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LABOR AND EMPLOYMENT LAWNOTES

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CHECK YOUR *BONA FIDES:* THE SUPREME COURT'S EXCEPTION FOR *BONA FIDE* SENIORITY SYSTEMS UNDER THE ADA

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As most employment law practitioners know, an employer may typically avoid a request for an accommodation from an allegedly disabled employee when (1) the request would constitute an undue hardship on an employer or (2) the accommodation would present a "direct threat" to the safety of the employee or others. Two years ago, the U.S. Supreme Court added another exception to the duty to accommodate. In *U.S. Airways v. Barnett,*[2] the Supreme Court ruled than an employer need not provide an accommodation to an employee qualified under the Americans with Disabilities Act ("ADA"),[3] if doing so would violate a *bona fide* seniority system established by an employer.[4] While in some ways, the Court's decision is neither surprising nor earth shattering — a similar rule always existed for seniority systems contained in collective bargaining agreements — the precise contours of this exception were left vague by the Supreme Court. This situation has only been made worse by decisions from trial and appellate courts that have variously interpreted *Barnett* as offering a very wide *or* very narrow exception.

This article will briefly examine the *Barnett* decision and federal cases applying its holding. It will conclude with some practical suggestions regarding the implementation and litigation of seniority systems in the context of the ADA.

U.S. Airways v. Barnett

Barnett involved a cargo handler for the defendant airline who injured his back. To accommodate this injury, Barnett invoked his seniority rights under his employer's internal policies and transferred to U.S. Airway's mailroom, a less physically demanding position. Two years later, Barnett requested that U.S. Airways allow him to stay in the mailroom despite the fact that two other employees were bidding on the mailroom position. Both employees had seniority superior to Barnett's and thus would have been able to "bump" Barnett under U.S. Airways seniority based bidding system. While U.S. Airways allowed Barnett to continue in the mailroom while it considered his request, the airline ultimately decided to apply its seniority system. As a result Barnett lost the mailroom position.[5]

In his subsequent lawsuit under the ADA, Barnett contended that he had been denied a reasonable accommodation. U.S. Airways responded that its "well established" seniority system effectively negated Barnett's request for an accommodation.[6] The district court awarded U.S. Airways summary disposition, based on its conclusion that violating a seniority system that had been in place for decades would constitute an undue hardship on U.S. Airways and its employees. In particular, the Court reasoned that allowing Barnett to circumvent the seniority system would harm those employees who had reasonably relied on the entrenched system.[7]

An *en banc* panel for the Ninth Circuit Court of Appeals reversed the district court, stating that the existence of an established seniority system was only "one factor" in the analysis of whether a proposed accommodation constituted an undue burden.[8] More precisely, the Court found that the ADA's legislative history did not support a per se rule even if the seniority system in question was the product of a collective bargaining agreement.[9] Accordingly, the Court reasoned that "without reassignment as a reasonable accommodation, even in the context of a seniority system, the goals of the ADA could easily be frustrated."[10] The Court held that, although a seniority system was one factor, in the analysis, a "case by case fact intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer."[11]

U.S. Airways petitioned for *certiorari* asking the Supreme Court to decide whether the ADA required an employer to ignore its *bona fide* seniority system and reassign an employee as a reasonable accommodation under the Act. In front of the Court U.S. Airways argued that any violation of an established seniority system made a requested accommodation unreasonable because violation of a seniority system would create a "preference" for an employee with a disability. According to U.S. Airways, nothing in the ADA suggested that Congress intended that disabled employees could disregard rules that non disabled employees were required to recognize. In other words, the ADA required only that a disabled employee receive treatment equal to that of other employees thus allowing disabled employees the same opportunities as non disabled employees.[12]

Echoing the Ninth Circuit, Barnett contended that the existence of a seniority system was only one fact an employer could present in carrying its burden of demonstrating that a particular accommodation constituted an undue hardship.[13] In support of this conclusion, Barnett argued that a plaintiff's burden under the ADA required only that he or she demonstrate a "reasonable" accommodation, which Barnett interpreted as requiring only that the accommodation be "effective" in eliminating the limitations imposed by a disability. According to Barnett, the reasonableness inquiry had nothing to do with the accommodation's impact, if any, on workplace policies.[14]

While stating that it was avoiding any "per se" rule, the Supreme Court held that an accommodation requiring that an employer ignore a seniority system would, ordinarily, constitute an unreasonable request.[15] As the Court stated:

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STATEMENT OF EDITORIAL POLICY

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

Stuart M. Israel, ***Editor***
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> The statute (the ADA) does not require proof on a case by case basis that a seniority system should prevail. That is because it would not be reasonable in the run of cases that the assignment in question trump the rules of a seniority system. To the contrary, it will ordinarily be unreasonable for the assignment to prevail.[16]

The Court rested its holding, in part, on the perceived importance of seniority systems to employees. More precisely, the Court opined that such systems are vital to an employee's expectation of equal treatment and ability to make a long term investment in their employer.[17]

The Court then stated that a plaintiff remained free to overcome the seniority system by presenting particular facts indicating that the requested accommodation was, in fact, reasonable.[18] For example, the Court noted that a plaintiff may carry this burden by establishing that the employer retained and regularly utilized the unilateral ability to change the seniority system; or that the seniority system was so riddled with exceptions that one more exception would not matter.[19]

What emerges then is a two step process. While an existing seniority system is not a *per se* bar to a reasonable accommodation request, the *Barnett* opinion does create a presumption in favor of upholding such a system as a bar to an accommodation. The affected employee may only overcome this presumption with evidence undermining the *bona fide* nature of the system.

Barnett's Aftermath

On its face, the *Barnett* decision appears to offer employers a new defense to a relatively common request for accommodation. As discussed below, however, courts applying *Barnett* have interpreted the decision as either offering a very weak or very strong exception. Post *Barnett* opinion also suggest that an employer's use of its seniority system is at least as important as its existence.

Expanding on *Barnett*

The Seventh Circuit's opinion in *Mays v. Principi*[20] is an example of an expansive reading of *Barnett.* In *Mays* the Seventh Circuit extended the rationale of *Barnett* to any reassignment policy regardless of whether it relied upon seniority. The case involved a nurse at a VA hospital who filed a suit under the Rehabilitation Act after the hospital allegedly failed to accommodate her back injury by allowing her to continue as a nurse (albeit without any duties involving lifting) or placing her in an administrative nursing position.[21] The plaintiff claimed, (and the Court assumed) that she was qualified for the latter position. Nonetheless, the hospital argued that it was under no obligation to place the plaintiff as an administrative nurse because there existed better qualified candidates for the position.[22]

The Seventh Circuit agreed that the hospital did not violate its duty of reasonable accommodation by giving the position to a more qualified candidate. According to the Court "This conclusion is bolstered by a recent decision of the Supreme Court [*Barnett*] which

holds that an employer is not required to give a disabled employee superseniority to enable him to retain his job when more seniority employee invokes an entitlement to it conferred by the employer's seniority system."[23]


"Seniority List."

In relying on *Barnett,* the Seventh Circuit appeared to extend the holding of that case well beyond its own facts. Specifically, unlike the system in *Barnett,* the placement system in *Mays,* was not seniority based, but was instead based on merit or ability to perform the task. Despite this difference, the Seventh Circuit held that such a system was entitled to protection. While consistent with Seventh Circuit jurisprudence, this ruling effectively extends the reach of *Barnett* beyond the typical "collective bargaining type" seniority system and into the type of merit based system utilized by many employers.

Reigning in *Barnett*

While *Barnett* and *Mays* appear to offer employers a wide ranging exception to their duty to accommodate, other courts interpreting *Barnett* have narrowed the contours of the exception. For example, in *Dilley v. Supervalu Inc.,*[24] the Tenth Circuity limited *the bona fide* seniority system exception to actual — not potential — violations of an existing system. Other cased have carefully examined the employer's application of that seniority system and at least one court has looked to the language of the employer's written policy to determine if it qualifies as *bona fide.* Each of these approaches has the effect of limiting the applicability of *Barnett.*

***Dilley* — Actual not Potential Violations**

Dilley deals with yet another back injury — this time by a unionized truck driver. After being injured while working in the employer's warehouse, the plaintiff sought a transfer back to a driving position that did not involve heavy lifting.[25] The employer refused, arguing that allowing the plaintiff to return to a driving position would violate the collective bargaining agreement the employer signed with its warehouse employees. More precisely, under the CBA, the driving positions were subject to a seniority system. Thus, if placed in such a position, the plaintiff could potentially be "bumped" by a more senior warehouse worker at a later date.[26]

While agreeing with the defendant employer that *Barnett* allowed an employer to avoid any accommodation that violated a seniority system in a CBA, the Tenth Circuit noted that *Barnett* only applied when a *direct* violation of a seniority system would occur. In contrast, the case at bar only involved a potential violation of a seniority system. In other words, the seniority system would only be violated if a more senior employee later requested to be placed in the position the plaintiff occupied. The Court noted that this event was unlikely, given that the plaintiff ranked fifth out of forty-two in overall seniority.[27] Concluding that any violation of the employer's seniority system was speculative and remote, the Court held that the ADA required the defendant to offer the plaintiff the accommodation he requested.

In narrowing the scope of the *bona fide* seniority exception, other decisions have focused on the "exception to the exception" articulated by the *Barnett* Court. That is, there is some case law shedding light on when a seniority system will not protect an employer from a reasonable accommodation claim.

Norman & Johnson — Application of the Seniority Policy

In *Norman v. University of Pittsburgh*[28] the plaintiff was a custodial employee at the University of Pittsburgh who suffered from long-term depression, anxiety disorder, and panic disorder.[29] When the University held a re-bidding process for jobs, she lost her then-current assignment and began working in a different building under conditions she claimed violated her medical restriction.[30] The plaintiff commenced a leave, during which she asked that the new position be modified to meet her restrictions.[31] The defendant employer refused and instead offered the plaintiff two alternate positions, both of which she refused. The plaintiff then brought suit alleging, among other things, a failure to accommodate under the ADA.

In its motion for summary judgment, the defendant employer argued that it had no obligation to place the plaintiff in another position because its ability to transfer employees was circumscribed by its CBA. Thus, according to the defendant, the plaintiff's requested accommodation was *per se* unreasonable. In rejecting this argument, the Court pointed out that the CBA "is not necessarily decisive" because it gave the union and employer the ability to waive certain provisions, allowing for an accommodation which could technically violate the agreement.[32] Additionally, the Court pointed to specific instances in the past when the employer made changes in work assignments and workloads despite conflicts with the CBA.[33] Among these instances were the accommodations previously made for the plaintiff when she had been injured on the job.[34]

The Court reasoned that the record of these past accommodations undercut the defendant's argument that accommodating the plaintiff would force it to violate its CBA. Thus, under *Barnett,* the plaintiff had at least raised a question of fact regarding whether her accommodation was "reasonable on the particular facts" of the case.

Similarly, in *Office of the Architect of the Capitol v. Johnson,* the Court looked to the fact that an employer made past exceptions to its pay grade system and held that the employer was required to place the plaintiff in a different position.[35] This case involved a custodial employee suffering from asthma who claimed reassignment to a position as a subway operator was not a reasonable accommodation.[36] The employer countered with the argument that the subway operator position was one salary grade higher than the plaintiff's current position.[37] Thus, the requested accommodation was not reasonable because it required that the defendant promote the plaintiff or create a new position for her.[38]

The Court disagreed. Relying on *Barnett,* the Court noted that the defendant had previously shifted employees between the positions with changing their pay classification.[39] Given evidence of the "fluidity" of the defendant's classification system, the Court held that the plaintiff had "presented sufficient evidence that special circumstances warrant[ed] an additional exception to that system in her case.[40]

While the defendants in both *Norman* and *Johnson* were hurt by past actions inconsistent with their seniority or pay grade provisions, this was not the case in *Wood v. Crown Redi-Mix, Inc.*[41] In this case, the plaintiff had suffered a work-related injury that prevented him from driving a truck.[42] Because this task was a requirement for every position with the employer, the plaintiff was terminated.[43]

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In his subsequent lawsuit, the plaintiff argued he could have been accommodated in any number of ways including placing him in a newly created "yard man" position. In response to this request, the defendant responded that placement in the yard man position was governed by its collective bargaining agreement which required the defendant to a award the job to the most senior qualified employee.[44] Citing *Barnett,* the defendant argued that the accommodation requested would have forced it to forego an already existing bidding process, collective bargaining agreement, and seniority system, and as such, was *per se* unreasonable.[45]

The employee countered this argument by submitting that his employer did not strictly adhere to this system in the past and could therefore make another exception in this case.[46] In particular the plaintiff presented evidence of previous employees who, under the aegis of the collective bargaining agreement's management rights clause, had been allowed to resign his position and then return years later without any loss of seniority.[47] The plaintiff also pointed out that he himself had been allowed to work in a higher job classification despite his failure to meet the formal prerequisites of the job.

The Court dismissed these arguments stating that the incidents the plaintiff relied upon "differ in their essential nature from ignoring seniority for purposes of job placement."[48] In the present case, the plaintiff was requesting that the employer "displace more senior employees to accommodate [him]."[49] Because the plaintiff was unable to show any specific exception to the seniority system that resulted in the bidding process of the seniority system being ignored, he was unable to utilize the *Barnett,* exception.

Valu Merchandisers — The Text of the Policy

At least one post — *Barnett* decision suggests that a plaintiff need not even present evidence that an employer violated its own seniority provisions in order to succeed. In *EEOC v. Valu Merchandisers,*[50] the plaintiff was injured and then restricted from lifting loads over ten pounds and repetitively using her wrist.[51] This effectively prevented her from performing her job as a "Order Selector" at the defendant, a wholesaler of beauty products. The plaintiff applied for three different lateral positions, none of which impinged on her restrictions.[52] She was not selected for any of the positions. After being placed on permanent medical restrictions, the plaintiff was terminated because those restrictions prevented her from performing her job.[53] The Equal Opportunity Commission ("EEOC") subsequently brought suit based on the defendant's failure to place the plaintiff in one of the positions for which she applied.

The defendant moved to dismiss the case arguing, in part, that it had not failed to reasonably accommodate the plaintiff.[54] Specifically, the defendant posited that it had no duty to reassign the plaintiff because to do so would violate its written policy which provided that vacancies would be filled

> on the basis of the qualifications of the bidders and their reasonable ability to perform the job. Where qualifications are considered equal, the job will be awarded to the most senior bidder.[55]

While the Court agreed that, consistent with *Barnett,* the defendant was not required to violate its policy, the Court denied the motion for summary judgment. The Court ruled that the defendant employer did not have a *bona fide* seniority system because 1) the written policy only looked to seniority if the bidders for a position were equally qualified and thus allowed the employer to "ignore seniority;" and 2) the policy allowed management the discretion to completely ignore the policy in cases of business necessity. On the latter point, the Court reasoned:

> A seniority system that permits complete disregard of the seniority of an applicant at the sole discretion of the company simply does not qualify as a "bona fide" seniority system. Given the flexibility of Defendant's seniority system, it would be possible for a jury to conclude Defendant had the ability to reasonably accommodate Kennedy [plaintiff].

Thus, defendant's system was disregarded without the plaintiff providing any evidence that it was not followed in practice.

Conclusion

Barnett makes it clear that all seniority systems — not just those contained in a union contract — may now trump an employer's duty to accommodate under the ADA. Beyond this, however, the future is less clear. The following points, however, may offer some guidance to employers and lawyers pondering their obligations under the ADA.

- While the Seventh Circuit has extended *Barnett's* rationale to those systems that do not even rely on seniority, it is an open question whether this view will spread to other Circuits. For example, it appears that the Seventh Circuit's view is inconsistent with the decisions of the Tenth Circuit and has been the subject of considerable academic criticism.[56]
- In the non-union context, an employer's failure to consistently abide by its own seniority system may well make the system a paper tiger in the litigation context. It is important to remember that the basis of the *Barnett* ruling is the perceived uniform operation of seniority rules and employees' assumed reliance on the system. A court may well find that frequent inconsistencies in the application of an employer's system destroys both these rationales.
- Even in the unionized context, an employer's frequent use of a management rights clause or a side agreement to avoid seniority provisions may also erode the *bona fide* nature of a seniority system.
- As *Valu Merchandisers, supra* shows, an employer's words may be used against them. At the handbook or contract drafting level, an employer's reservation of a unilateral right to deviate from its seniority system may undermine the employer's ability to utilize the system as a defense in litigation.
- In this same vein, an employer need not refuse every exception to its seniority system out of fear that a court will ultimately ignore it. Using *Wood,* an employer may argue that only those exceptions which actually robbed another employee of their rights can be used against an employer in the accommodation context.
- A *bona fide* seniority system alone does not provide an employer with an adequate reason to refuse a suggested accommodation. Rather, as noted above, an employer must

be able to identify a concrete violation of an employee's rights. Speculative violations, or a violation in spirit only, may not protect an employer. Accordingly, when considering a request for an accommodation during the interactive process, an employer should examine whether the accommodation will actually harm another employee.

- Seniority systems and other placement schemes are not the sole focus of *Barnett's* analysis. As *Johnson* points out, other types of employer rules affected by accommodation decisions (such as pay classifications) are subject to *Barnett* as well.

— END NOTES —

[1]The author wishes to thank Kayhan Kasher for her research assistance.
[2]122 S. Ct. 1516 (2002).
[3]42 U.S.C. 12112 *et seq.*
[4]*Id.* at 1524.
[5]*Barnett,* 122 S. Ct. 1515, 1519 (2002). Some courts have referred to the *Barnett* rule as simply an extension of the undue burden analysis.
[6]*Id.*
[7]*Id.* at 1520.
[8]*Barnett v. U.S. Airways,* 228 F.3d 1105 (9th Cir. 2000).
[9]*Id.* at 1119. The Ninth Circuit recognized that most Circuit Court's have ignored legislative history and held that a bargained-for seniority system is a per se bar to reassignment. *Barnett, supra* at n.9.
[10]*Id.*
[11]*Id.* at 1120
[12]*Barnett,* 122 S. Ct. at 1521.
[13]*Id.* at 1516.
[14]*Id.* at 1522-1524.
[15]Justice Breyer delivered the opinion of the Court. Justices Stevens and O'Connor filed concurring opinions. Justice Scalia filed a dissent that was joined by Justice Thomas. Justice Souter also filed a dissent that was joined by Justice Ginsburg.
[16]*Id.* at 1524.
[17]*Id.* at 1524.
[18]*Id.* at 1525.
[19]*Id.*
[20]301 F.3d 866 (7th Cir. 2002).
[21]The plaintiff was given a clerical position when the need for a light duty nurse abated. *Id.* at 868,871.
[22]*Id.* at 872.
[23]*Id.* at 872. (citing *U.S. Airways Inc. v. Barnett,* 122 S. Ct. 1516 (2002).
[24]296 F.3d 958 (10th Cir. 2002).
[25]*Id.* at 961.
[26]*Id.* at 963.
[27]*Id.* at 963-64.
[28]*2002* WL 32194730 (W.D. Pa. 2002).
[29]*Id.* at 1.
[30]*Id.* at 1.
[31]*Id.* at 2. In particular, the plaintiff wanted the tasks she was to perform equalized with other employees in the building and she did not want to clean laboratories, a task the plaintiff claimed would exacerbate her emotional condition.
[32]*Id.* at 16.
[33]*Id.*
[34]Apparently, the plaintiff had been stuck by a needle in a laboratory. This incident rendered her psychologically unable to clean laboratories.
[35]361 F.3d 633 (Fed. Cir. 2004).
[36]*Id.* at 633.
[37]*Id.* at 640.
[38]*Id.* The court noted that actual promotion was beyond the requirements of the ADA.
[39]*Id.* at 640-641.
[40]*Id.* at 642.
[41]218 F. Supp. 2d 1094 (S.D. Iowa 2002), *aff'd,* 339 F.3d 682 (8th cir. 2003). (Yes, this case too involves a back injury.)
[42]*Id.* at 1094, 1096.
[43]*Id.* This position was also adopted by the plaintiff's union, a co-defendant in the action.
[44]*Id.* at 1104-05.
[45]*Id.* at 1105 (drawing this conclusion from the holding in *Barnett* recognizing that lower courts have unanimously found collectively bargained seniority to trump the need for reasonable accommodation).
[46]*Id.* at 1106.
[47]The specifics of this argument are not contained in the published opinion, but can be gleaned from the parties appellate briefs, available on Westlaw.
[48]*Id.*
[49]*Id.*
[50]2002 WL 1932533 (D. Kan 2002).
[51]*Id.* at *1.
[52]*Id.* at *2.
[53]*Id.* at *3.
[54]*Id.* at 6.
[55]*Id.* at 7.
[56]See, Jared Hager, *Bowling for Certainty: Picking up the Seven-Ten Split by Pinning Down The Reasonableness of Reassignment after Barnett,* 87 Minn L.Rev. 2063 (2003); John E. Murray & Christopher Murray, *Engaging the Disabled: Reassignment and the ADA,* 83 Marq. L.Rev. 721 (2000). ■

TAX TREATMENT OF ATTORNEYS' FEES UNDER THE AMERICAN JOBS CREATION ACT OF 2004

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Attorneys' fees and costs typically constitute a significant portion of a judgment or settlement of an employment discrimination or similar employment claim. Who is responsible for paying the income tax on the attorneys' fees and costs? The attorney? The client? Both? Until recently, the answer to this question depended on the circuit in which the attorney and client were located. The American Jobs Creation Act of 2004 ("AJCA") now provides a uniform answer to this tax question for all judgments and settlements occurring after October 22, 2004 – the attorneys pay the income tax on attorneys' fees and costs, not the client.

"Double Taxation" by the IRS and Other Circuits

Prior to the enactment of the AJCA, the IRS and some circuits (not including the Sixth Circuit) subjected attorneys and their clients to "double taxation" by requiring them to include the portion of a settlement or judgment attributable to attorneys' fees in their adjusted gross incomes for federal income tax purposes. The Sixth Circuit, along with the Fifth and Eleventh Circuits, did not subject individuals to this "double taxation."

In those circuits in which the recovery of attorneys' fees was subject to "double taxation," attorneys' fees were deductible as an itemized deduction, but the deduction was often illusory because of the limitations placed on itemized deductions. Specifically, a taxpayer could only deduct attorneys' fees to the extent they exceeded 2% of adjusted gross income. Furthermore, the total amount of a taxpayer's itemized deductions was phased out as the taxpayer's adjusted gross income increased.

A successful employment discrimination plaintiff in a "double taxation" circuit never received the full benefit of the settlement or judgment. For example, a low income taxpayer who was successful in an employment discrimination suit, but who did not itemize deductions, was required to pay income tax on the portion of the judgment or settlement paid to his or her attorney. Conversely, the attorneys' fees paid by a successful high income employment discrimination plaintiff might not exceed the 2% of the taxpayer's adjusted gross income threshold. Even more problematic was the successful employment discrimination plaintiff who was subject to the alternative minimum tax, and thus, could not deduct attorneys' fees when calculating alternative minimum taxable income.

These "double taxation" problems have long hindered settlement negotiations and penalized successful employment discrimination plaintiffs. The AJCA eliminates these problems by uniformly abolishing the "double taxation" of attorneys' fees and costs recovered by settlement or judgment.

Uniform Tax Treatment under the AJCA

Under section 703 of the AJCA, only the attorney is responsible for paying income tax on the attorneys' fees recovered by way of settlement or judgment. In other words, a successful employment discrimination plaintiff is not required to include attorneys'

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fees and costs when reporting adjusted gross income for federal income tax purposes, so long as the settlement or judgment occurred after October 22, 2004. This tax relief applies to various discrimination statutes, including Title VI, ADEA, ADA and Michigan's Elliott-Larsen Civil Rights Act and Persons with Disabilities Civil Rights Act.[1]

Settlements and Judgments Occurring Prior to October 22, 2004

Although the AJCA does not apply to settlements and judgments that took place prior to October 22, 2004, there may be some tax relief on the horizon for those claims as well. The United States Supreme Court recently heard oral arguments on whether attorneys' fees recovered in a settlement agreement are subject to "double taxation." *See Commissioner of Internal Revenue v. Banks*, Case No. 03-892; *Commissioner of Internal Revenue v. Banaitis*, Case No. 03-907. The Supreme Court's decision in these cases could have a substantial impact on the taxability of attorneys' fees for settlements and judgments occurring prior to October 22, 2004.

Conclusion

Passage of the AJCA should be welcome news for both plaintiffs and employers. Successful plaintiffs will no longer be burdened by the "double taxation" of the portion of their judgments or settlements attributable to attorneys' fees and will be able to determine the after-tax value of their awards with more certainty. Although the new law does not directly benefit employers, it may help to moderate the costs of judgments and settlements paid by employers in employment discrimination cases and provide them with a new bargaining tool in settlement negotiations.

— END NOTES —

[1]The tax relief provisions of the AJCA apply to all of the following claims:

(1) Section 302 of the Civil Rights Act of 1991 (2 U.S.C. § 1202);

(2) Section 201, 202, 203, 204, 205, 206, or 207 of the Congressional Accountability Act of 1995 (2 U.S.C. §§ 1311, 1312, 1313, 1314, 1315, 1316, or 1317);

(3) The National Labor Relations Act (29 U.S.C. § 151, *et seq.*);

(4) The Fair Labor Standards Act of 1938 (29 U.S.C. § 201, *et seq.*);

(5) Section 4 or 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 623 or 633a);

(6) Section 501 or 504 of the Rehabilitation Act of 1973 (29 U.S.C. §§ 791 or 794);

(7) Section 510 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1140);

(8) Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681, *et seq.*);

(9) The Employee Polygraph Protection Act of 1988 (29 U.S.C. § 2001, *et seq.*);

(10) The Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2102, *et seq.*);

(11) Section 105 of the Family and Medical Leave Act of 1993 (29 U.S.C. § 2615);

(12) Chapter 43 of title 38, United States Code (relating to employment and reemployment rights of members of the uniformed services);

(13) Section 1977, 1979, or 1980 of the Revised Statutes (42 U.S.C. §§ 1981, 1983, or 1985);

(14) Section 703, 704, or 717 of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-2, 2000e-3, or 2000e-16);

(15) Section 804, 805, 806, 808, or 818 of the Fair Housing Act (42 U.S.C. §§ 3604, 3605, 3606, 3608, or 3617);

(16) Section 102, 202, 302, or 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12112, 12132, 12182, or 12203);

(17) Any provision of Federal law (popularly known as whistleblower protection provisions) prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted under Federal law; *and*

(18) Any provision of Federal, State, or local law, or common law claims permitted under Federal, State, or local law–

(i) providing for the enforcement of civil rights, or

(ii) regulating any aspect of the employment relationship, including claims for wages, compensation, or benefits, or prohibiting the discharge of an employee, the discrimination against an employee, or any other form of retaliation or reprisal against an employee for asserting rights or taking other actions permitted by law. ■

EMPLOYMENT LAW CASES BEFORE THE UNITED STATES SUPREME COURT

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The United States Supreme Court will decide several employment discrimination cases this term. Two of those cases are the subject of this article.

Age Discrimination – Disparate Impact

In *Smith v. City of Jackson, Mississippi*, 351 F.3d 183 (2003), *cert. granted,* 124 S. Ct. 1724 (2004), the court will decide whether a disparate impact theory of liability is available to plaintiffs suing for age discrimination under the Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C.A. §621 et seq. Plaintiffs, police officers and public safety dispatchers ("officers") over the age of forty, claimed injuries because of defendant's performance pay plan ("plan").[1]

The plan gave officers with five or fewer years of tenure proportionately greater raises than those with more than five years of tenure. Statistical data demonstrated that the average pay increases differed by age and older officers received smaller raises. Plaintiffs alleged that the plan resulted in pay increases to officers under forty that were four standard deviations higher than the raises received by officers over forty.

The court noted the split in the circuit courts regarding whether the ADEA, like Title VII,[2] allows disparate impact claims. Circuits that find disparate impact claims cognizable "do so based on the textual similarities between the prohibitory sections of the ADEA and Title VII." *Smith, supra,* at 187.[3] Circuits declining to hold a disparate impact theory cognizable recognize the textual similarities in the prohibitory sections of the two statutes, but look to the purposes behind the ADEA and Title VII, concluding that important differences exist that counsel against extending Title VII disparate impact theory to the ADEA.[4] Other circuits have expressed "considerable doubt" regarding whether age discrimination claims may be stated under a disparate impact theory.[5]

The court noted important textual and policy-based differences between the ADEA and Title VII. As for textual difference, an employer can avoid liability under the ADEA if the adverse employment action is "based on reasonable factors other than age." 29 U.S.C. 623(f)(1).

> Neither the "reasonable factors other than age" exception nor a parallel provision is found in Title VII. Facially, the exception appears to serve as a safe harbor for employers who can demonstrate that they based their employment action on a reasonable non-age factor, even if the decision leads to an age-disparate result. *Smith* at 189.

The court concluded that the exception implied congressional intent to remedy only intentional discrimination. "The addition of this broader exception to the ADEA, on its face, appears to preclude a disparate impact theory liability under the ADEA; at a minimum, it amounts to a salient textual difference between the substantive liability provisions of the ADEA and Title VII… ." Id. at 190. Interestingly, the court conceded that an alternate reading of the language was reasonable:

> As the dissent argues, the prohibitory section and the "reasonable factors other than age" clause could together be read as announcing a general rule that disparate impact is actionable but then carving out a defense for adverse impacts that can be justified by business necessity. The dissent's position is, of course, essentially how the courts have treated claims under Title VII. *Smith* at 191.

However, the court noted, it was bound by *Marshall v. Westinghouse Elec. Corp.*,[6] where the circuit had already held that the exception does not create an affirmative defense to liability, but instead allows defendant to offer evidence to negate the prima facie case.[7]

The policy considerations relied on by the court stemmed from its interpretation of the differing purposes behind the ADEA and Title VII. Citing the report provided to Congress by the Secretary of Labor ("Report"), which found "no evidence of prejudice based on dislike or intolerance of the older worker," the court concluded that the main problem faced by older workers was "arbitrary age discrimination—namely explicit age limitations—based on misconceptions about the abilities of older workers." *Smith* at 193. The court agreed with the First Circuit, which described the Report as "recommend[ing] that arbitrary discrimination be statutorily prohibited, but that systemic disadvantages incidentally inflicting older workers be addressed through educational programs and institutional restructuring."[8]

The court referred to the "refined purpose" of the ADEA and compared it to the "broad remedial purpose" of Title VII. Disparate impact is cognizable under Title VII because there is a link between "the history of educational discrimination on the basis of race and the use of that discrimination to continue to disadvantage individuals on the basis of their race." Id. at 195, citing *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), where the Supreme Court held that plaintiffs could bring disparate impact claims under Title VII ("good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs* at 432.)

Oral argument was held on November 3, 2004. Amicus briefs were filed on behalf of Smith by the American Association of Retired Persons and the American Association of University Professors, among others. The National League of Cities, Council of State Governments and Chamber of Commerce of the United States filed briefs in support of respondent.

Implied Cause of Action – Title IX

The other employment case to be heard is *Jackson v. Birmingham Bd. of Ed*., 309 F.3d 1333 (CA 11 2002), *cert. granted,* 124 S. Ct. 1724 (2004). The Supreme Court will decide whether the private cause of action under Title IX of the Education Amendments of 1972 encompasses a claim of retaliation for complaints about sex discrimination. Oral arguments were scheduled for November 30, 2004.

Practitioners who represent educational institutions, their students and employees are all too familiar with Title IX claims. While best known as a vehicle for seeking gender equity in sports and academic programs, a private cause of action has been implied, among other circumstances, on behalf of employees subjected to sex discrimination,[9] applicants rejected for admission,[10] students sexually harassed by a teacher,[11] and students sexually harassed by other students.[12] The Fifth Circuit has recognized Title IX claims on behalf of employees who are retaliated against because they have opposed sex discrimination against others.[13] Yet, the Eleventh Circuit rejected the retaliation claim of Roderick Jackson.

Mr. Jackson, a teacher since 1993, became the girls' basketball coach at Ensley High School in 1999. He soon began complaining to his supervisors about unequal funding and unequal access to facilities and equipment on behalf of female athletes. He alleged that, as a result of his complaints, he was relieved of his coaching duties in May 2001. The U.S. District Court in Alabama rejected his claim, finding no private cause of action for retaliation under Title IX. The Eleventh Circuit affirmed.

The opinion focused on a literal reading of the text of Title IX.[14] The Court found no direct or implied reference to a prohibition of retaliation. Moreover, the court observed that, even if Title IX were intended to remedy retaliation for complaints about gender discrimination, Mr. Jackson was not discriminated against because of *his* gender and thus was not a person protected by Title IX. As the court put it, Mr. Jackson's claim was "twice removed" from the plain language of the statute. The court had no trouble overruling longstanding administrative regulations as contrary to its reading of the plain language of the statute.

The Eleventh Circuit's reliance on a recent decision of the U.S. Supreme Court under Title VI[15] of the 1964 Civil Rights Act suggests the U.S. Supreme Court's decision in *Jackson* will have implications for other federal statutes that prohibit discrimination in federally assisted programs.[16] Title VI prohibits discrimination in federally assisted programs on the basis of race, religion, color and national origin, while Section 504 of the Rehabilitation Act of 1972[17] prohibits discrimination on the basis of disability. Like Title IX, these statutes appeal to plaintiffs' attorneys because they imply waiver of Eleventh Amendment immunity, require no exhaustion of administrative remedies, have a relatively long statute of limitations, and provide for damages for pain and suffering as well as attorneys fees.

Briefs filed on behalf of Jackson include those of the Solicitor General of the United States, the American Bar Association and the National Education Association. Briefs were filed on behalf of the employer by several states (including Alabama), the Association of School Boards, various coaches' organizations and several advocacy groups.

— END NOTES —

[1]Plaintiffs also alleged disparate treatment, but that claim will not be discussed here.

[2]Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. 2000(e) et seq.

[3]Cases where disparate impact claims were upheld include *Frank v. United Airlines, Inc.,* 216 F.3d 845 (CA 9 2000); *Criley v. Delta Air Lines, Inc.,* 119 F.3d 102 (CA 2 1997) ; *Smith v. City of Des Moines,* 99 F.3d 1466 (CA 8 1996).

[4]Cases declining to extend disparate impact theory to ADEA claims include *Adams v. Fla. Power Corp.,* 255 F.3d 1322 (CA 11 2001); *Maier v. Lucent Tech., Inc.,* 120 F.3d 730 (CA 7 1997); *Ellis v. United Airlines, Inc.,* 73 F.3d 999 (CA 10 1996). Those cases, in addition to noting the differing purposes behind the ADEA and Title VII, also note substantial similarities between the ADEA and the Equal Pay Act. See footnote 7.

[5]*Lyon v. Ohio Educ. Ass'n & Prof'ls Staff Union,* 53 F.3d 135 (CA 6 1995); *DiBiase v. SmithKlineBeecham Corp.,* 48 F.3d 719 (CA 3 1995).

[6]576 F.2d 588 (CA 5 1978).

[7]The court also noted that the Supreme Court, interpreting a similar exception in the Equal Pay Act 29 U.S.C. 206, ("any factor other than sex"), held that the exception precluded disparate impact actions under that act, *County of Washington v. Gunther,* 452 U.S. 161 (1981), which provides considerable insight into how the court will rule in *Smith.*

[8]*Mullin v. Raytheon Co.,* 164 F.3d 696, 703 (CA 1 1999).

[9]*North Haven Board of Education v. Bell*, 456 U.S. 512 (1981)

[10]*Cannon v. University of Chicago*, 441 U.S. 677 (1979)

[11]*Gebser v. Lago Vista School District*, 524 U.S. 24 (1998)

[12]*Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*,526 U.S. 629 (1999)

[13]*Lowery v. Texas A & M Univ. Sys*., 117 F. 3d 242 (CA 5 1997)

[14]Section 901 of Title IX states that: "no person shall *on the basis of sex*, be excluded from … or denied the benefits of or subjected to discrimination. under any education program or activity receiving federal financial assistance." 20 USC § 1681(a). It is enforced either by way of an administrative scheme that may include withdrawal of federal assistance or by way of a judicially implied private right of action.

[15]29 U.S.C. 2000(d)

[16]*Alexander v. Sandoval*, 532 U.S. 275 (2001)

[17]29 U.S.C. 794 ■

THE TRUTH ABOUT THE NEW FAIR LABOR STANDARDS ACT REGULATIONS: A VIEW FROM THE TRENCHES

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Butzel Long, P.C.

I. Introduction

The United States Department of Labor's (DOL) new regulations on the "white collar" overtime pay exemptions to the Fair Labor Standards Act (FLSA) went into effect August 23, 2004. The new regulations represent the most significant overhaul of the overtime wage system in more than fifty years. According to the DOL, the new regulations simplify and streamline the criteria for determining when employees are exempt from overtime pay under the FLSA. However, the new regulations have caused considerable political debate among Democrats and organized labor, on the one side, and Republicans and big business, on the other side. Now that the 2004 Presidential Election is over, it is clear that, regardless of one's political affiliation, the new regulations are here to stay. This article gives a brief overview of the new regulations, and discusses their impact on the American workforce.

II. Overview of Changes

The FLSA is the primary federal law controlling payment of wages. It requires employers to pay its employees overtime compensation for all hours worked over forty in a workweek. In most cases, this overtime equates to one and one-half times the employee's regular rate of pay.

Not all employees are covered by the FLSA, however. Most executive, administrative and professional employees, as well as outside sales employees, are exempt from the FLSA's overtime pay requirements. In order to be classified as exempt from the FLSA's overtime pay requirements, most employees must satisfy three tests: (1) a salary level test; (2) a salary basis test; and (3) a duties test. The new regulations address all three of these tests.

A. The Salary Level Test

Under the new regulations, the new salary level for most executive, administrative and professional employees to qualify for exempt status is $455.00 per week ($23,660.00 annualized). Thus, in order to be exempt from overtime eligibility, an employee must earn at least $455.00 per week. This is an increase from the old salary level, which ranged from $155.00 to $250.00 per week. Notably, this $455.00 floor is not pro-rated for part time employees. According to the DOL, nearly 1.3 million workers who were formerly exempt will lose their exempt status due to this change.

In addition, the DOL created a new "highly compensated" employee exemption. Under this exemption, executive, administrative and professional employees will be automatically exempt if they: (1) earn a total annual compensation of at least $100,000.00 per year or more; (2) earn at least $455.00 per week paid on a salary or fee basis; (3) perform office or non-manual work; and (4) customarily and regularly perform any one or more of the exempt duties identified in the duties tests for the executive, administrative or professional exemptions (detailed below). Thus, a salary of $100,000.00 or more serves as a virtual proxy for exempt status. The DOL estimates that approximately 107,000 employees who were non-exempt under the old regulations, but who earned $100,000.00 a year or more, will be exempt under this new test.

B. The Salary Basis Test

Under both the old and new regulations, most executive, administrative and professional employees must be paid on a salary basis in order to be exempt.[1] This means that an exempt employee who works any part of a week must be paid his or her full salary for that week, and the salary may not fluctuate based on the quality or quantity of work performed in a given week.

Both the old and new regulations have very limited exceptions to this rule – that is, they only permit a very narrow set of deductions from one's salary without jeopardizing one's exempt status.[2] However, the new regulations added an exception that will greatly benefit employers. Under the new rules, employers may dock an exempt employee's pay to implement an unpaid disciplinary suspension of one or more full days imposed in good faith for violations of workplace conduct rules. Under the old rules, employers could only implement unpaid disciplinary suspensions for violations of *safety rules of major significance*.[3] Thus, under the old rules employers could not give an exempt employee an unpaid suspension of a day or more (but less than a full week) for violations of the employer's harassment policy, drug or alcohol policy or other workplace conduct policies. Pursuant to the new regulations, employers can now give such a suspension to an exempt employee. Notably, such a suspension must be pursuant to a written policy applicable to all employees. This is a very significant change to the salary basis rule.

Another significant change is the implementation of the new "safe harbor" rule. Unlike the old rules, under this new "safe harbor" rule, if an employer, by mistake, makes an improper deduction to an exempt employee's pay, the mistake will not cause the employee to lose his or her exempt status. In order to take advantage of this new "safe harbor" rule the employer must: (1) have a clearly communicated policy prohibiting improper deductions, including a complaint mechanism; (2) reimburse employees for any improper deductions; and (3) make a good faith commitment to comply in the future. This is a very significant change for employers because it reduces liability for overtime back-pay due to an inadvertent mistake.

Further, the new regulations also limit the scope of an employer mistake, not covered by the new "safe harbor" rule. Thus, if an employer willfully violates the salary basis rule by continuing to make improper deductions after receiving complaints or failing to reimburse employees for such improper deductions, then the exemption will *only be lost during the applicable time period as to all employees in the same job classifications working for the same managers*. This limitation as to who loses their exemption is new and significant.

C. The Duties Tests

The last test an employee must satisfy in order to be deemed exempt is the duties test. There are separate duties tests for executive, administrative, professional and outside sales employees. Under the new regulations, there is also a separate duties test for computer-related employees.

1. Exempt Executive Employees

Under the new regulations, to qualify as an exempt executive employee, the employee must: (1) earn at least $455.00 per week on a salary basis; (2) have, as his or her primary duty, the man-

agement of either the enterprise in which the employee is employed, or a customarily recognized department or subdivision of the enterprise; (3) customarily and regularly direct the work of two or more other employees; and (4) have authority to hire or fire other employees or have particular weight given to suggestions and recommendations as to hiring, firing, advancement, promotion, or any other change of status of other employees.

This test is essentially the same as the test under the old regulations. The only significant change is the addition of hiring and firing to the fourth part of the test.

2. Exempt Administrative Employees

Under the new rules, to qualify as an exempt administrative employee, the employee must: (1) earn at least $455.00 per week on a salary (or fee) basis; (2) have, as his or her primary duty, the performance of office or non-manual work related to management or general business operations of the employer or the employer's customers; and (3) exercise discretion and independent judgment with respect to matters of significance.

Again, this test is essentially the same as the test under the old regulations. However, the new regulations have clarified what is meant by "discretion and independent judgment." A detailed discussion of this clarification and its impact can be found in section III below.

3. Exempt Professional Employees

Both the old and new regulations provide separate duties tests for learned professionals and creative professionals. However the new regulations also provide a separate duties test for computer and information technology professionals.

To qualify as an exempt learned professional, an employee must: (1) earn at least $455.00 per week on a salary or fee basis, unless the employee is a computer professional paid at least $27.63 per hour, or a doctor, lawyer or teacher; and (2) have, as his or her primary duty, the performance of work requiring advanced knowledge in a field of science or learning, customarily acquired by a prolonged course of specialized instruction. This is essentially the same as the old regulations. The new regulations do, however, provide clarification regarding the word "customarily," and the extent to which an employee can gain the requisite advanced knowledge through work experience.[4] In addition, the new regulations specify certain professions that will not be considered exempt professionals.[5]

To qualify as an exempt creative professional employee, the employee must: (1) earn at least $455.00 per week on a salary or fee basis; and (2) have, as his or her primary duty, the performance of work requiring invention, imagination, originality or talent; and (3) perform such work in a recognized field of artistic or creative endeavor such as music, writing, acting or graphic arts. This test is essentially the same as the old regulations.

As stated above, the new regulations created a stand-alone exemption for computer-related employees. Under the old regulations, employees working in computer and information technology were treated as exempt if they satisfied the salary and duties tests for the administrative or professional exemptions or performed high level computer-related functions and were paid $27.60 per hour. Under the new stand-alone exemption, to qualify as an exempt computer employee, the employee must: (1) be paid either on a salary or fee basis at least $455.00 per week, or on an hourly basis at least $27.63 per hour; (2) be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field; and (3) perform as his or her primary duty, any of the following:

(a) Application of systems analysis techniques and procedures including consulting with users to determine hardware, software or system functional applications;

"The latest shipment of new regulations is here."

(b) Design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specification;

(c) Design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(d) A combination of these duties, the performance of which requires the same level of skills.

4. Outside Sales Employees

Finally, to qualify as an outside sales employee under the new regulations, the employee must: (1) have as his or her primary duty the making of sales or obtaining of orders or contracts for services or the use of facilities for which a consideration will be paid by the client or customer; and (2) be customarily and regularly engaged away from the employer's place or places of business. This is essentially identical to the old regulations, except the new regulations have eliminated the 20% restriction on the employee performing non-exempt work not directly related to the sales activity.

III. Impact of the New Fair Labor Standards Act Regulations

On their face, the above-described regulations seem benign. However, they have caused a great amount of political debate regarding how they will impact the American workforce. Generally, Democrats and organized labor oppose the changes, and Republicans and big business support the changes.

A. Opponents' View

Democrats and organized labor argue that as many as 6 million workers could lose their overtime eligibility under the new regulations.[6] Along these same lines, the liberal Economic Policy Institute ("EPI") predicts that close to two million workers could be reclassified as exempt executives under the new regulations, and lose their right to overtime.[7] The EPI predicts similar results for learned or creative professionals, computer programmers, teachers and workers in the financial services industry.[8]

B. Supporters' Views

Republicans and big business point out that under the new salary threshold 1.3 million previously exempt low-wage earners could receive overtime. In addition, addressing the EPI's predictions regarding executives, the DOL points out that the "hiring and firing" addition to the duties test for exempt executives makes it more difficult to deny overtime compensation.[9] The EPI's other arguments regarding learned professionals are also disputed by the DOL, which states that "the final rule makes no change to the educational requirements for the learned professional exemption."[10]

(Continued on page 10)

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(Continued from page 9)

C. View from the Trenches

Despite this political mud-slinging, a clear result is emerging from the trenches. Attorneys who have conducted FLSA audits in response to the new regulations have found that, regardless of their political affiliations, the reality is that more employees are receiving overtime compensation under the new regulations.[11] The reasons for this result are both predictable and surprising.

The first reason for the outcome is predictable. Any employee who was previously exempt under the old regulations, but was paid a salary lower than $455.00 per week, is now non-exempt and entitled to overtime benefits under the new salary threshold. This is a simple, long-overdue, result of the new salary level threshold.

The second and more interesting reason more employees are receiving overtime under the new regulations is due to the hotly contested "discretion and independent judgment" qualification for exempt administrative employees. Many attorneys conducting audits have found that the new regulations' clarification of what constitutes "discretion and independent judgment" has resulted in previously exempt administrative personnel being reclassified as non-exempt. The new regulations state that the following factors should be considered when determining whether an employee exercises discretion and independent judgment:

1. Whether the employee has the authority to formulate, affect, interpret, or implement management policies or operating practices;
2. Whether the employee carries out major assignments in conducting the operations of the business;
3. Whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operations of a particular segment of the business;
4. Whether the employee has authority to commit the employer in matters that have significant financial impact;
5. Whether the employee has authority to waive or deviate from established policies and procedures without prior approval;
6. Whether the employee has authority to negotiate and bind the company on significant matters;
7. Whether the employee provides consultation or expert advice to management;
8. Whether the employee is involved in planning long or short term business objectives; and
9. Whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

Indeed, looking at this list of factors, fewer administrative personnel than previously thought have the requisite discretion and independent judgment to qualify for the exemption. Thus, many Human Resource Administrators are finding that previously exempt employees who perform office work related to the management of the company are, in reality, non-exempt. These employees simply do not have the ability "formulate policy", carry out "major assignments," conduct work that affects the business to a "substantial degree," bind the company or the like. Examples of some administrative employees who have been reclassified as non-exempt due to this clarification under the new regulations are: administrative assistants, customer support employees, computer help-desk employees, and telecom "engineers" or technicians.

A third reason that FLSA audits are resulting in more employees being entitled to overtime is the new regulations' specific clarifications regarding certain classes of employees. For example, paralegals are now categorically not exempt professionals unless they have some form of expertise.[12]

A fourth and somewhat startling reason more employees are being reclassified as non-exempt under the new regulations is that they were not properly classified in the first place. As predicted by the DOL, the new regulations have forced many employers to conduct audits of their workforces. In many instances these workforces have not been audited for many years, and therefore have not kept up with the case law and administrative opinions. Therefore, many attorneys and auditors are finding that employees were, and are, misclassified under both the old regulations and the new regulations. This result has occurred most often with misclassified "working supervisors." Indeed, many employers automatically assume that if an employee has the title "supervisor," he or she should be an exempt, salaried employee. This is a very dangerous assumption. Under both the old and new regulations, working supervisors are exempt only under certain conditions. The new regulations clarify this standard a bit. Generally, working supervisors who have some supervisory functions, but who also perform work that is clearly not of an executive nature, are not to be considered exempt if their primary duty consists of work generally performed by their subordinates or consists of repetitive and routine tasks. Starbucks, Waffle House and Einstein Brothers have been subject to large awards against them due to misclassifying working supervisors as exempt.[13]

IV. Conclusion

As stated in the introduction to this article, the DOL believes its new regulations clarify and simplify the criteria for determining who is exempt or non-exempt under the FLSA. In practice, this has been true. The dire predictions of masses of employees losing overtime eligibility have yet to come to fruition. To the contrary, thus far, it seems like the clarifications and the impetus to conduct audits, provided by the new regulations, have caused more employees to gain overtime eligibility than lose it. Only more audits and the inevitable waive of new litigation will prove if this result will remain.

— END NOTES —

[1]Doctors, lawyers, teachers, outside sales employees and certain computer-related professionals paid at least $27.63 per hour need not be paid on a salary basis in order to be deemed exempt. *See* CFR §§§ 541.600(c), (d), and (e).

[2]*See* CFR § 541.602(b) for a complete list of the exceptions.

[3]Employers were always allowed to suspend in full week increments because no work is performed in the week.

[4]*See* CFR § 541.301(d).

[5]*See* CFR § 541(e).

[6]*See Appropriations Committee Clears DOL Spending Bill For House Floor; Overtime Debate Continues,* Daily Lab. Rep. (BNA) (July 15, 2004).

[7]*See id.*

[8]*See id.*

[9]*See id.*

[10]*See id.*

[11]*See Sears Says No Employees Lose OT Eligibility*, HR.BLR.com (August 24, 2004), http://hr.blr.com/Article.cffm/Nav/5.0.0.0.30902.

[12]*See* CFR § 541.301 (e)(7).

[13]*See Shields v Starbucks Corp*; 79 DLR A-13, 4/24/02; *Cowan v Treetop Enterprises Inc*, MD Tenn, No 3:98-0623, 8/16/01; *Bagel Chain Agrees to Pay Almost $500,00 In Overtime to 427 Assistant Store Managers*, Daily Lab. Rep. (BNA) (September 30, 2002). ■

MIOSHA UPDATE

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New to *Lawnotes* are recent selected decisions involving the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.1001 *et seq.* A brief summary of four cases follow which were issued by Administrative Law Judges, the Board of Health and Safety Compliance and Appeals (Board), Circuit Court Judges and the Court of Appeals, respectively. All decisions issued by Administrative Law Judges or the Board can be reviewed on the Department of Labor & Economic Growth, Bureau of Hearings' website at www.cis.state.mi.us/ham/boh/pdf/sr_bhear.asp.

1. Appeals

Metro Industrial Contracting, Inc. v. Bureau of Safety and Regulation, 2003 Mich App Lexis 2692 (2003), *Iv den,* 470 Mich 858 (2004).

Under the MIOSHA Act, an employer who seeks to contest a citation must file two written notices of appeal prior to an administrative hearing. Failure to timely file either appeal is jurisdictional. The first appeal is filed with the Michigan Occupational Safety and Health Administration (formerly known as the Bureau of Safety and Regulation) and is due within 15 working days after receipt of the citations. The second appeal is filed with the Board and is also due within 15 working days after receipt of the Bureau's decision denying the employer's appeal. The issue in this case was whether the employer's statement in a telephone call that it wished to file a second appeal satisfied the requirements to perfect an appeal. Ultimately, the employer filed a written notice of second appeal but it was filed beyond the statutory deadline. An Administrative Law Judge ruled on October 19, 2000 that the employer's appeal was untimely and dismissed it. The Board reached the same result in a Final Order dated January 2, 2001. On appeal, the Ingham County Circuit Court reversed, finding that the oral notice to an employee of the Bureau was sufficient to meet the statutory requirements for the second appeal. The Court of Appeals in an unpublished opinion dated October 23, 2003 reversed, holding that the employer's appeal was untimely since it was not received in writing during the appropriate timeline. The Court held that the clear language of the Act and the administrative rules promulgated thereunder require that the notice of appeal be in writing.

"Safety first!"

2. Isolated Incidents/Employee Misconduct

Detroit Edison Company v. Bureau of Safety and Regulation, No. 2002-1513.

This matter involved an accident which occurred at the St. Clair Power Plant after a supervisor failed to close a grounding switch before putting a generator back on line. The Bureau of Safety and Regulation cited the employer for failing to inspect the work area prior to restoring energy to the equipment and failing to conduct a job briefing with the involved employees prior to starting the work assignment. The employer argued that the citation should have been vacated on the grounds that the actions of the supervisor were the result of unpreventible employee misconduct. This defense requires the employer to show that (1) it has established work safety rules and regulations designed to prevent the violation; (2) that it has communicated those safety rules to its employees; (3) it has taken steps to discover violations of the safety rules; and (4) it has effectively enforced the safety rules when violations have been disclosed by the employer. The Administrative Law Judge ruled that Detroit Edison had met its burden of proof as to the first citation involving the failure to inspect the work area prior to energizing the equipment. The ALJ found that the employer had satisfied all the elements of the employee misconduct defense. As to the second citation, the ALJ affirmed concluding that Detroit Edison did not satisfy the employee misconduct defense because it did not discipline the supervisor for failing to conduct a job briefing. Detroit Edison filed exceptions to the second part of the ALJ's decision with the Board. In July, 2004, the Board reversed that portion of the ALJ's decision concluding that Detroit Edison had satisfied all the elements of the employee misconduct defense on that matter. Accordingly, both citations were dismissed.

3. Hazard Assessments

United Parcel Service v. Department of Consumer & Industry Services, Bureau of Safety and Regulation, Ingham County Circuit Court No. 04-1141-AA.

On August 26, 2003, the Administrative Law Judge issued a decision upholding two identical citations issued to United Parcel Service (UPS). Under a General Industry Safety Standard, all employees are required to evaluate the "workplace" for the purpose of determining "if hazards that necessitate the use of personal protection equipment present." Michigan General Industry Safety Standard, Part 33, Rule 408.13308(1). UPS did not perform the hazard assessments at its Lansing and Romulus facilities. Instead, it performed hazard assessments at its main aircraft facility in Louisville, Kentucky and another facility in Des Moines, Iowa and claimed that the safety rule at issue permitted it to apply those assessments to its Michigan facilities. The ALJ disagreed holding that the plain language of the rule requires a hazard assessment at each separate workplace and is not satisfied by hazard assessments completed at out-of-state work places. On June 16, 2004, the Board issued an Order affirming the decision of the Administrative Law Judge. A Petition for Review is present pending in Ingham County Circuit Court.

4. Willful Violations

Bailey Excavation v. Department of Consumer & Industry Service, Ingham County Circuit Court No. 03-828-AA.

Does the Bureau of Safety and Regulation have the authority to increase the classification of a citation from serious to willful serious based solely on the employer's history of repeatedly violating the same safety standard? In this appeal, the Bureau of Safety and Regulation, Construction Safety Division issued a citation to Bailey Excavation for violating a trenching rule because it filed to maintain the proper angle of repose within an excavation. Because the employer had been cited one month earlier for the same rule infraction and because it had been cited on five prior occasions in Michigan for the same rule violations, the Bureau issued a willful serious violation. On January 29, 2003, the Administrative Law Judge upheld the citation concluding that this history of violations demonstrated an intentional reckless disregard for the safety rule. The Board affirmed the ALJ's decision on April 14, 2003. On appeal, the Ingham County Circuit Court also affirmed. The court held that there was more than enough evidence to uphold the willful serious citation. ■

EASTERN DISTRICT UPDATE

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"High Bar" For Proving Sexual Harassment

The plaintiff in *Berkeihiser v. Allen Chevrolet Cadillac, Inc.,* 2004 WL 1689753 (E.D. Mich.), alleged that, in the 12 days she worked for the defendant, co-workers exposed her to graphic internet pornography, such as an image of a "brutal rape scene," and offensive comments, such as "what kind of perfume are you wearing," "I want to eat you," "I'm gonna spank you," "I bet you can be a real screamer during sex" and requests that she "show a little leg." Noting that courts have "raised a high bar" for proving sexual harassment, Judge Feikens granted summary judgment for the employer because such evidence did not reveal "extremely serious" conduct that "permeate[d] the entire work environment." Alternatively, after noting that the plaintiff was a part-time "exotic dancer" with a history of leaving jobs quickly, Judge Feikens concluded that a reasonable person could not conclude that the plaintiff subjectively felt harassed. She had participated in discussions about the sexual appeal of previous female employees and reacted to the internet pornography by suggesting that they access a "readhead fan club."

Effects of Medication Can Be Disabling

The plaintiff in *Rosteutcher v. MidMichigan Physicians Group,* 332 F.Supp.2d 1049 (E.D. Mich.), raised a triable question whether her depression, migraine headaches and periodic seizures substantially affected major life activities. The powerful narcotic she takes for her headaches renders her unable to do anything but sleep; her seizures cause her to lose consciousness and/or negatively affect her ability to see, hear, communicate and work; and her depression medication produces disabling side-effects. Judge Lawson granted summary judgment for the employer, however, because the plaintiff failed to disprove her employer's claim that the adverse employment decision was motivated by the availability of more qualified candidates.

Actual Experience Might Prove Job Duties "Non-Essential"

Relying on Sixth Circuit precedent, Judge Feikens ruled in *Pernak v. Ashland, Inc.,* 330 F. Supp.2d 890 (E.D. Mich. 2004), that the *employer* carries the burden of proving a job function is "essential" under the Michigan PWDCRA. The opinion did not reference the Michigan Supreme Court's recent decision in *Peden v. City of Detroit,* 470 Mich. 195 (2004), which rejected Sixth Circuit precedent and held that the employer's judgment regarding whether a particular job duty is "essential" is given "substantial deference," which employees bear the burden of overcoming. Judge Feikens found material issues of fact regarding whether the employer could carry its burden because the employer had (1) previously accommodated the plaintiff's disabilities; (2) certified the plaintiff as "qualified" to perform the position, despite knowing he could not perform each "required" task, (3) promoted the plaintiff, (4) retained the plaintiff for approximately five years, despite knowing he could not perform every job function, and (5) given the plaintiff positive performance reviews. "This suggests that the challenged functions, as a practical matter, may have been 'non-essential' to the Assistant Manager position."

Mitigation Might Require Reapplication

Although victims of invidious discrimination are generally not required to reapply to the offending employer as a means of mitigating damages, Judge Taylor ruled in *Grace v. City of Detroit,* ___ F.Supp.2d. ___; 2004 WL 2377261 (E.D. Mich.), that a reapplication requirement is not unreasonable where the discrimination was based on an unconstitutional residency requirement, not "an inherently personal trait such as race or religion...." Prospective police officers who did not apply due to the City's unconstitutional preemployment residency requirement were therefore unable to seek damages beyond the date the department issued a letter inviting them to take the police department examination. For class members who were not actually or constructively aware before filing suit that they were being given an opportunity to reapply, damages would be cut on the date the lawsuit was filed. Class members knew by then that the preemployment residency requirement had been eliminated and that they could apply for positions with the City.

Union Acted Reasonably In Temporarily Withdrawing Grievance

In *Fowler v. United Auto Workers,* 2004 WL 2237708 (E.D. Mich.), Judge O'Meara refused to hold a union liable for wages the plaintiff lost between the local union's initial decision to withdraw his grievance and the plaintiff's eventual reinstatement. It was not unreasonable to withdraw the grievance, given the member's poor attendance record, "relatively low seniority," and the plausibility of the employer's position that at least one of the plaintiff's two recent absences violated the governing attendance policy. "Although the grievance was later reinstated and Plaintiff ultimately prevailed, that is not dispositive."

Plaintiff's Evidence Supported Summary Judgment

The *in propria persona* plaintiff in *Davis v. Eastern Michigan University*, 2004 WL 2283553 (E.D. Mich.), supported her employer's summary judgment motion by proffering her own poor performance reviews and evidence that she failed to return from leave. Judge Fiekens ruled that such evidence counteracted her race discrimination and retaliation claims because it "tends to show that Plaintiff was not qualified and was actually a substandard employee." ■

KELMAN'S CARTOON

"You're an acknowledged expert on justice. Tell the jury who you think should win this case."

WESTERN DISTRICT UPDATE

John T. Below and Heather G. Ptasznik
Kotz, Sangster, Wysocki and Berg, P.C.

COURT SUBMITS ISSUE REGARDING VIOLATION OF TEMPORARY RESTRAINING ORDER TO ARBITRATION IN ACCORDANCE WITH THE PARTIES' WRITTEN AGREEMENT

Lincoln National Life Insurance Co. and Lincoln Financial Advisors Corp. al v Ellis, et al. (NO. 1:04-cv-251), Enslen, J. Plaintiffs brought suit for fraud, breach of fiduciary duty, conversion, breach of contract and tortious interference with contract against its contractual agent. The Court issued a temporary restraining order (TRO) and the parties consented to a preliminary injunction. Defendant filed a Motion to Dismiss and Compel Arbitration pursuant to the parties' agreement. Plaintiffs filed a Motion for Entry of Order to Show Cause, Sanctions and Entry of Default Judgment when Plaintiff violated the TRO. At issue was whether the District Court could rule on Plaintiff's Motion prior to compelling arbitration.

The District Court held (1) the parties' dispute should be resolved by arbitration because doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration and there is a liberal federal policy in favor of arbitration agreement; (2) there was no immediate threat which could be averted by having the Court rule on Plaintiff's motion regarding spoliation of evidence and violation of the TRO prior to compelling arbitration; and (3) the relief sought by Plaintiffs would not merely preserve the status quo pending arbitration. As such, the District Court ordered the matter to arbitration. ■

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, Klass, Legghio & Israel, P.C., Suite 600, 306 South Washington, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@martensice.com.

MICHIGAN SUPREME COURT UPDATE

Aaron Leal
Varnum, Riddering, Schmidt & Howlett, LLP

Cases from June 1, 2004-July 30, 2004

Lind v. City of Battle Creek, 468 Mich 869 (2004).

A plaintiff attempting to establish a prima facie case of reverse racial discrimination under the Michigan Civil Rights Act, MCL 37.2202(1)(a), does not have to prove "background circumstances," as required by *Allen v. Comprehensive Health Services,* 222 Mich App 426 (1997). In this case, plaintiff, a white police officer, claimed reverse discrimination against his employer, the City of Battle Creek, when a black officer was promoted to police sergeant instead of him. The Court of Appeals relied on *Allen,* which held that a majority plaintiff, when establishing a prima facie reverse discrimination claim, must additionally present background circumstances to support a suspicion that defendant is the unusual employer who discriminates against the majority. The Supreme Court overruled *Allen* in a 5-2 vote, holding that *Allen* is contrary to the language of the MCL 37.2202(1)(a), which does not draw a distinction between plaintiffs on account of race. The Supreme Court reversed the judgment of the Court of Appeals and remanded the case to the circuit court for further proceedings consistent with their holding in this opinion.

Corley v. Detroit Board of Education, 470 Mich 274 (2004).

In this case, plaintiff alleged a hostile work environment and an adverse employment action as a consequence of having a prior romantic relationship with her supervisor. Their relationship ended when plaintiff's supervisor began dating another employee. Both supervisor and co-employee were named as defendants. At issue was whether plaintiff had been subjected to "conduct or communication of a sexual nature," the third element of MCL 37.2103(i). Plaintiff claimed that her supervisor repeatedly warned her not to interfere with his new relationship and threatened plaintiff with consequences if she did. Further, plaintiff alleged her co-employee engaged in "catty" conversations about plaintiff and caused plaintiff's work station to be relocated. However, the Supreme Court found that the supervisor's threats were not inherently sexual in nature, and therefore could not constitute sexual harassment. In addition, the defendant co-employee's conduct or communication was not sexual in nature, but instead was nothing more than the co-employee's personal animosity towards plaintiff. The Court noted that MCL 37.2103(i) does not forbid the "communication of enmity between romantic rivals." The Supreme Court reversed the decision of the Court of Appeals with respect to plaintiff's sexual harassment claims and reinstated the circuit court's order granting summary disposition for defendants.

Pedan v. City of Detroit, 470 Mich 195 (2004).

In *Pedan v. City of Detroit,* the Supreme Court held that plaintiff did not have a disability discrimination claim under the American with Disabilities Act (ADA), 42 USC 12101, et seq or the Michigan Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.101 et seq, because he could not perform the essential functions of a police officer as defined by the City of Detroit due to his heart condition. Plaintiff, a former Detroit police officer, suffered a heart attack in 1986. He returned to work

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MICHIGAN SUPREME COURT UPDATE

(Continued from page 13)

on indefinite restricted duty. He performed clerical duties for about 10 years. In 1995, the Detroit Police Department (Department) implemented a list of Essential Job Functions for all city police officers. Included in this list were such tasks as pursuing suspects on foot chases, engaging in vehicle pursuits, effecting forcible arrests and overcoming violent resistance. Since plaintiff, due to his heart condition, could not perform these tasks, the Department placed plaintiff on involuntary, non-duty, disability retirement. Plaintiff sued the Department alleging it violated the ADA and the PWDCRA because the Essential Job Functions tasks were not essential to his job duties, which were basically clerical.

Under both the ADA and the PWDCRA, a plaintiff must show that he is a "qualified person with a disability" as part of his prima facie case. Put another way, a plaintiff must show that he is capable of performing the "essential functions" of his position. The Supreme Court broke this down into the following two issues: (1) whether the Department properly characterized the essential functions or duties of a police officer position under the ADA and the PWDCRA; and (2) whether plaintiff, who suffers from a permanent heart conditions, has presented prima facie evidence that he is able to perform the essential functions of his position.

With respect to the first issue, the Supreme Court concluded the plaintiff failed to prove that the Department's Essential Job Functions were not essential to his position. In analyzing plaintiff's ADA claim, the Court referred to the Equal Opportunity Employment Commission (EEOC) regulations for a list of relevant factors for use in determining whether the job functions are essential. These factors weighed against the plaintiff and in favor of the Department. As for plaintiff's PWDCRA claim, the Court held that the Department's definition of a police officer's job duties is entitled to substantial deference. Plaintiff did not present sufficient evidence to overcome this deference.

As to the second issue, the Court held that the plaintiff did not meet his burden of raising a genuine issue of material fact regarding whether he could perform the Department's Essential Job Functions. On the contrary, the evidence showed that plaintiff suffered a heart attack, was diagnosed with heart disease, was confined to light duty, and spent the majority of his career as a desk clerk. In addition, plaintiff's own counsel admitted to the trial court that plaintiff was unable to perform many of the tasks within the Essential Job Functions list. Therefore, the Court reversed the decision of the Court of Appeals on both issues and reinstated the circuit court's grant of summary disposition in favor of defendant.

Gilbert v. DaimlerChrysler Corporation, 470 Mich 749 (2004).

In an appeal involving the largest recorded compensatory award for a single-plaintiff sexual harassment suit in the history of the United States, the Michigan Supreme Court, in a 4-3 decision, held that the case should be remanded for a new trial due to plaintiff's counsel's deliberate and repeated efforts to divert the jury's attention from the facts and the law, and instead plaintiff's counsel "sought to inflame passion and to incite the jury to punish the defendant even while disclaiming that he was seeking punitive damages." Examples of plaintiff's counsel's conduct cited by the Court included: (1) analogizing plaintiff as a Holocaust survivor and DaimlerChrysler, a company partially under German ownership, with the Nazis; (2) attempting to convince the jury that DaimlerChrysler had physically injured plaintiff, where there was no evidence of physical injury in the record; (3) playing on the prejudice against corporations by arguing that DaimlerChrysler thought it did not have to obey law due to its corporate status; and (4) repeatedly using language calling for punitive rather than compensatory language.

Also, the Supreme Court clarified a trial court's gatekeeping role required by MRE 702 as a result of the controversy surrounding the expert testimony of a social worker. Plaintiff's expert, a social worker, was allowed to interpret plaintiff's medical records and render an opinion that required medical expertise. The social worker's opinion was used to support plaintiff's theory at trial that the sexual harassment she encountered as an employee had produced a permanent change in her "brain chemistry," which change led to an increase in substance abuse and that, in the end, DaimlerChrysler's failure to curb sexual harassment at her plant would cause plaintiff to die the most painful death imaginable. This opinion became the "linchpin of plaintiff's case and unmistakably affected the verdict." The Court concluded the social worker was unqualified to interpret plaintiff's medical records and to give medical opinions. There was no evidence in the record that the social worker was qualified by training, experience, or knowledge as required by MRE 702. In addition, the Court rejected the Court of Appeals argument that the social workers' lack of expertise or experience merely related to the weight, and not the admissibility, of his testimony. The proffered expert testimony was simply far beyond the scope of the social worker's expertise.

Finally, the Supreme Court addressed the defendant's appeal regarding the trial court's denial of a motion in limine to exclude incidents that plaintiff reported for the first time at her deposition. The Court upheld the trial court's ruling, stating that such evidence may be admissible under two rationales. "First, such evidence may be admissible in order to establish the nature and extent of the hostile environment to which plaintiff was subjected and the adequacy of defendant's response upon being notified about sexual harassment. Second, that evidence may be admissible under a 'constructive notice' theory when a plaintiff contends that sexual harassment was so pervasive that her employer should have known of the need for corrective measures." Any incidents the plaintiff reported for the first time during her deposition were admissible under the first rationale. ■

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, Klass, Legghio & Israel, P.C., 306 South Washington, Suite 600, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@martensice.com.

MERC UPDATE

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

Since the previous issue of *Lawnotes,* the Michigan Employment Relations Commission has issued 19 Decisions and Orders in a variety of cases. A brief summary of 5 of those cases follows. Of the 19 cases, 10 were unfair labor practice hearings, 3 were representation and/or unit clarification hearings, and 6 were duty of fair representation/unfair labor practice hearings. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/cis.

UNFAIR LABOR PRACTICES.

City of Troy

Case No. C03 G-165 (September 28, 2004).

The Administrative Law Judge issued his Decision and Recommended Order granting Respondent's Motion for Summary Disposition. Charging Party labor organization filed a charge alleging that the Employer violated the duty to bargain in good faith when it unilaterally changed a practice regarding the assignment of overtime. The ALJ dismissed the charge, finding that a unilateral reduction in overtime hours was not a mandatory subject of bargaining.

On Exception, Charging Party sought to distinguish between the assignment of overtime and the protocols associated with overtime. The Commission found that the legal status of a practice affecting employees covered by a collective bargaining agreement cannot be determined without reference to the agreement and evidence regarding the history of the practice. Therefore, the charge was remanded for further development of the record.

Grand Rapids Public Museum

Case No. C01 L-242 (September 10, 2004).

The ALJ issued his Decision and Recommended Order finding that Respondent public employer committed an unfair labor practice by engaging in bad faith bargaining with Charging Party. On exception, Respondent argued that its course of conduct during bargaining amounted to hard bargaining rather than a violation of the duty to bargain. In a 2 to 1 decision, the Commission reversed the ALJ and dismissed the charges.

In August 1999, the parties began bargaining their first contract. Between August 1999 and May 2000, the parties met and bargained 10 times and engaged in mediation. Two major issues in dispute were agency shop and seniority.

After mediation was unsuccessful, the Union filed for factfinding. After the factfinder issued a report, the Union expressed to the Employer its willingness to accept the report and meet to reach agreement. The Employer agreed to meet but noted after the events of September 11, 2002, its circumstances had changed, and it was now facing a projected budget deficit. The parties met, and the Employer maintained its position on most issues including agency shop and seniority, but did offer some concessions. The charge alleged that the Employer did not engage in the factfinding process in good faith, refused to consider the recommendations of the factfinder, and engaged in impermissible surface bargaining.

The Commission noted it its Decision that it was mindful of Section 15 which states that agreement or concessions cannot be compelled. To determine whether a party has bargained in good faith, the Commission examines the totality of the circumstances to determine whether a party has approached the bargaining process with an open mind and a sincere desire to reach agreement.

In finding that the Employer engaged in surface bargaining, the ALJ found that the Employer did not use the factfinder's recommendations to reach agreement or meet the Union part way. The Commission disagreed, noting that a factfinder's report provides a basis for further bargaining; however, it is not binding and there is no obligation for either party to accept it. After examining the bargaining process as a whole, the Commission failed to find any conduct by the Employer that demonstrated unwillingness to meet and bargain in good faith. The Employer's reasons for its particular positions were not so illogical as to warrant an inference that it intended to frustrate the bargaining process.

In dissent, Commissioner Green noted that the testimony regarding a projected budget deficit after September 11, 2001, was "no more than speculation." He found that the Employer evidenced an intent to avoid reaching agreement, and would have imposed the remedy recommended by the ALJ.

UNIT CLARIFICATIONS/REPRESENTATION.

City of Grand Rapids Police Department

Case No. R03 H-114 (September 9, 2004).

The Command Officers Association of Michigan filed a Petition seeking to represent a bargaining unit of sergeants employed by the City of Grand Rapids in its Police Department. The sergeants were currently part of a bargaining unit of nonsupervisory officers represented by the Grand Rapids Police Officers Labor Council (GRPPLC) and had been part of that unit since 1968. The Petitioner maintained that the sergeants were supervisory as defined by the Commission.

The record demonstrated that sergeants oversaw the work of their subordinates, made assignments, provided their subordinates with assistance and advice, and monitored their performance. The sergeants also prepared written evaluations of their subordinates that were used to determine eligibility for wage increases and to identify employees performing below standards. The sergeants had no authority to discharge employees or issue formal discipline. Sergeants could issue written counseling. The sergeants also had no role in hiring. They had limited authority regarding time off but could not authorize overtime.

The Commission first noted its policy of refusing to disturb established bargaining relationships unless the unit violates some broader policy of the Commission or the petitioner establishes some extreme divergence in community of interest. Since law enforcement departments are organized along paramilitary lines, determination of supervisory status has been made on a case by case basis.

In this case, the Commission found that the sergeants' authority was insufficient to make them supervisors. While responsibility for preparing written evaluations is often an indication of this authority, in this case the sergeants' lieutenants also independently evaluated the subordinates. In this case, the fact that sergeants evaluated their subordinates was not determinative.

The Commission also noted that an individual who is "in charge of" a group of employees is generally not found to be a supervisor unless he or she issues or effectively recommends discipline. In this case, the sergeants had no such authority. The Commission also noted that the sergeants had been part of the GRPOLC

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MERC UPDATE

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bargaining unit since 1968. Bargaining history is an important factor to be considered, even in the context of possible supervisory status, and the Commission refused to needlessly alter a bargaining unit with an extensive bargaining history. Therefore, the Petition was dismissed.

Hastings Area School District

Case No. R02 E-066 (September 9, 2004).

Petitioner filed a representation petition seeking to accrete all full-time and part-time B-4 Michigan School Readiness Program teachers to its unit of professionally certified teaching personnel. The Employer contended that the Petition inappropriately sought to carve out the B-4 teacher from an appropriate residual unit of Adult and Community Education teachers.

The B-4 preschool program had been a part of the Adult and Community Education Program since its inception. The program was designed for four year old students determined to be at risk. The B-4 teacher must be a certified teacher with an early childhood endorsement. The B-4 teacher had informal coordination with the K-12 program. The wages, hours, and terms and conditions of employment between the B-4 teacher and the K-12 teachers were similar.

The Adult and Community Education Program included programs such as a GED program, a tutoring program, and leisure and enrichment classes. The enrichment courses offered were determined by community demand and varied from year to year. The tutors were scheduled based on need. These teachers were generally paid on an hourly basis and did not receive insurance or other benefits. The teachers were also not necessarily certified.

The Commission noted that any litigated residual unit must include all unrepresented employees with a community of interest. The question the Commission posed was whether the other teachers in the Adult and Community Education Program shared a community of interest with the B-4 teacher and the members of the Petitioner's bargaining unit. The Commission has held that teachers of leisure and enrichment classes share a community of interest with K-12 teachers even if they are not certified.

Since the Commission found a community of interest, the next issue was whether these other Adult and Community Education teachers were casual and without a reasonable expectation of continued employment. All of the teachers in the Adult and Community Education Program with the exception of the B-4 teacher were employed on a part-time basis. In determining whether the Adult and Community Education teachers were casual, the Commission held that if a class is offered for four or more hours per week on a continuing weekly basis throughout the semester, the teacher could be said to have an interest in continued employment. The Commission found that this broader unit would be appropriate and directed an election after employees with an interest in continued employment were identified.

DUTY OF FAIR REPRESENTATION/UNFAIR LABOR PRACTICE.

Washtenaw Community Mental Health

Case Nos. C03 C061 and CU03 C-017 (August 6, 2004).

The ALJ issued his Decision and Recommended Order dismissing individual Charging Party's unfair labor practice against his employer and labor organization. In the Decision, the ALJ found that Charging Party failed to file his charges against Respondents within the six month statute of limitations period.

Under Section 16 of PERA, a charge must be filed with the Commission within six months of the date the claim accrued. A claim accrues when the charging party knows or should have known of the alleged violation. In this case, the ALJ found that because the charge was filed more than six months after Charging Party first brought its complaints to the Union's attention, it was untimely. The Commission agreed with the ALJ that the charge was untimely. However, the Commission applied a different standard with respect to when the statute of limitations began to run.

The Commission held that in cases where there is an allegation of union inactivity, the Statute of limitations begins to run when the charging party should have reasonably realized that the union would not act on his behalf. Looking at each of Charging Party's allegations, the Commission found that the allegations were more than six months beyond when Charging Party should have reasonably realized that the Union would not act on his behalf. Therefore, the charges were dismissed in their entirety. ■

LETTERS TO *LAWNOTES*

from Judge Avern Cohn:

Jeffrey S. Kopp's discussion of the Michigan Supreme Court's decision in *Lind v. City of Battle Creek,* 470 Mich. 230 (2004), requires comment. Your readers may find of interest what I told the *Detroit Free Press* in a letter-to-the-editor about this decision in June 2004.

> First, the majority decision did not take the trouble to explain why it takes a different view of the proofs necessary to establish reverse discrimination than do federal courts in like circumstances.
>
> What the federal courts say is that it takes more to establish discrimination against a member of the majority class (white) than it does against a member of the minority class (black) "because it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society." There is an adage that we should not deny as judges what we know as men. Courtesy, if nothing more, required a fuller explanation than was given for the divergence from federal precedents under the same rule of law.
>
> Second, comment could have been made on the incivility of the concurring opinion, which characterized the dissenter's view of the law as "Orwellian racial policy preferences." This displays disrespect not only to the dissenters but also to federal judges who follow the precedents calling for a higher standard of proof in reverse discrimination cases.

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

From time to time in my arbitration practice someone will ask me for what one lawyer called a Writ of Rachmones (Yiddish for "compassion" or "pity"). Yes, he admitted, the contract says what it says and the facts are what they are, and both of them are very bad for us. But the result is so *harsh*. Surely you will have pity and not rule against my guy.

Like all arbitrators, I struggle with these decisions. I know my rulings have severe consequences for real people. But the success of labor arbitration is not based on mercy. It is based on respect for the contract negotiated by the parties.

The problem comes up, for example, with zero tolerance drug policies – the ones that require dismissal for a first offense. I don't personally believe in zero tolerance drug policies. I think they are simplistic and misguided. But if there is a clear zero tolerance drug policy in a collective bargaining agreement and the grievant violated it, I'm going to sustain that discharge.

I'm assuming there are no fatal procedural defects and my efforts to get the parties to settle have failed. And I'm not talking about the simple case where the employer failed to consider the grievant's many years of faithful service in assessing a penalty. I'm talking about a case where the contract calls for a result I think is stupid or cruel or both. And the point is: too bad for me.

It's a matter of respect. If the parties bargained for a harsh result, they are entitled to get one. Another way to say the same thing is say, as lawyers often do: The parties should not get in arbitration what they were not able to get at the negotiating table.

You wouldn't want it otherwise. You do not want me to make decisions based on my judgment of "general considerations of fairness and equity." You want me to make judgments based on the contract negotiated by the parties.

Why? To paraphrase a great Michigan philosopher, there are two things that happen when an arbitrator bases his opinion on the language of the contract, and both of them are good. Everyone knows what the contract means and everyone knows what they have to do to change it.

When an arbitrator applies his own brand of industrial justice and starts issuing Writs of Rachmones, no one has any way of knowing anything.

VIEW FROM THE CHAIR

James M. Moore, ***Chair***
Labor and Employment Law Section

VALUE IN THE WORKPLACE

The practice of labor and employment law has much to commend it. High on the list are the opportunities to learn more about work, surely one of the cornerstones of our society. To be sure, the education of a labor or employment lawyer in various occupations can sometimes be superficial. But I have found fascinating the chance to get a glimpse into such activities as the processing of sugar beets, the mysteries of security in the nuclear power industry, the manufacture of engine blocks in a foundry and the challenges and frustrations of fire fighting and law enforcement. More than the jobs, themselves however, I have come to appreciate, I hope, the people who perform these many tasks and to value all they contribute to not only the economy but to the community. And it troubles me that these contributions are being increasingly devalued.

Whether it is a good thing or not, people are often defined or define themselves by the work they do. It seems, then, that understanding work—whether it's delivering beer or teaching children—is important and valuing the people who do the work is more important still.

One of the persistent annoyances of representing workers is the proclivity of some to belittle or underestimate the intelligence, commitment, wisdom and that most uncommon quality—common sense—of workers. The declining recognition of workers flows, in part, from an increasing tendency of many to see workers as fungible and a diminished part of what an old Marxist would label the tools of production—materials (raw and otherwise), machinery/technology and labor (in current parlance human "resources"). Parenthetically, employers have become fond of artificially inflating job titles, ostensibly as a form of positive recognition of employees. Marketing, however, seems the more likely motive. A former Chief of Police in Detroit changed the names of two basic field commands on the department's organizational chart—Eastern and Western Operations—to Customer Service Zones East and West. He's gone now, so we'll never know if he was planning to re-label Police Officers as Customer Service Representatives. I spent a summer collecting garbage in the alleys of an aging suburb. I was a garbage collector. Calling me a sanitation technician or a waste management associate would not have made the work easier or more fragrant.

There have been periodic dissents from the view of the world that workers are devalued but the emergence of an outfit like Wal-Mart, which combines the highly efficient use of technologies (including the silent and extensive collection of customer information) with low labor costs, points in the other direction, its warm and fuzzy ads notwithstanding. The Wal-Mart model may be great for prices and shareholder value but relegates Wal-Mart's workers to a declining share of the prosperity they help generate. I don't have to agree with Charles Wilson's view that what's good for General Motors is good for America to be more than occasionally nostalgic for the corporate model that included high-paying jobs as part of its successful business plan.

The mantra that all enterprises, notably public sector employers, should operate "like a business," begs the question—what kind of business? Wal-Mart? Lincoln Savings? Enron? WorldCom? More to the point, a business that devalues labor in order to improve shareholder value and not incidentally to expand executive and board room compensation may be making a pact with the devil. And it certainly is giving short shrift to a core ingredient of any worthwhile enterprise—its employees.

I am aware that we live in a global economy. But I do not see many of the economic and societal challenges we face being solved by driving workers into lower paying jobs where hard work, loyalty and longevity are not valued much less rewarded and enterprise costs are increasingly shifted to workers. Two prominent examples are the shifting of health care costs to employees (as if that will reduce injuries or illnesses) and the replacement of defined benefit pension plans with defined contribution plans—or, more likely, no retirement plan at all.

The conventional excuse for these and other changes is "the market." As is usually the case, a simple answer to a complicated question is a wrong answer. The market is not all knowing and does not exist in a vacuum. Unfettered market forces can lead to bad results—witness the recent shortage of influenza vaccine because "market forces" supposedly persuaded most drug companies to abandon this line of business in favor of more profitable undertakings. Thousands of vulnerable and faceless victims of these market forces are the result. And, of course, markets can be manipulated. The growing controversy over the millions spent to advertise prescription drugs that has the effect of creating a dubiously legitimate demand for some drugs is a recent example.

Back in the workplace, employees toil as their contributions are recognized less. Here is where I should insert my polemic on the value of labor unions as a force to help workers find a more level playing field with all the bottom-line driven enterprises. But I will leave that to others or a later date. What I am endorsing today is a more modest suggestion that we labor and employment lawyers not lose sight of the central importance of workers to the success of any enterprise and the human relations that are an integral part of that activity. Moreover, perhaps especially in a traditional labor law context, human relationships are usually on going. The resolution of disputes arising in the workplace should not ignore the reality that when the immediate fight is over, the workplace has to keep functioning, usually with the same people, and hopefully with the common goal to maximize the enterprise without diminishing the central means of production—employees.

The people are the most important element in a nation; the spirits of the land and grain are next; the sovereign is the least. – Mencius

USING HYPOTHETICAL EXAMPLES TO PREPARE WITNESSES FOR CROSS-EXAMINATION

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

As all good lawyers know, there are 162 essential rules which must be mastered by prospective witnesses before they submit themselves to the relentless engine of cross-examination.[1]

"The unprepared witness."

For some reason, many witnesses-to-be are unwilling (or, if truth be told, unable) to attain Zen mastery of all 162 rules. Some even refuse to memorize them! This is where good lawyers intercede, providing about-to-be witnesses with an incentive to diligently prepare. They do this by using vivid hypothetical examples of what can happen under fire to the unprepared witness.

Hypothetical examples command attention and give vitality to the abstract rules. They help to constructively communicate your point: prepare thoroughly now, or prepare for humiliation and disaster later. Hypothetical examples help you communicate by "showing, not telling," the same forensic principle you'll later use with the judge or jury.

Use an everyday fact situation, one your witness can relate to. For example, let's say the hypothetical issue is how many times some elected official, maybe the President of the United States, was alone with some particular unelected individual, call her Ms. Lewinsky, in some public building, say the White House.

Use this "fact" situation to illustrate some of the essential rules: Answer clearly and directly (Rule 9). Give short, concise answers (Rule 45). Don't use formulations that dilute your credibility (like "let me begin with the correct answer" and "frankly") (Rule 51). Don't offer information that wasn't requested (like describing records when *nobody asked* about records) (Rule 47). Don't guess (Rule 17). And, of course, tell the truth (Rule 1).

Use the hypothetical "facts" to demonstrate how things can go awry when the rules are ignored. Here's what I mean. Let's say this President testified as follows:

Q. [the cross-examiner] . . . Mr. President, you indicate in your statement that you were alone with Ms. Lewinsky. Is that right?

A. [the witness]: Yes, sir.

Q. How many times were you alone with Ms. Lewinsky?

A. Let me begin with the correct answer. I don't know for sure. But if you would like me to give an educated guess, I will do that, but I do not know for sure. And I will tell you what I think, based on what I remember. But I can't be held to a specific time, because I don't have records of all of it.

Q. How many times do you think?

A. Well there are two different periods here. There's the period when she worked in the White House until April of '96. And then there's the period when she came back to visit me from February of '97 until late December '97.

Based on our records — let's start with the records, where we have the best records and the closest in time. Based on our records, between February and December, it appears to me that at least I could have seen her approximately nine times. Although I do not believe I saw her quite that many times, at least it could have happened.

There were — we think there were nine or 10 times when she was in, in the White House when I was in the Oval Office when I could have seen her. I do not believe I saw her that many times, but I could have. *** I remember specifically, I have a specific recollection of two times. I don't remember when they were, but I remember twice when, on Sunday afternoon, she brought papers down to me, stayed, and we were alone.

And I am frankly quite sure — although I have no specific memory, I am quite sure there were a couple of more times, probably two times more, three times more. That's what I would say. That's what I can remember. But I do not remember when they were, or at what time of day they were, or what the facts were. But I have a general memory that would say I certainly saw her more than twice during that period between January and April of 1996, when she worked there.

Okay, I know this quoted testimony is far-fetched. You're thinking: nobody would believe a real person, much less a president, was capable of such a bozo-like performance. We students of the cognitive sciences, however, have confirmed from studies performed in the Borscht Belt by tenured education professors that humorous exaggeration actually can enhance learning. So you are on firm scientific ground when you use this sort of credulity-straining hypothetical example to help your witness appreciate the rules.

After you give your witness the "facts," use the Socratic Method. (You suffered it in law school. There's no reason why your witness should be spoon-fed actual direct information.) Ask your witness: What's wrong with this testimony? Which of the essential rules for witnesses were violated? Is this witness credible? How could this witness do better? Do you feel the witness' pain?

Help your witness critique the hypothetical testimony. Use literary allusions to make important points. Like that Shakespeare line about protesting too much. Or that Biblical proverb about knowing when to shut up.[2]

Don't focus only on the negative, however. Use positive examples to reinforce the rules. You want your witness to answer "yes" or "no" if appropriate (Rule 14) and to be positive, assertive, confident, certain, strong, and precise (Rule 25). Use the hypothetical testimony to show how it should be done. For example:

Q. [the cross-examiner]: Did you have an extramarital sexual affair with Monica Lewinsky?

A. [the witness]: No.

Q. If she told someone that she had a sexual affair with you beginning in November of 1995, would that be a lie?

A. It's certainly not the truth. *** I have never had sexual relations with Monica Lewinsky. I've never had an affair with her.

You can't get much more positive, assertive, confident, certain, strong, precise, succinct, and concise than this. This hypothetical testimony creates a role model for your witness.

Using vivid hypothetical examples will bring the abstract rules to life for your witness. You can develop hypotheticals from your own experience. Or, if your experience is jejune, lackluster, and pedestrian, just make the hypotheticals up. By the way, any similarity between the examples used above and real persons and events is strictly due to legal research.[3]

— END NOTES —

[1]See Stuart M. Israel, *Taking And Defending Depositions* (ALI-ABA 2004), Chapter 10, "The 162 Essential Rules For Deponents And The Importance Of Practice." The book is available at www.ali-aba.org/aliaba/BK14.asp.

[2]Proverbs 17:28 ("Even a fool, when he holdeth his peace, is counted wise; and he that shutteth his lips is esteemed as a man of understanding.")

[3]*Jones v. Clinton,* 36 F.Supp2d 1118, 1128-1129 (E.D. Arkansas W.D. 1999) ■

8(e)'S HOT CARGO PROVISIONS: TOO HOT TO HANDLE (Part One)

Joseph A. Barker, ***Regional Attorney - Region 7 National Labor Relations Board***[1]

There is no more complicated and confusing area of the law than the "hot cargo" provisions of Section 8(e) of the National Labor Relations Act. Fortunately, few charges are filed under this section, although part of the reason may be lack of understanding as to what type of activity is actually proscribed by 8(3).

Below is my effort to bring a little simplification to this section of the Act. However, as becomes quickly evident to the casual reader, this is no easy task. Indeed, the task is too complicated to explain in a single effort. Consequently, in Part One I will endeavor to provide an explanation of the various factors used in analyzing an 8(e) case. In a second installment, Part Two, these factors will be applied to various clauses and agreements between unions and employers that are subject to possible 8(e) attack.

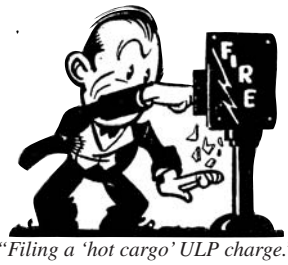
BACKGROUND

Section 8(e) of the Act (29 U.S.C. 158(e)) makes it an unfair labor practice for a union and an employer "to enter into any contract or agreement, express or implied, whereby such employer . . . agrees . . .to cease doing business with any other person. . . ." Section 8(e) was intended to close certain loopholes in the secondary boycott provisions of Section 8(b)(4) that prohibited a union from engaging in a strike or other concerted activity to enforce a "hot cargo" agreement—one that required an employer to boycott the goods or services of another employer that did not comply with union standards or recognize a union—but employers and union were free to enter into such agreements, and voluntary compliance with them were lawful. *Carpenters Local 1976 v. NLRB*, 357 U.S. 93 (1958). Section 8(e), enacted in 1959, forbid voluntary agreements, thereby eliminating that loophole. *Connell Construction Co. v. PlumbersLocal 100*, 421 U.S. 616, 628 (1975); *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 634-37 (1967). As the Board has stated, perhaps "no language can be explicit enough to reach in advance every possible subterfuge of resourceful parties. Nevertheless ... in using the term 'implied' in Section 8(e) Congress meant to reach every device which, fairly considered, is tantamount to an agreement that the contracting employer will ... cease doing business with another person." *Lithographers Local 78 (Miami Post),* 130 NLRB 968, 976 (1961), enfd. as modified 301 F.2d 20 (5th Cir. 1962).

OVERVIEW

Section 8(e) thus prohibits employers and unions from entering into agreements that condone future secondary boycotts. Agreements that serve a primary objective, such as work preservation, are not prohibited by 8(e) and no further analysis is necessary under 8(e). If an agreement is found to have a secondary objective, the second inquiry is whether the agreement is saved by the construction industry proviso, which allows certain secondary agreements. However, even if an agreement is saved by the construction industry proviso, there may nevertheless be a violation of 8(e) if the union is entitled to use self-help to enforce the agreement.

Consequently, an analysis under 8(e) requires a multi-level approach. First, a determination must be made whether a potentially unlawful contract or agreement has been "entered into." If the "entering into" requirement has been met, the analysis turns to whether the agreement is aimed at causing the employer to "ceasing doing business" with another entity. If both those criteria are satisfied, the inquiry turns to whether the agreement in dispute has a primary or secondary objective. If the object is primary, there is no violation. If the object is secondary, the analysis proceeds to determine whether the agreement is protected by the construction industry proviso. If it is not protected, a violation of 8(e) is present. If it is protected, the last inquiry is whether the union may resort to self-help to enforce the secondary agreement, which will render the agreement violative of 8(e).



"Filing a 'hot cargo' ULP charge."

"ENTERING INTO" REQUIREMENT

A prerequisite to establishing a violation under 8(e) is that a union and employer "enter into" a contract or agreement containing unlawful secondary provisions. This contemplates bilateral action or agreement by both parties rather than unilateral action by a union that is insisting upon the adoption of an unlawful clause, or is asserting an unlawful interpretation of an otherwise facially lawful clause. Consequently, the mere filing of a grievance by a union for an unlawful secondary purpose under a facially lawful contract clause does not violate Section 8(e), although it may violate Section 8(b)(4)(A), which prohibits a union from taking certain action to force or require an employer to enter into an 8(e) agreement. The Board has noted that "as a matter of law, solely unilateral conduct by a union, for example, a threat of picketing or the mere filing of a grievance, to enforce an unlawful interpretation of a facially lawful contract clause does not violate Section 8(e) because such conduct does not constitute an 'agreement.'" *Sheet Metal Workers Local 27 (AeroSonics),* 321 NLRB 540 fn. 3 (1996). Since the subcontracting clause in *AeroSonics* was lawful and no arbitration award had been issued upholding the Union's grievance, there had been no "agreement" within the meaning of Section 8(e).

However, a union by virtue of its successful use of the contractual grievance process and its subsequent effort to enforce the favorable award will have "enter[ed] into an agreement" within the meaning of Section 8(e). *Carpenters Local 745 (SC Pacific Corp.)*, 312 NLRB 903 (1993), enfd. 73 F.3d 370 (9th Cir. 1995). It has long been recognized that an arbitration award, which results from a contractual arbitration procedure and is binding on both parties, amounts to a "reentering into" of the contract. *Bricklayers Local 2*, 224 NLRB 1021, 1025 (1976), enfd. 562 F.2d 775, 781-783 (D.C. Cir. 1977); *Retail Clerks Union Local 770*, 218 NLRB 680, 683 fn.11 (1975); *Teamsters Local 610 (Kutis Funeral Homes),* 309 NLRB 1204, 1204 fn.2 (1992).

The Board has interpreted the phrase "to enter into" in Section 8(e) to also encompass the concepts of reaffirmation, maintenance, or enforcement of any agreement which is within the scope of Section 8(e). See *Electrical Workers (IBEW) Local 46 (Puget Sound Chapter, NECA)*, 303 NLRB 48, 62 (1991).

"CEASE DOING BUSINESS"

The "cease doing business" requirement of Section 8(e) includes more than just an effort to effect a complete termination of one employer's business relationship with another employer. *Sheet Metal Workers, Local 91 v. NLRB*, 905 F.2d 417, 421 (D.C. Cir. 1990), citing *NLRB v. Operating Engineers Local 825*, 400 U.S. 297, 304-305 (1971). Thus, the cease doing business language of 8(e) is met where the agreement involves an alteration or interference with the business relationship between the signatory employer and another person, or is calculated to cause a change or disruption of another employer's mode of business. See *Sheet Metal Workers*, supra at 421; *Associated General Contractors of California v. NLRB,* 514 F.2d 433, 437 fn. 6 (9th Cir. 1975).

In *Carpenters Local 745 (SC Pacific Corp.)*, 312 NLRB 903 (1993), enfd. 73 F.3d 370 (9th Cir. 1995), the Board found that by enforcing a clause that prevented a signatory contractor from "illegally using an alter-ego operation to escape the obligations" of the contract, the Union was seeking to accomplish its unlawful secondary objective by requiring the contract signatory to "cease doing business" with another "person." Thus, the purpose and effect of the clause were to alter the business relationship between the Company and its related firm, SC Pacific. To comply with the clause, the Company would be required either to induce SC Pacific to change its employment policies and adopt the collective bargaining agreement, or to terminate its relationship with SC Pacific. Either action "is within the ambit of Section 8(e)." *Sheet Metal Workers Local,* supra at 421 (D.C. Cir. 1990). Cf. *Sheet Metal Workers Local 80 (Limbach Co.)*, 305 NLRB 312, 313-314 (1999), enfd. in relevant part, 989 F.2d 515, 521 (D.C. Cir. 1993) (union coercion of Limbach to end its business relationship with Harper or to force Harper to sign union contract had cease doing business objective, where Limbach and Harper, although both wholly owned subsidiaries of same corporation, were separate employers).

PRIMARY V. SECONDARY OBJECTIVE

Although Section 8(e) can be literally read to forbid all agreements that prevent an employer from establishing a business relationship with another person or cause it to terminate or alter an already existing relationship, it has not been so construed. Thus, the Board has approved clauses whose main purpose is to protect the jobs customarily performed by unit employees. Because a union has a legitimate primary interest in preserving unit work for unit employees and in ensuring that negotiated employment standards will not be undermined, a union may negotiate work preservation and union-standard clauses despite their incidental effect of limiting the group of persons with whom the primary employer may do business. *Associated General Contractors*, 280 NLRB 698 (1986).

Thus, the Board's inquiry is whether the contract clause at issue has the "primary purpose of protecting unit work or unit standards" or, instead, the secondary purpose of promoting the broader goals of the union "by asserting control over the labor relations" of other employers. *Ibid.* See also *Food & Commercial Workers Local 1442 (Ralph's Grocery),* 271 NLRB 697 (1984). Contractual clauses whose main purpose is to serve the institutional interest of the union to organize or regulate the labor policies of employers with whom the union does not have a collective-bargaining relationship are unlawful under Section 8(e) because they are secondary in character and not aimed at preserving unit work or standards. As the Supreme Court has stated, the touchstone of Section 8(e) is whether the agreement is addressed to "the labor relations of the contracting employer vis-a-vis his own employees" or whether it is "tactically calculated to satisfy union objectives elsewhere." *National Woodwork*, supra at 644-645.

An agreement to boycott other persons is generally secondary, and proscribed by Section 8(e), if at least one object of the agreement is to make the boycotting employer an instrument for changing the labor relations policies of some other employer—thereby implicating the signatory employer in the achievement of union goals among other than his own employees. *National Woodwork,* supra at 632, 635-639, 644-645; *Sheet Metal Workers Local 91 (Schebler Co.),* 294 NLRB 766, 770 (1989), enfd. in relevant part, 905 F.2d 4l7 (D.C. Cir. 1990) ("contractual clauses whose main purpose is to serve the institutional interest of the union to organize or regulate the labor policies of employers with whom the union does not have a collective bargaining relationship are . . . secondary in character and not aimed a preserving unit work or standards").

A union's actions are not, as has sometimes been asserted, "primary" simply because a grievance or action are directed at the signatory employer. In *SC Pacific*, supra, the Union's real primary dispute was with SC Pacific, the non-contracting party, which the Union sought to change from a nonunion operation to a union operation by virtue of it contractual agreement with the related Company . In view of the undisputed finding that SC Pacific and the Company were separate employers, enforcement of the clause against the Company, with the object of influencing SC Pacific, constituted secondary activity. See *Limbach*, supra at 313-314.

Nor was there merit to the Union's claim in *SC Pacific* that it had a statutorily protected work preservation objective. The Union's work preservation claim was founded on its objection to "the growing tide of non-union contractors created by employers who also had a union operation," and not on specific evidence of loss of unit work. The Company's focus was commercial construction, while SC Pacific was a residential construction company, and since SC Pacific's establishment, the Company's revenues from its commercial construction and renovation operations had increased. Moreover, the Union failed to show that the Company transferred construction jobs to the nonunion affiliate, or that the Company changed its bidding practices so as to divert work from it to the nonunion affiliates. Nor did the arbitration panel award that the Union acquired require the assignment to unit employees of any work performed by SC Pacific. Rather, it was aimed at ensuring that the employees of a separate employer, SC Pacific, were covered by the collective bargaining agreement.

(Continued on page 22)

8(E)'S HOT CARGO PROVISIONS: TOO HOT TO HANDLE (Part One)

(Continued from page 21)

Even though a clause may be lawful on its face because it represents primary activity, the Board will find a union's conduct unlawful when its true motive is secondary, rather than to preserve unit work. For example, in *Teamsters Local 610 (Kutis Funeral Home, Inc.)*, 309 NLRB 1204, 1205-06 (1992), although employees of a subcontractor were performing the same work as unit employees, the Board held that the union violated Sections 8(b)(4)(A) and 8(e) by grieving and attempting to enforce an arbitration award under a no-subcontracting clause that compelled the signatory funeral homes to loan each other vehicles and drivers before using unrepresented drivers employed by nonsignatory funeral homes. The Board rejected the union's work preservation defense, finding that this "trading" scheme protected union driver jobs generally rather than jobs in each funeral home unit, and that the "trading" scheme forced signatory funeral homes to cease doing business with nonsignatory funeral homes.

Likewise, in *Teamsters Local 282 (Active Fire Sprinkler Corp.)*, 236 NLRB 1078 (1978), the Board affirmed an ALJ's determination that the true purpose of a jobsite picket and strike by the union which represented the general contractor's truck drivers was to enable it to represent the plumbing subcontractor's truck drivers, and, in the alternative, to compel the general contractor to cease doing business with the plumbing subcontractor, and not for work preservation.

THE CONSTRUCTION INDUSTRY PROVISO

In enacting Section 8(e), Congress expressly provided that purely secondary activity would be tolerated in certain industries. See *National Woodwork*, supra at 637-38; *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859, 869 (D.C.Cir. 1980), cert. denied 451 U.S. 976 (1981). To that end, Congress added the garment industry and construction industry provisos to section 8(e).[2] The construction industry proviso states that:

> nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

In combination with the other provisions of Section 8(e), the proviso therefore explicitly sanctions certain "agreement[s]" between unions and employers under which the employers agree "to cease or refrain from ... doing business with any other person." In adopting the proviso, Congress wished "to preserve the status quo" regarding agreements between unions and contractors in the construction industry. To the extent that subcontracting agreements were part of the pattern of collective bargaining in the construction industry, and lawful, Congress wanted to ensure that they remained lawful. *Woelke & Romero Framing, Inc. v. NLRB,* 456 U.S. 645, 657 (1982). The Board has also found that the Section 8(e) proviso: "indicates that Congress sought only to preserve the status quo and the pattern of bargaining in the construction industry at the time the legislation was passed." *Carpenters District Council (Alessio Construction)*, 310 NLRB 1023, 1027 (1993).

There is no definition of the "construction industry" in Section 8(e), just as there is no definition of the "building and construction industry" as used in Section 8(f), which allows a 7-day waiting period for the purposes of a union-security provision and permits prehire agreements. *Carpenters Local 623 (Atlantic Exposition Services),* 335 NLRB No. 49 (Aug. 27, 2001). The Board has stated that "the so-called building and construction concept subsumes 'the provision of labor whereby materials and constituent parts may be combined on the building site' to form, make or build a structure." *Painters Local 1247 (Indio Paint)*, 156 NLRB 951, 959 (1966). The Board has also adopted the definition of construction used in the Standard Industrial Classification (SIC) Manuals for 1957 and 1987 that: "The term construction includes new work, additions, alterations, reconstruction, installations, and repairs." *Carpenters (Rowley-Schlimgen),* 318 NLRB 714, 715 (1995). It is not necessary for the purposes of Section 8(e) to show that the employer is primarily engaged in the construction industry, unlike Section 8(f). If an employer actually performs construction work, it may be covered by the proviso. *Id.* at 715-716. As the Board observed in *Carpenters Local 743 (Longs Drug),* 278 NLRB 440, 442 (1986), "[W]hether an employer is 'an employer in the construction industry' within the meaning of the first proviso of Section 8(e) is dependent on the circumstances of each situation, rather than on the principal business of the employer."

The construction industry proviso protects only provisions, such as no-subcontracting provisions, covering "work actually to be done at the construction jobsite." *Ohio Valley Carpenters District Council (Cardinal Industries)*, 136 NLRB 977, 988 (1962). The Board has consistently "held to a narrow definition of jobsite work when evaluating contractual provisions on a case by case method." *Teamsters Local 42 (Irvine-Santa Fe)*, 248 NLRB 808, 815 (1980). Thus, the proviso does not ordinarily extend to offsite work merely because it could be done at the site. *Sheet Metal Workers Local 91 (Schebler Co.),* 294 NLRB 766, 772 (1989).

In *Rowley-Schlimgen,* the Board found that the employer, Rowley, sold office products, including supplies, furniture, and draperies. It also designed office interiors, and, as part of that business, it sold and installed floor covering, including carpeting, hardwood, vinyl sheeting, and vinyl tiling at, among various commercial sites, newly erected buildings and existing buildings undergoing renovation or remodeling. In the course of that work, the employer usually subcontracted to one particular firm the work of installing the flooring. The Board held that the installation of floor covering at construction, renovation, and remodeling sites is construction industry work of the type performed by special trade contractors. In addition, the Board found that Rowley had control over the work force, even though it did not directly employ the floor covering installers, because of its close connection with the subcontractor, whose owner was concurrently employed by Rowley. In so finding, the Board relied on the fact that Rowley procured its flooring installation contracts at construction sites through competitive bidding and distinguished *Carpenters Chicago Council (Polk Bros.)*, 275 NLRB 294 (1985), on the ground that there was no competitive bidding and that Polk's "carpet sales and installations were principally to home owners of already existing dwellings." *Rowley-Schlimgen*, supra at 716 fn. 11.

Based on the legislative history of the construction industry proviso to Section 8(e), the Board has found that the proviso does not apply to various types of transportation work. As the Board recognized in *Joint Council of Teamsters No. 42 (AGC of California),* 248 NLRB 808, 815 (1980), enfd. sub nom. *Teamsters Joint Council 42 v. NLRB (California Dump Truck Owners Assn.)*, 671 F.2d 305 (9th Cir. 1981), amended 702 F.2d 168 (9th Cir. 1981), cert. denied 464 U.S. 827 (1983), the legislative history of Sec. 8(e) reveals that a primary motivation for the enactment of the proviso was the desire to "prevent potential labor strife between union and nonunion personnel working at the same jobsite." These concerns are not implicated by the temporary presence on the jobsite of delivery personnel. Thus, the Board has found that the mixing, delivery, and pouring of ready-mix concrete, *Teamsters Local 294 (Island Dock Lumber),* 145 NLRB 484 (1963), enfd. 342 F.2d 18 (2d Cir. 1965); the delivery of precast concrete pipe, *Joint Council of Teamsters No. 42 (Inland Concrete Enterprises)*, 225 NLRB 209 (1976); the transportation of tools, materials, and personnel to and from a construction site, *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB 673 (1972); the delivery of sand fill, *Teamsters Local 294 (Rexford Sand & Gravel),* 195 NLRB 378 (1972); and the haulage of waste, *AGC of California*, supra, 248 NLRB at 817, are not jobsite work.

However, in *Operating Engineers Local 12 (Stief Co. West),* 314 NLRB 874, 877 (1994), the Board found that the work of the Employer's drivers distinct from the foregoing examples and fell within the Board's narrow definition of jobsite work. The work subcontracted to the Employer involved the erection of concrete highway bridge barrier walls. The specific work addressed in the Union's grievances, the hoisting and placing of the steel forms by the Employer's drivers, also was performed at the site of construction. Although the Employer's boom truckdrivers occasionally transported forms to and from the jobsite during each highway project, the Board found this transportation work was only an incidental part of the drivers' duties. Their principal task throughout each project (lasting from 6 months to 4 years) was to operate the boom truck on the jobsite. They repeatedly and continuously hoisted, lowered, placed, and removed steel forms as an integral part of the process of constructing barrier walls. Consequently, while performing this work, the drivers were as much a part of the construction crew as any of its other members.

Of course, employers and unions which are not in the construction industry are not afforded protection under the proviso for offensive, secondary clauses. *Retail Clerks Local 1288 (Nickel's Pay-Less Stores),* 163 NLRB 817, 819 (1967). See *Teamsters Local 277 (J & J Farms Creamery)*, 335 NLRB 1031 (2001)(clause as interpreted by arbitrator dictated that universe of potential subcontractors was limited to subcontractors who had collective bargaining agreements with the union).

SELF-HELP

The Board has held, with judicial approval, that contractual provisions otherwise protected by the construction industry proviso that allow a union to employ economic "self help" to enforce secondary subcontracting clauses are unlawful under Section 8(e). Self-help provisions for enforcing voluntary secondary agreements violate Section 8(e) in the construction industry even though the self-help and subcontracting provisions are in different articles of an agreement, the remedy sought would be the same if achieved by lawful judicial means, and the means of enforcement reserved by the union are not strictly limited to strikes and picketing. See *Operating Engineers Local 701 (Pacific Northwest Chapter of Associated Builders & Contractors)*, 239 NLRB 274, 277 (1978), and cases cited therein.

In *Jamco Development,* supra, the restrictions against subcontracting considered alone, came under the protection of the 8(e) construction industry proviso. However, they were contractually linked to the grievance and arbitration provisions. By recourse to these provisions, claims for breach of the secondary subcontracting clause could be submitted for settlement or decision. Another section of the contract specifically authorized the Union to "take any action they deemed necessary" to enforce compliance with "any settlement or decision reached" through the grievance and arbitration procedure, despite the general "no strike-no lockout" provisions of the contract. Read together, the sections thus sanctioned economic action to ensure compliance with the secondary subcontracting provisions of the contract. Accordingly, the self-help aspects of these sections did not share the protection otherwise afforded the no-subcontracting clause under the construction industry proviso to Section 8(e). That there was an intermediate stage before the Union could resort to economic action, and that they have refrained thus far from economic action, was of no consequence. The collective- bargaining agreement allows the Respondents to employ "non-judicial acts of a compelling or restraining nature, applied by way of concerted self help" for the enforcement of a secondary provision. See *Sheet Metal Workers Local 48 v. Hardy*, 332 F.2d 682, 686 (5th Cir. 1964). In these circumstances, the Board found that there is a violation of Section 8(e) to the extent that the contract permitted self-help enforcement of the otherwise lawful no-subcontracting clause.

Likewise, in *Southern California Conference of Carpenters (D & E Corp.)*, 243 NLRB 888 (1979), a clause was nevertheless found unprivileged under the construction industry proviso because the broad self-help provision in collective-bargaining agreement permitted the Union to resort to economic action against a contractor who refused to make payments on behalf of a delinquent subcontractor. In that case the Union had indeed threatened to withhold the services of all carpenters on the jobsite because of the fund delinquencies of a nonunion contractor on the jobsite. Consequently, the Board found the Union had violated 8(e) because the contract terms looked to economic pressure for enforcement of the secondary agreement.

Remember, however, that if a contract clause is primary, and therefore lawful under Section 8(e) without resort to the construction industry proviso, it may be lawfully enforced by resort to economic self-help. *Teamsters, Local 982 (J. K. Barker Trucking Co.),* 181 NLRB 515, 521 (1970), enfd. 450 F.2d 1322 (D.C. Cir. 1971); *Orange Belt District Council of Painters (Calhoun Drywall Co.)*, 153 NLRB 1196, 1199 (1965), enfd. 365 F.2d 540 (D.C. Cir. 1966).

— END NOTES —

[1]The views expressed are those of the author and do not constitute NLRB policy.

[2]The garment industry proviso creates an even broader exception than the construction industry proviso, allowing unions in the garment industry to use restrictive subcontracting clauses as organizational and economic weapons. See *Danielson v. Garment Workers' Union,* 494 F.2d 1230, 1236 (2d Cir.1974) (Friendly, J.). See also *Connell Construction Co. v. Plumbers Local 100,* 421 U.S. 616, 633 fn. 13 (1975). ■

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