v. Hampton*, 338 F. Supp. 1141 (D.D.C., 1972); see also Allen Weinstein, *Perjury: The Hiss-Chambers Case* (revised ed., 1997) and Sam Tanenhaus, *Whittaker Chambers* (1997).

Hiss-tory is repeating itself. Confessed traitor FBI agent Robert Hanssen, according to *Time Magazine*, as part of his plea bargain to avoid the death penalty "will get another inducement than his life — the bulk of his FBI pension for [his wife] Bonnie." The DOJ web site characterizes the deal differently: in addition to forfeiting $1.4 million paid to him by Russia/USSR, "he forfeits his government pension, except for a portion that amounts to a survivor's annuity, pursuant to an applicable statute, which his wife will receive contingent on her continued full cooperation in this matter." I am one union attorney who thinks this government employee should have suffered industrial "capital punishment." No DFR problem here. This case also shows that the death penalty can provide an incentive for criminals to plea bargain to avoid death, e.g., Unabomber.

Sexism and Misandrist. Speaking of things to hate, most of us have used or hear the term "misogynist" — a person who hates women. This word sometimes appears in some sex discrimination cases, and a real misogynist can create problems for an employer. *Ritter v. Medical Arts Ctr. Hosp.*, 94 Civ. 5883, 1997 WL 45349 at *2 (S.D.N.Y. 1997) ("Ritter contends that she also complained about Remeika's alleged harassment to other MAC officers . . . and that she was told 'what am I going to do about it?' and 'what do you expect? He's a misogynist; he hates women.'") Expect $$$ to go to Ritter, was the answer I would give.

But being sexist is not the same as a misogynist, as Justice Stevens pointed out in addressing the Court's 1873 decision, *Brandwell v. State*, 21 L.Ed. 442 (1873), that upheld a state law barring women from being lawyers. "The Justices who subscribed to those views were certainly not misogynists, but their basic attitude — or animus — toward women is appropriately characterized as "invidiously discriminatory." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 321 (1993) (dissenting opinion).

A term we rarely if every hear is "misandrist," a person who hates males. The corresponding noun is misandry. This word is never seen in labor cases or elsewhere. It is not even on my computer's spell check! This is sexist! There's always "misanthropy," hatred of everybody, without regard to race, sex, national origin, religion or union activity.

French Lessons. Speaking of sexism, French is the language of labor lawyers, not just the language of amour. French words are abundant or beaucoup in labor law. For example, grievance is from greve, a French word meaning to strike. The French word for war is guere. Justice Brennan wrote: "strikes, are to some extent, "war.'" *Fait accompli* means already done. The word *appellee* means to call. *Impasse* (dead end). Some ALJs get a chance to use their college French. *Telescope Casual Furniture*, 326 NLRB 588, 590 (1998) (All "that is required is that there be an opportunity for bargaining in good faith between both labor and management prior to impasse — the French word for 'no exit' — and the unilateral implementation of such conditions of employment."); *National Health Care*, 327 NLRB 1175, 1190 (1999) ("Although *syndicat ouvrier* is the French term for trade union, there is no evidence that Cenatus had any familiarity with the term prior to hearing it on the radio.")

A Tieless Society. Why do we inflict ties upon lawyers and other white-collar workers. Who invented the tie? Is it related to Thai food or Tai Chi?

Based on my web browsing, Croatia is the origin of the necktie, with the help of the French. "Around the year 1650, during the reign of Louis XIX, the Croatian scarf was accepted in France, above all in court, where military ornaments were much admired. The fashionable expression, 'a la croate,' soon evolved into a new French word, which still exists today: la cravate." www.croatia.her/en/hystory.htm. Originally, the necktie was a heavy scarf to protect its wearer from the cold and nod it is used to "protect: our shirts from food and drink!" See, *La Grande Histoire de la Cravate* (Flamarion, Paris, 1994). "There is no mention of neckwear or adornment until about 1660 when the birth and evolution of the tie, as we know it, began. Croatian solders serving in the French army of Louis XIX were seen wearing scarf like ties." about neckties.com

Ironically, the French Revolution of 1789 made neckwear a political symbol. "Republicans [not like George W.] were donning large coloured neckcloths to proclaim their allegiance, red being the colour of choice, of course. These neckcloths were known to measure up to 15 feet long, and cold be wrapped around the neck 10 times until the ends were tied in a bow. Not too surprisingly, these radical cravats were known as Incroyables." But it was an American, Jesse Langsdorf, who is considered to be the father of modern neckties when in 1920 he patented the all-weather wrinkle-free tie. Thanks a lot, Mr. Langsdorf.

John G. Adam

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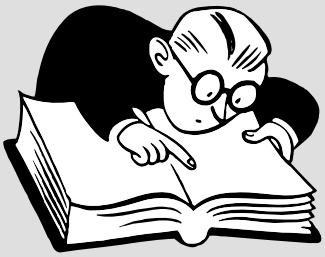

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- EEOC Regional Attorney Adele Rapport writes on health insurance plans and contraception coverage.
- Adam Forman traces new developments at the interface of cyberspace and the workplace.
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- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, websites to visit, the Joy of Labor Law, and more.
- Authors John G. Adam, John T. Below, Gary S. Fealk, Patricia Fedewa, Adam S. Forman, Barry Goldman, Stuart M. Israel, Danielle N. Mammel, Andrew M. Mudryk, Adele Rapport, Roy Roulhac, William C. Schaub, Jr., Michael M. Shoudy, John W. Smith, Shel Stark, Jeffrey A. Steele, 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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