LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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AI IN THE WORKPLACE: THE TIME TO DEVELOP A WORKPLACE STRATEGY IS NOW

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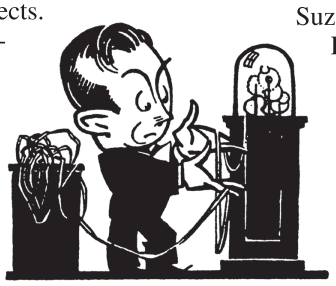
HAL, Skynet, Samantha and Hollywood's other sentient computers are what most people envision when they hear the phrase artificial intelligence ("AI"). The state of technology is not quite there yet, but those images are not too far off. AI already is and will continue to impact our lives at an exponential rate. Workplaces are amongst the first areas seeing AI's effects.

On-demand workers, robotic laborers and algorithms analyzing employee data are just some of the ways that AI is presently disrupting today's workplace. With more innovations being invented an implemented daily, the time to develop a workplace strategy is now. As with most strategies, there is no one-size-fits all solution. Factors that firms should consider as they introduce AI into the workplace include:



"Artificial Intelligence GIGO?"

- **HR Technology:** AI such as people analytics, digital interview platforms, and chat bots are rapidly becoming the norm in human resource departments. Combining "big data" with human insight to glean unique information about talent for and within an organization are generating efficiencies and numerous other benefits. Before introducing these technologies, employers should make sure to review the vendor contracts and algorithms for employment law issues, such as whether the AI accounts for people with disabilities. It is also advisable to aggressively monitor to make sure that the technologies do not have a disparate impact.
- **Union Issues:** Organizations with union represented workforces may have additional issues to consider before introducing AI into the workplace. For example, they may need to bargain with their labor unions over AI's introduction, as well as the effects of AI on represented employees. Non-represented employers should make sure that the AI does not unlawfully interfere with its employees' right to engage in protected concerted activities, such as organizing and discussing wages, hours, and other terms and conditions of employment. Care should also be taken to make sure that data captured and stored with AI is not used for purposes pro - hibited by federal labor law, such as for unlawful surveillance.
- **Data Privacy & Security:** By their very nature, many workplace AI solutions collect and store large amounts of employee personally identifiable information ("PII"). Organizations utilizing such AI should take steps to make sure that they properly store and protect their employees' PII from unauthorized access by third parties or exposure through a data breach.
- **Employee Benefits:** As more workers and jobs are displaced and/or transitioned into new workplace models, in whole or in part, by AI, the ability of workers to obtain employer-provided benefits will be compromised. As a result, the traditional social safety net that has historically been supported by employer-provided benefits, such as retirement savings and health care coverage, is ripe for increased disruption. Policymakers are already proposing solutions to the workplace reality that employers will need fewer full-time employees. For example, on May 25, 2017, U.S. Senator Mark Warner introduced in the Senate the Portable Benefits for Independent Workers Pilot Program Act (Representative Suzan DelBene introduced a companion bill in the House), which seeks to address the lack of an employer-provided safety net for workers who are not employed in traditional full-time positions and are not eligible for such benefits. While the bill seeks to provide grants to states, local governments, and nonprofit organizations to design and innovate existing benefit approaches, it also contemplates the future creation of a national portable benefits model that would require contributions from contingent workers as well as the entities that employ them. Employers should monitor these trends as well as navigate the design and compliance of their current benefits programs in light of such realities as (1) Affordable Care Act repeal and replace efforts; (2) increased appeal of health savings accounts; (3) policy efforts to move toward payroll IRAs for retirement savings; and (4) trends to de-risk and terminate pension plans, which can also involve pension withdrawal liability. Employers should also evaluate the types of benefits their workforce values in an AI-driven workplace so that they can continue to offer programs that attract and retain their desired talent.
- **Workplace Transition Policies:** With the inevitable disruption and displacement of certain jobs as workplace models transition to the new AI realities, employers should consider developing a workplace transition policy that may include establishing guidelines for employee reductions and retirements, severance and career-transitioning programs, skills development and tuition reimbursement programs, job-sharing, and flexible work arrangements.

When it comes to workplace AI, the proverbial horse is out of the barn. Whereas firms should embrace the positives that come with AI, they should make sure to do so thoughtfully and responsibly. Prudent organizations should being the process of evaluating their workplace management goals and objectives and start developing strategies for introducing AI into the workplace. Or, just wait for singularity and hope for the best. ■

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STATEMENT OF EDITORIAL POLICY

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

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

COURTS ISSUE CONFLICTING OPINIONS ON LGBT PROTECTION UNDER TITLE VII

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Some of the most significant developments in employment discrimination law over the past year have concerned protections for individuals who identify as lesbian, gay, bisexual or transgendered (LGBT). There have been decisions by three U.S. Circuit Courts of Appeals—the Second, Seventh, and Eleventh Circuits—and we are currently awaiting a sequel decision by the Second Circuit, with respect to whether sexual orientation discrimination is a form of sex discrimination under Title VII. Two U.S. Courts of Appeals have ruled on whether a person's LGBT status is protected under Title IX, which could have implications in the employment context. The Trump administration also has been weighing in on these issues.

The U.S. Courts of Appeals have decided cases regarding sexual orientation discrimination in one of three ways: (1) finding that sexual orientation status is not a protected characteristic; (2) finding that it is protected; or (3) a middle ground, finding that sexual orientation is only protected as gender discrimination insofar as it constitutes treating individuals differently because they are not conforming to traditional gender roles. The U.S. Supreme Court may have to settle the Circuit split and provide a consistent approach. Here are the recent developments.

Eleventh Circuit. In March 2017, in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), the Eleventh Circuit issued the first decision on this issue. This case examined the claim of a lesbian former employee who brought suit claiming sexual orientation and gender non-conformity discrimination in violation of Title VII. The court ruled that her gender non-conformity claim, which was based on the argument that she was discriminated against because she did not conform to stereotypes of her gender, may be a viable claim of gender discrimination, and sent the case back for a trial. But the court upheld its prior precedent that discrimination based on sexual orientation is not cognizable under Title VII.

Second Circuit. Later in March 2017, in *Christiansen v. OmnicomGroup, Inc.*, 852 F.3d 195 (2nd Cir. 2017), the Second Circuit followed the Eleventh Circuit's holding in *Evans v. Georgia Regional Hospital*. The plaintiff, Christiansen, was an HIV-positive openly gay man who alleged that during his employment at an advertising agency, he was subjected to a pattern of harassment by his supervisor in the form of suggestive images and inappropriate remarks that referred to his effeminacy, sexual orientation, and HIV status. The trial court dismipssed the case, holding that the claims alleged sexual orientation discrimination which under Second Circuit precedent is not cognizable sex discrimination under Title VII.

On appeal, the Second Circuit stopped short of finding that sexual orientation discrimination is prohibited by Title VII. But, like the Eleventh Circuit, the court held that Christiansen adequately alleged discrimination on the basis of gender stereotyping, warranting a trial. In a concurring opinion, Chief Judge Katzmann argued that the Second Circuit should revisit its prior decisions that sexual orientation claims are not cognizable as sex discrimination under Title VII.

In May 2017, another panel of the Second Circuit took Judge Katzmann's suggestion. In *Zarda v. Altitude Express Inc.*, 855 F.3d 76 (2nd Cir. 2017), the plaintiff argued that he was fired because he was gay. The trial court dismissed the case, which was affirmed, but then the Second Circuit agreed to hear the case *en banc* and revisit its prior rulings. The *en banc* decision has not been issued yet at this writing.

Seventh Circuit. In April 2017, the Seventh Circuit, in a rare *en banc* decision in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017), was the first, and so far the only, federal appellate court to rule that discrimination on the basis of sexual orientation is sex discrimination prohibited by Title VII. This decision expands sexual orientation rights to full protected status in the Seventh Circuit, making lesbian, gay or bisexual status equal to race, gender, religion, national origin, etc.

The plaintiff, Hively, was a part-time adjunct professor who was openly lesbian. She applied for and was denied several full-time positions, and her contract was not renewed. She sued claiming she was discriminated against based on her sexual orientation. The trial court dismissed her claim on the ground that sexual orientation is not a protected category under Title VII. In August 2016, a three-judge panel of the Seventh Circuit affirmed, stating it was bound by precedent.

Hively's petition for an *en banc* hearing was granted, and the entire Seventh Circuit bench overturned the panel decision. The full court concluded that adverse employment actions on the basis of sexual orientation were a subset of actions taken because of sex, and therefore constituted sex discrimination. The court reasoned that it is no different for an employer to discriminate against a female employee for having a female partner than for dressing or speaking differently from other female employees, which is cognizable sex discrimination under Title VII. The court also reviewed U.S. Supreme Court opinions relating to sexual orientation over the last 20 years and noted a gradual extension of protections under the U.S. Constitution. The court concluded that, in light of recent U.S. Supreme Court decisions and "common-sense reality," it is impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex.

Relying on *Hively*, and agreeing with the position taken by the U.S. Equal Employment Opportunity Commission, the U.S. District Court for the Central District of Illinois ruled that discharging an employee because she is transgender or has transitioned from male to female is a form of sex discrimination and is prohibited by Title VII. *EEOC v. Rent-A-Center East, Inc.*,—F.Supp.3d—-, 2017 WL 4021130 (C.D. Ill. Sept. 8, 2017).

Fourth Circuit. In other developments having implications for LGBT employees, in particular transgendered employees, last year the U.S. Supreme Court remanded a case involving a transgendered student's right to use the restroom of his gender identity. *See GG v. Gloucester County School Bd.*, 137 S.Ct. 1239 (2017). The district court had granted the student's motion for a preliminary injunction and required the school board to allow him to use bathrooms designated for males. The U.S. Supreme Court was expected to hear the case this past Term, but the Trump administration reversed an Obama administration policy that was central to the Fourth Circuit's prior ruling, so the Supreme Court remanded the case to the Fourth Circuit for a new opinion. On remand, the Fourth Circuit vacated the preliminary injunction and considered whether the case was moot because the student had graduated. It remanded the case to the district court to develop the record on that issue, and no opinion on mootness has yet been issued. Although the case involves Title IX of the Civil Rights Act, if the case is not found to be moot, a ruling could impact the meaning of "sex discrimination" under Title VII.

Sixth Circuit. The Sixth Circuit has not opined on the issue of sexual orientation or gender identity discrimination under Title VII recently. In 2006 it held that discrimination based on sexual orientation alone is not actionable under Title VII. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006). Recently, in *Tumminello v. Father Ryan High School, Inc.*, 678 Fed.Appx. 281 (6th Cir. Jan. 30, 2017), the Sixth Circuit addressed the issue of sexual orientation discrimination under Title IX, relying on the above principles as under Title VII. In that tragic case, the mother of a high school student who had committed suicide as a result of bullying at school because of his sexual orientation sued the school under Title IX. The district court dismissed the complaint because it alleged at most that the student was harassed based on his perceived sexual orientation. On appeal, the mother argued that he was harassed based on his gender non-conforming behavior. The complaint did not assert that, however.

The Sixth Circuit affirmed the dismissal of the complaint, referring to the law under Title VII, because the complaint did not allege the theory that the student did not conform to traditional gender stereotypes and that these characteristics were the basis for the harassment. The Sixth Circuit noted that "[d]iscerning the line between discrimination based on gender-non-conforming characteristics that supports a sex-stereotyping claim and discrimination based on sexual orientation is difficult. Despite the practical problems with the current interpretation of Title VII and Title IX, a panel of this Court cannot overrule the decision of another panel." *Id.* at 285. The U.S. Supreme Court denied *certiorari* in that case on October 2, 2017.

State Law. Michigan does not prohibit LGBT discrimination in private employment, but does prohibit such discrimination against state employees. Courts in Michigan faced with sexual orientation discrimination claims against private sector employers under the Elliott-Larsen Civil Rights

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COURTS ISSUE CONFLICTING OPINIONS ON LBGT PROTECTION UNDER TITLE XII

(Continued from page 3)

Act have concluded that it does not prohibit such discrimination. However, Michigan courts often look to the law under Title VII in construing the ELCRA, and if the U.S. Supreme Court eventually decides that Title VII bans sexual orientation discrimination, Michigan courts may follow in their construction of the state law.

In September 2017, the Michigan Civil Rights Commission delayed a vote on whether ELCRA prohibits discrimination on the basis of sexual orientation and gender identity. The Commission's vote could have expanded protections for gay and transgender residents even without action from Michigan's legislature or courts. However, the Commission decided to ask Michigan Attorney General Bill Schuette, who recently announced his candidacy for governor, for a formal opinion on the issue.

A number of other states have such legislation, including California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. And many municipalities have ordinances banning discrimination based on sexual orientation and gender identity.

Other Developments. Trump's appointment of Associate Supreme Court Justice Neil Gorsuch likely will impact this issue when it comes before the Court. The Trump administration has been weighing in on this issue in other ways, opposing the expansion of LGBT rights. Several months ago, Trump tweeted that he opposes transgender individuals serving in the military. His Justice Department also filed an unsolicited brief in the *Zarda* case in the Second Circuit arguing that Title VII does not protect sexual orientation, and that any efforts to amend the law should be directed to Congress. Attorney General Jeff Sessions recently ordered Justice Department attorneys to take the position in court cases that transgendered individuals are not protected under Title VII, contrary to the Justice Department's position under Attorney General Eric Holder. The EEOC continues to take the position that discrimination based on sexual orientation or gender identity violates Title VII.

In light of the unsettled state of the law in this area, employers should review their anti-discrimination and anti-harassment policies for compliance with federal, state, and local laws in the jurisdictions where they have employees. Employers also should keep in mind that the EEOC considers discrimination based on sexual orientation and gender identity to be forms of sex discrimination. Many employers choose to include sexual orientation and gender identity as categories protected under company policy, even if not protected by law, as harassment has no place in the work environment—regardless of whether it is based on race, sex, national origin, religion, sexual orientation, or transgendered status. ■

MICHIGAN SUPREME COURT JUSTICE KURTIS T. WILDER'S REMARKS AT THE STATE BAR OF MICHIGAN SEPTEMBER 2017 "NEXT" CONFERENCE

Thank you for the invitation to join the State Bar Labor and Employment Section. In particular, thank you to my dear friend Gloria Hage, general counsel at Eastern Michigan University, for asking me to speak. Gloria and I practiced together at Butzel Long, and were active in the Labor and Employment practice and the state bar section together.

Certainly, when we were at Butzel, we often dreamed of what the NEXT phase of our lives would look like. I do like the theme of this conference and the new title—NEXT—because the success of our profession depends on how diligent we are in imagining the future.

Think of it this way—just ten years ago, who would have imagined that a little device that fits in our pockets would dominate our lives? That means our profession must comprehend and take advantage of the dramatic changes in how people receive, process, and share information.

And while I am talking about smartphones and social media, I encourage you to all take out your phones and follow the Michigan Supreme Court on Twitter and Facebook. We're also on LinkedIn and have a YouTube channel. No Pinterest yet, though.

No doubt, imagining the future is serious business, but my advice to you today is that we must be just as serious and just as diligent about remembering the past and learning from it.

In that regard, let me tell you about a new artifact that will soon be on display just outside the Supreme Court courtroom at the Hall of Justice in Lansing. If you're standing outside the Courtroom on the sixth floor, looking in from the rotunda, the new artifact will be on your left, just opposite the bust of Justice Henry Butzel.

This new artifact is a silver cup, given to Justice Samuel Douglass by the Detroit Bar Association upon his retirement from the Court in 1857. Chief Justice Markman received the cup from the Michigan Supreme Court Historical Society at their annual luncheon earlier this year.

I highlight the cup for two reasons. First, because on that cup is engraved a passage in Latin, by the poet Horace. It translates: "as gold is worth more than silver so is virtue worth more than gold." Certainly, for a judge or a lawyer, virtue is priceless and once lost can almost never be recovered. That message, so important to the integrity of our judicial system, must constantly be reinforced and re-emphasized.

Secondly, I mention the cup because of the Justice who received it. Following his service on the Supreme Court, Samuel Douglass practiced law for many years, and I think the qualities he exhibited are ones that the lawyers in this room might want to emulate.

When the portrait of Justice Douglass was unveiled in 1899, Justice Frank Hooker spoke about the qualities that

Douglass showed as a lawyer. It's a long quotation, but bear with me. Justice Hooker said:

> … [Douglass] exhibited the traits of character which are so important to a strong lawyer. His points were always carefully prepared. In their presentation they stood forth in their rugged strength, being divested of all extraneous and superfluous accompaniments. I cannot say that he was not partisan; I think he was, as lawyers usually are and have a right to be; but his judgment never seemed to be warped by his partisanship. He seemed to have a pretty accurate conception of his legal rights, and did not allow his desires or hopes to inspire confidence in an erroneous principle. His tact was admirable. Like an army besieging a city, he made his approaches in a cautious but effective way, carefully entrenching himself in each advanced position he took before making another advance. He did not allow himself to be diverted from his object by side issues. The record contained a vast amount of costly but useless testimony, to which he gave no attention, contenting himself with keeping in view what he considered to be, and what very clearly were, the crucial questions in the case. His entire management was a model of honest prudent, careful, and intelligent management of a case for the very best interest of a client.

What I would like to do now, in the few remaining moments I have with you, is highlight the key elements of that statement and focus on why they are important.

First, he says, that "[Douglass's] points were always carefully prepared…stood forth in their rugged strength, being divested of all extraneous and superfluous accompaniments." Here is made the case for clear and concise presentation, whether in writing or at oral argument.

In this regard, I am very anxious to sit for the first time with my colleagues on the Michigan Supreme Court in a couple of weeks. We will be hearing the first dozen or so cases of the term on October 11 and 12. You can watch the live stream on our website: courts.mi.gov. In fact, the first case will be heard in the old Supreme Court Chamber in the State Capitol.

I have very high expectations for the presentations we will be hearing. Justices have read the briefs. We know the cases backward and forward. What we want is the clearest, strongest, and simplest argument as to why your client is right and what the remedy should be.

What do I expect in this regard?

The easiest way for me to articulate what I am looking for is to say that I want to hear a compelling story that must have a beginning, middle, and an end. And when I say story, I don't mean bedtime story that lulls me to sleep. The story needs to grab my attention from the start, so start with your best shot. The Supreme Court is not a place for trial balloons. Watch videos of oral argument we have posted on YouTube. You will see immediately what works and what doesn't.

And most importantly, when applying for leave to appeal, you must successfully make the argument that this case matters, that it is jurisprudentially significant. Indeed, unlike the Court of Appeals, which is an error-correcting court, the Supreme Court only grants leave in a small fraction of the more than 2000 cases we review each year. You must articulate clearly why your case is important, why it is relevant to an entire class of cases, and how review by this Court could prevent future litigation.

Next, he says of Douglass that "I cannot say that he was not partisan; I think he was, as lawyers usually are and have a right to be; but his judgment never seemed to be warped by his partisanship." I believe by this Hooker meant that your tone is vitally important. No matter the strength of your feelings about the case or about your opponent, there is no ground to be gained with a tone that is anything but measured, calm, and confident. Remember, you are seeking not to annoy us, but to persuade us.

Finally, Justice Hooker said that "[Douglass] seemed to have a pretty accurate conception of his legal rights, and did not allow his desires or hopes to inspire confidence in an erroneous principle."

There are two important points in that statement. First, know the law and the record, and in the case of oral argument, know the rules of the game. What does this mean? It means that moot court is not just for students. Practice your arguments, give them a test drive with colleagues and staff, answer tough questions, fine tune, and focus in order to distill just the essential elements that are outcome determinative.

Secondly, and I think just as important, is not allowing yourself to be seduced by an "erroneous principle" that makes the merits of your case seem stronger than they really are. If you have any doubts about the efficacy of your argument, the Justices will find them, expose them, and leave you gasping for air. Put those "desires and hopes" to the side, and focus on the facts and the law.

Ultimately, my advice to you regarding appellate advocacy is simple: Be inspired by the example of Justice Douglass. Be prepared to take your best shot, be nice, make your story compelling, and tell us how to get to the outcome you seek. Thank you for giving me a few minutes of your time this afternoon. ■

WRITER'S BLOCK?

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

WHAT'S NEW AT PRESIDENT TRUMP'S DEPARTMENT OF LABOR

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There have been a number of significant developments at the U.S. Department of Labor (DOL) in the months since Donald Trump took office. It seems that "everything old is new again," as the Trump administration attempts to undo policies the Obama administration had put in place.

The Obama DOL, as with many of his administrative agencies, took an aggressive and expansive position to rein in what it viewed as employer avoidance of regulations. For example, the Obama administration modified joint employer concepts to expand circumstances under which a company can be deemed a joint employer, and thus liable under employment laws such as the Fair Labor Standards Act (FLSA) and Family and Medical Leave Act (FMLA). The Obama administration was similarly aggressive in examining independent contractor relationships it believed employers were using to avoid employment laws such as Title VII, FLSA, FMLA, and tax laws. And the Obama Labor Board's 2015 decision in *Browning-Ferris Industries of California* created much consternation among employers that the requirements for showing joint employer status under the National Labor Relations Act (NLRA) between an employer and a staffing firm's employees, or between a franchisor and its franchisee's employees, were being substantially lightened.

After President Trump's initial choice for Secretary of Labor withdrew following criticism of his company's employment practices and his hiring of a household employee not authorized to work in the United States, Alexander Acosta, Dean of the Florida International University College of Law, was confirmed as Labor Secretary.

The pendulum is now swinging back under the Trump administration in several key areas.

Independent Contractors and Joint Employment. In June 2017, the DOL withdrew two highly publicized 2015 and 2016 Administrator Interpretations regarding the misclassification of employees as independent contractors and joint employment. The Obama administration's DOL had taken a narrow view of independent contractor relationships. Indicative of its attack on the perceived misuse of independent contractors was an Administrator Interpretation issued by the Wage and Hour Division of the DOL in July 2015. It focused on a six factor "economic realities" test that would make it difficult for employers to convince the government its contractor relationships were truly independent.

Similarly, the Wage and Hour Division, through its Administrator Interpretation, expanded the circumstances under which an employer can be deemed a joint employer under the FLSA for workers the employer believes are employed by separate entities with which it contracts. The Wage and Hour Division had suggested that courts abandon control-based joint employer tests in favor of a single uniform list of "economic reality factors" with a focus on unassociated businesses that contract for the provision of services. The Administrator Interpretation unabashedly announced that its intent was to expand statutory coverage of the FLSA so that it can collect wages from deep-pocket businesses.

The withdrawal of both Administrator Interpretations by the DOL should provide some comfort to employers. But be cautious. Although the Obama administration's guidance was expansive, it was not inconsistent with some court rulings on these issues. For example, a U.S. District Court Judge in the Eastern District of Michigan recently found pleadings to be sufficient on an FRCP 12(b)(6) motion on the issue of whether Marriott and one of its franchise owners jointly employed food service managers working at the franchisee's hotels. *Parrot v. Marriott International, Inc.*, No. 17-10359 (E.D. Mich. Sept. 5, 2017). One factor of control cited by the court was that Marriott International treated the franchisees' employees as its own by providing employee discounts at all of its company-owned hotels. (Apparently "no good deed goes unpunished.") Other factors the court found to be sufficiently pled were auditing and compliance oversight and the right to terminate the franchise agreement, which would result in terminations of franchisee employees.

As the *Marriott* case illlustrates, employers should continue to be careful about classifying workers as "independent contractors" or entering into borderline "joint employer" situations. It is not yet clear whether the withdrawn guidance will be replaced by new guidance that is more employer-friendly. Dramatic changes to existing law are unlikely, even though enforcement priorities appear to be changing.

Persuader Rule. The DOL is also taking steps to rescind the revised "persuader" rule under the Labor Management Reporting and Disclosure Act of 1959 (LMRDA). This was another Obama administration proposal that would have expansively required employers to report to the DOL when they sought professional advice designed to persuade employees about union organizing or collective bargaining, whether the persuasion was through direct contact with employees or indirectly. Under the prior interpretation of the LMRDA's "advice" exception, employers could hire consultants (including attorneys) to create materials and strategies for organizing campaigns and to script managers' communications with employees, without disclosing this to the DOL, as long as the consultant (or attorney) had no direct contact with employees. In November 2016, a Texas federal court issued a nationwide permanent injunction on enforcement of the newly proposed interpretation, and in June 2017 the DOL issued a notice of proposed rulemaking regarding its intended withdrawal of the new rule. The comment period closed in August 2017,

and it is expected that the proposed expanded rule will be rescinded in the near future, returning employers and professionals to the LMRDA reporting regime that has existed for 50 years.

White Collar Exemptions. The long-awaited new rule on the white collar exemptions turned out to be a non-event, with a Texas federal court, in November 2016, enjoining the new rule regarding the salary threshold necessary for meeting the exemptions. The Obama DOL appealed the injunction in December 2016, but most predicted that the appeal would not be pursued under the Trump administration. This prediction turned out to be inaccurate, as the DOL under Secretary Acosta has continued to argue that the lower court's decision should be reversed. However, the DOL is not seeking to have the specific salary threshold of $913 per week ruled valid. Instead, it is asking the U.S. Court of Appeals for the Fifth Circuit to confirm the DOL's authority to establish a salary level test for the exemptions. The Texas court, in issuing the injunction, essentially had ruled that the DOL did not have the authority to use salary level as a test for determining whether an employee fit within an exemption. The DOL asked the appeals court not to address the validity of the *specific salary level* set with the new rule, and stated that it intended to address that through future rulemaking.

Use of Opinion Letters. The DOL has also announced that it will reinstitute its use of opinion letters, perhaps setting the table for more meaningful guidance in the future. Opinion letters, which were utilized for decades but were stopped in 2010 in favor of Administrator Interpretations, typically provided guidance on specific inquiries made by employers and other groups. In contrast, Administrator Interpretations were general and broad-based in nature and provided less specific and meaningful guidance. But they were used by the previous Wage and Hour administrator to signal the administration's enforcement priorities.

The reinstitution of opinion letters should provide better guidance to employers seeking to understand how these complex Wage and Hour regulations, and others, may apply to particular factual situations. While not binding precedent, courts often look to such guidance as persuasive. In making the announcement, DOL Secretary Acosta said, "Opinion letters will benefit employees and employers, as they provide a means by which both can develop a clearer understanding of the [FLSA] and other statutes." DOL opinion letters are available on its website. Employers may also submit requests for new opinion letters on specific issues.

OSHA Changes. The Occupational Safety and Health Administration has not been immune from reversals with the new administration either. According to an April 25, 2017 memo, OSHA has reversed its policy announced in the 2013 "Fairfax Memorandum" of allowing employees at non-union workplaces to choose a union-affiliated representative for "walk around" inspections. OSHA has also withdrawn its Obama-era "Volks Rule" which effectively extended the six-month statute of limitations for OSHA recordkeeping violations by five years. ■

MICHIGAN MEDIATION CASE LAW UPDATE

Lee Hornberger
Arbitrator and Mediator

I. INTRODUCTION

This update reviews Michigan appellate cases issued since April 2015 concerning mediation. For the sake of brevity, this update uses a short citation style rather than the official style for Court of Appeals unpublished decisions. Prior cases back are reviewed at Michigan Mediation Case Law Update, *Labor and Employment Lawnotes* (Spring 2016), p. 20.
https://higherlogicdownload.s3.amazonaws.com/MICHBAR/186c8f91-1162-4d30-9e4a-e10a92bbb606/UploadedImages/pdfs/newsletter/spring2016.pdf

II. MEDIATION

A. Michigan Supreme Court Decisions

Supreme Court orders mediation.

City of Huntington Woods v City of Oak Park, 500 Mich 1224; 886 NW2d 635 (November 2, 2016). The Supreme Court directed the parties to participate in settlement proceedings and appointed Court of Appeals Chief Judge Michael J. Talbot as a mediator who could direct the parties to produce additional information that he believes will facilitate mediation. Additional information or comments made during these proceedings will be confidential and will not become part of record, except on motion by one of the parties. MCR 7.213(A)(2)(f); MCR 2.412(C). The mediator shall file a status report with the Supreme Court. If mediation results in a full or partial settlement, the parties shall file a stipulation to dismiss. MCR 7.318. Eventually the Supreme Court vacated 311 Mich App 96; 874 NW2d 214, 321414 (2015), and remanded the case to the Circuit Court. ___ Mich ___, 152035 (May 3, 2017). MCR 7.316(A)(9).

B. Michigan Court of Appeals Published Decisions

Other than Supreme Court leave to appeal cases that are cited as Supreme Court cases, there do not appear to have been any Michigan Court of Appeals published decisions concerning mediation during the review period.

C. Michigan Court of Appeals Unpublished Decisions

Mediation confidentiality.

Hanley v Seymour, 334400 (October 26, 2017). Communications received by an attorney from the defendant were not part of the mediation proceedings. The plaintiff was made aware of the communications at the conclusion of the mediation in which the plaintiff participated with the attorney. The attorney had received the documents before the mediation was conducted. There was no violation of MCR 2.412(C).

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MICHIGAN MEDIATION CASE LAW UPDATE

(Continued from page 7)

Mediation and domestic violence.

Kenzie v Kenzie, 335873 (August 8, 2017). Attorney fees granted, in part, because the husband initiated an altercation with the wife following the mediation at which he called the police and accused the wife of domestic violence; and he obstructed the mediation process that would have allowed the case to reach settlement posture.

Spousal support language not in MSA.

Amante v Amante, 331542 (June 20, 2017). The plaintiff argued both counsel and the mediator forgot to include a provision barring spousal support in the settlement agreement. The plaintiff argued that under the plain language of the judgment of divorce, the dispute regarding a provision barring spousal support should have been decided by the arbitrator. Under the terms of the judgment of divorce, "any disputes regarding the judgment language" should be submitted to an arbitrator. The Circuit Court did not abuse its discretion in following the settlement agreement and entering the judgment of divorce and denying the plaintiff's motion for relief from the judgment.

Binding settlement agreement.

Roth v Cronin, 329018 (April 25, 2017), **lv app pdg**. "[S]he understood (1) the terms of the settlement, (2) she would be bound by the terms of the settlement if she accepted it, and (3) she had the absolute right to go to trial, where she could get a better or worse result. She testified she understood the terms and would be bound by the settlement, and had the right to go to trial. Plaintiff further testified that it was her own choice and decision to settle pursuant to the terms that were placed on the record." *Roth* was a legal malpractice case in which the court held that the above comments made under oath by the plaintiff in the prior case were judicial estoppel which precluded the plaintiff from subsequently arguing that the settlement was not voluntary. The quoted language can be used in settlement agreements to help make the agreements enforceable.

Circuit Court Judge not disqualified.

Ashen v Assink, 331811 (April 20, 2017), **app lv pdg**. The plaintiff argued that the Circuit Court judge should have been disqualified because, as a mediator over the case, he would have had "personal knowledge of disputed evidentiary facts concerning the proceeding." The mediation scheduled for June 11, 2015, was cancelled on June 2, 2015. The judge never actually mediated the case. The plaintiff failed to show what personal knowledge, if any, the judge had of any disputed evidentiary facts concerning the proceeding. MCR 2.003(C)(1)(c).

Can a Circuit Court appoint a Discovery Master?

Barry A Seifman, PC v Raymond Guzell, III, 328643 (January 17, 2017), lv dn ___ Mich ___ (2017). The defendant contended the Circuit Court lacked authority to appoint an independent attorney as a Discovery Master and to require the parties to pay the Master's fees; and the Circuit Court should have made a determination regarding the reasonableness of the Master's fees. The Court of Appeals held once the parties accepted the case evaluation award, the defendant lost the ability to appeal the earlier Discovery Master order. Can a Circuit Court appoint a Discovery Master? The authority of the court to appoint a Discovery Master is discussed at *ADR Quarterly* (May 2013), p . 5. https://higherlogicdownload.s3.amazonaws.comMICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/May13.pdf

CCA trumps custody MSA.

Vial v Flowers, 332549 (September 22, 2016). The Court of Appeals rejected the wife's contention that the parties had not entered into a MSA concerning custody. The December 2015 mediation resulted in a MSA. The Court of Appeals held that the Circuit Court failed to adequately consider the child's best interests before it entered a custody judgment in April 2016. The Court of Appeals said a party is bound by the party's signature on the custody MSA as long as the Circuit Court agrees that the MSA is in the best interests of the child. The MSA signed by the parties was binding on the parties subject to the Circuit Court doing a best interests analysis. When the parties enter into an otherwise binding custody agreement, the Circuit Court is not relieved of its obligation to examine the best interest factors. By entering a judgment of custody, the court implicitly acknowledges that it has (1) examined the best interest factors, (2) engaged in a profound deliberation as to its discretionary custody ruling, and (3) is satisfied that the custody order is in the child's best interests. An evidentiary hearing was not necessarily required given the custody MSA. The Court of Appeals indicated that the Circuit Court also erred by not considering whether an established custodial environment existed. Does this mean, if an established custodial environment exits, the parents cannot agree to an enforceable MSA that changes parenting time, "unless there is presented clear and convincing evidence that [the changes are] in the best interest of the child[?]" MCL 722.27(1)(c). If so, does this arguably mean that an MSA that changes parenting time is a prelude to litigation rather than the end or avoidance of litigation?

Attendance and authority at mediation session.

Howard v Glen Haven Shores Ass'n, 325812 (July 7, 2016). The Circuit Court properly refused to enforce a purported MSA where the defendant did not violate an order by not having the entire Board of Directors at the mediation; and it was known that settlement was subject to approval by the full Board.

MSA not enforced.

Coloma Emergency Ambulance, Inc v Timothy E Onderline, Ears, Inc, 325616 (2016) lv dn ___ Mich ___ 153839 (November 30, 2016). The parties participated in a mediation which resulted in all counsel signing a "Proposed Settlement" document, which referenced the future signing of additional documents. The Circuit Court held the document was not a binding contract. The Court of Appeals affirmed.

Domestic relations MSA enforced.

Kleinjan v Carlton, 328772 (January 19, 2016), enforced a domestic relations MSA. The Circuit Court did not err by entering an order based on the parties' signed, handwritten MSA,

despite the defendant's attempt to disavow the MSA. The defendant was bound by the terms of the signed, written MSA. MCR 3.216(H)(7). She cannot dispute the MSA based on a change in heart.

Custody MSA not enforced.

Bono v Bono, 325331 (November 19, 2015). The Circuit Court abused its discretion by entering a MSA judgment of divorce, which included custody, without first considering the best interest factors. The Child Custody Act requires the Circuit Court to determine what custodial placement is in the best interests of the children, even if the parties utilize alternative dispute resolution to reach an agreement regarding custody.

III. MCR AMENDMENTS CONCERNING MEDIATION

MCR 3.216 amended, effective September 1, 2017

"**MCR 3.216 Domestic Relations Mediation**

(3) **Unless a court first conducts a hearing to determine whether mediation is appropriate, the court shall not submit a contested issue in a domestic relations action, including postjudgment proceedings, if the** parties are subject to a personal protection order or other protective order, or are involved in a child abuse and neglect proceeding. **The court may order mediation without a hearing if a protected party requests mediation.**

(H) Mediation Procedure

(2) **The mediator must make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues. A reasonable inquiry includes the use of the domestic violence screening protocol for mediators provided by the state court administrative office as directed by the supreme court. …**

Comments: The amendments of MCR 3.216 update the rule to be consistent with MCL 600.1035, 2016 PA 93, which allows a court to order mediation if a protected party requests it and requires a mediator to screen for the presence of domestic violence throughout the process."

MCL 600.1035 is discussed at *The ADR Quarterly* (July 2016), p. 12. https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/July16.pdf

MCR 7.316, concerning mediation, amended effective September 1, 2017.

"**Rule 7.316 Miscellaneous Relief**

(A) Relief Obtainable. The Supreme Court may, at any time, in addition to its general powers …

(9) order an appeal submitted to mediation. The mediator shall file a status report with this Court within the time specified in the order. If mediation results in full or partial settlement of the case, the parties shall file, within 21 days after the filing of the notice by the mediator, a stipulation to dismiss (in full or in part) with this Court pursuant to MCR 7.318. …

Staff Comment: The amendment of MCR 7.316 explicitly provides that the Supreme Court may order an appeal to mediation. The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

MARKMAN, C.J. (dissenting). When the proposed amendment of MCR 7.316(A) was published for comment, I wrote a concurring statement raising questions, and expressing concerns, about the proposed amendment, which will allow this Court to "order an appeal submitted to mediation." 500 Mich 1224, 1225-1227 (2016). Following publication of the proposed amendment, the Appellate Practice Section of the State Bar indicated that it "shares in [my] concerns," while the Alternative Dispute Resolution Section offered point-by-point responses to these concerns. Although I certainly appreciate these responses, they do not alleviate my concerns. As a result of the concerns raised in my statement of November 30, 2016, I respectfully dissent from the adoption of the present amendment."

Justice Markman's viewpoint is reviewed in *The Michigan Dispute Resolution Journal* (Summer 2017), p. 3. https://higherlogicdownload.s3.amazonaws.com/MICHBAR/2b10c098-e406-4777-a199-33b9d3e7c568/UploadedImages/pdfs/Summer17.pdf ■

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SIXTH CIRCUIT PANEL MISFIRES TWICE ON FLSA COLLECTIVE ACTION CLAIMS

Thomas G. Kienbaum
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In *Monroe v. FTS USA, LLC*, 815 F.3d 1000 (6th Cir. 2016), the U.S. Court of Appeals for the Sixth Circuit had affirmed a troubling U.S. District Court award against a Tennessee employer of cable technicians that allegedly violated overtime obligations under the Fair Labor Standards Act (FLSA). However, on the employer's petition for *certiorari*, the U.S. Supreme Court issued a "grant/vacated/ remand" order (GVR) in light of its intervening 2016 decision in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016), which addressed similar FLSA collective action principles. The Supreme Court sent the *Monroe* case back to the Sixth Circuit to conform its decision with *Tyson Foods*.

In June 2017, the Sixth Circuit reaffirmed its 2016 holding, paying scant attention to *Tyson Foods*. Unless the case is reversed by the Supreme Court (as it should be), it will present a dangerous precedent for employers in Michigan, Ohio, Kentucky, and Tennessee who try to resist across-the-board collective actions and damages claims brought under the FLSA.

In the *Monroe* case, the plaintiff cable technicians alleged a corporate-wide "time-shaving" policy, and there was some evidence supporting this claim. They were paid on a "piece-rate" basis. They asserted that management had falsified time sheets; that management had instructed employees to under-report hours; and that "incentives"—such as rewarding "productivity"—were designed to motivate employees to under-report their time worked. Productivity involved completing the work quickly. But offering such an incentive would not be unlawful absent connecting evidence that the plaintiffs had apparently not presented in the *Monroe* case.

The case was tried as if only one overall theory was being advanced: According to the trial court, the employer's policy to shave time to avoid overtime—regardless of the method used—was said to impact all employees similarly, thus making certification of one class appropriate. A supposedly representative sample of plaintiffs' witnesses testified—17 out of approximately 300 class members. The trial court found the employer liable, and damages were assessed by the court, based on the testimony of these supposedly representative 17 witnesses. The court computed an average for each plaintiff who testified, and then applied that average to the rest of the class. This average of an average was used despite the fact that weekly unpaid overtime situations for the 17 witnesses varied from 8 to 24 hours. The jury was given no role in this calculation.

On remand following the Supreme Court's GVR, the Sixth Circuit panel again affirmed (by a 2-1 vote), finding *Tyson Foods* inapplicable, despite the Supreme Court's rather pointed suggestion that it should be applicable. The Sixth Circuit panel essentially reprinted its original decision, barely mentioning *Tyson Foods*. If the case had involved a properly defined class, or subclasses, affirmance of certification would not have been surprising, and likely would not have generated a blistering dissent from Judge Jeffrey Sutton.

As the dissenting judge forcefully pointed out, the case should at least have involved certification of subclasses so that during trial on liability, the jury could determine whether testimony was representative of what had been alleged. The trial court's approach, on the other hand, conflated dissimilar fact settings into one supposedly representative and uniform scenario, allowing proofs pertaining to one group of employees to apply to a dissimilar group. For instance, there was no way to check whether jurors had found any one of the alleged time-shaving approaches to have impacted any group, let alone the entire class, in a similar way. The trial court's approach to damages likely violated the Seventh Amendment's requirement that a jury, not the trial judge, assess damages.

Judge Sutton's dissent did not challenge the notion that representative proofs could—if properly aligned with a viable theory of a case—support class certification, as well as damages calculations by a jury. Instead, he focused on the disconnect between who was representing whom on account of what violative conduct, and the fact that the jury had virtually no input into the damages award.

The U.S. Supreme Court's decision in *Tyson Foods* did in fact warrant consideration, not the dismissive label of "dictum" in effect given it by the Sixth Circuit panel's majority. The Supreme Court in *Tyson Foods* had approved a method for calculating damages based on statistical showings, as opposed to requiring individual testimony from each claimant. The time required for "donning and doffing" at issue in *Tyson Foods* could be calculated with a measure of reliability as an average applicable to all employees required to wear work-related gear, who had not been paid for the time to put the gear on and to later take it off. The underlying liability issue and resulting calculation of damages could then be deemed representative for all class members. In approving this approach, the Supreme Court stressed the reliability of the data in this uniform factual setting—vastly different from the facts in *Monroe* where each employee's experience was different. Even as to donning and doffing, the Supreme Court cautioned that representative testimony, to establish class-wide liability, must involve evidence that each class member could have relied on to establish liability in his or her own claim.

The Sixth Circuit's panel decision in *Monroe* warrants further review. A petition for rehearing *en banc* was filed but denied on July 28, 2017. We have been advised that a petition for *certiorari* will be filed which should stand a good chance of being granted in light of the split between the Sixth Circuit's decision in *Monroe* and the Seventh Circuit's 2013 decision in *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770 (7th Cir. 2013), as well as the history of the *Monroe* case. In considering the petition, the Supreme Court may well take note of the cavalier treatment the Sixth Circuit panel's majority gave the Supreme Court's GVR. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Reading Stuart Israel's new book is like watching an autopsy. You know how a skilled pathologist slices up a body and carefully removes each organ and weighs it and examines it and puts it in a meticulously labeled jar? Neither do I, but go with me on this. Imagine you're watching this old doc. He's done so many autopsies he can do them blindfolded. He proceeds, as Goethe would say, "Ohne hast, ohne rast," without haste, without rest. He examines each bloody bit as thoroughly as if he had nothing else to do. He describes the condition of each tissue with encyclopedic knowledge and total recall of the relevant literature, and he moves to the next piece of bloody business with a practiced grace. He misses nothing. And while works, he talks. He quotes Oscar Wilde, G. Gordon Liddy, Charles Dickens, and Mike Tyson. And he makes jokes.

My friend, colleague, and sometimes co-author Stuart is like that. He is meticulous, thorough, and subtle. He is scrupulously careful. And he is wise, charming, and funny. The grisly business he is about is taking and defending depositions, and it's hard to imagine how anyone could do a better job.

Every section is carefully cross-referenced to the relevant provisions in the Federal Rules of Civil Procedure, the Federal Rules of Evidence, the American Bar Association Model Rules of Professional Conduct and the relevant caselaw. But you would expect that. What you might not expect is the hard-won practical advice about the application of those provisions in the real world. And what you almost certainly do not expect is the wit with which that wisdom is conveyed.

Here is Stuart on the decision to take a discovery dispute to the judge:

> [E]ven if you're in the right, bringing a motion to compel or for a protective order may produce judicial antipathy or worse.… [W]hen you go to court on a discovery motion, you risk the Law of Unintended Consequences, which may result in judicial micromanagement, burdensome discovery limitations, undesirable discovery extension and expansion, merits prejudgment ("premature adjudication"), and sanctions for having the temerity to file a motion that is denied.

You are not going to find "premature adjudication" in any other book on this subject.

Here he is on copies of exhibits:

> Some lawyers provide a complete set of exhibits to the reporter at the beginning of a deposition, sometimes in a binder. This is very courteous and efficient. It obviates the need for breaking the flow to get papers marked and distributed during the deposition. Courteous and efficient, yes, but also disadvantageous to the questioner, who is supplying the other side with a roadmap to his thought processes, and with a comprehensive set of materials for the opposition's review at lunch and during evenings between deposition days.

As I said, worldly, practical, and subtle.

Here he is on "transcript awareness:"

> [I]f your client is asked to select from a number of documents those she read before a crucial date and she answers "This one, these three, and the one by your left hand," you have a choice. You can leave the record as it is—obscure and unusable at trial. Or you can clarify. If obscurity favors you, leave things alone. On the other hand, if the testimony helps, clarify the record.

This is not just pushing the pieces around. This is chess. And there is counsel at this level on every page of this profoundly valuable book. ■

Stuart M. Israel's *Taking and Defending Depositions—Second Edition* (American Law Institute CLE 2017) is available at www.ali-cle.org/BK97

WHY MEDIATORS SHOULD NEVER SAY "NEVER"

Sheldon J. Stark
Mediator and Arbitrator

"Never give in, never give in, never, never, never, never…."
Winston Churchill. Quoted in *Churchill and Orwell, the Fight for Freedom* by Thomas E. Ricks, Penguin Press 2017

If the parties to a dispute are not ready to settle, no technique, no approach, no amount of skill or artistry employed by a mediator will bring them together. Conversely, if the parties desire a resolution it will happen notwithstanding misjudgments, blunders or missteps by the mediator. Knowing party intent in advance might just save time and money[1]. Regrettably, a party's commitment to the settlement process in any given dispute is not always evident or even discernable[2].

What's behind an unwillingness to settle? Parties may lack sufficient information on which to base a realistic assessment of risk and exposure. Mediation can, but does not always, provide the kind of information on which decision makers generally rely. Information supplied by the other side may not be trusted or be so wrapped in "spin" as to warrant rejection and disbelief. In such cases, the parties are unwilling to settle until they have had some amount of discovery or an opportunity to "test" a theory or claim. On other occasions, a party is not ready to engage seriously until the other side has been forced to answer for its conduct—although mediation may help that party realize such is unlikely to happen. Similarly, a party may require some form of acknowledgment of wrong or unfairness. In still other cases, the defense may insist on a dispositive motion decision before it is ready to put real money on the table. More often, parties wish to settle but are unready to bargain productively because they have dramatically different—and sometimes unrealistic—opinions about the value of the claim or potency of the defense.

Accordingly, readiness to settle is often a matter of timing. Have the parties had an opportunity to take the discovery they need? Are important motions pending or decided? Have expenses been mounting up to where settlement has become a more attractive option? Every mediator has seen cases where the parties retain their services immediately after a key witness has been deposed, or they are preparing for oral argument on a dispositive motion and decide the time has come to manage risk, or following decision on an important legal or evidentiary matter and a trial on the merits is looming on the horizon. This paper encourages mediators and litigators to consider *returning* to mediation because the dynamics of the dispute may have shifted and settlement has become possible.

Keep in mind: Just because mediation didn't result in resolution at the table doesn't mean the dispute *can't* or *won't* be settled. No more than 1.2% of cases are going to trial today. Failure to reach agreement on the scheduled mediation date may well mean simply that the timing wasn't right. Mediators, therefore, should not give up just because settlement was beyond reach on a given day. Instead, mediators should be ready and available to return to the mediation process at any time, either at the request of the parties or on their own initiative. There is little or no harm in returning to the table—literally or figuratively—at later stages in the litigation process. Perhaps a few telephone calls will suffice. If a case doesn't resolve, good practice suggests the mediator ask if the parties would be open to a call in 30, 60 or 90 days. No one ever refuses the offer. Litigators on their own should be ready to bring the mediator back into the negotiation any time they believe further negotiations might prove productive.

Never saying "never" is especially apt in this era where *early* mediation has become increasingly popular. More and more parties are opting to engage in mediation before filing suit. Judges increasingly encourage early mediation to resolve legal disputes on their docket. This is the norm in our Business Courts. Early mediation does work. Most business court cases do settle. Participant surveys suggest participant satisfaction with both process and outcome. Early settlement reduces transaction costs, eliminates business disruption and distraction, and salves the stresses and strains of an often-invasive litigation process. Even when the conflict does not resolve at an early stage the issues may be narrowed, the sails trimmed, a better understanding reached, and an appreciation of what it might take to achieve resolution gained.

Awareness of the benefits of early resolution, however, doesn't necessarily translate into readiness on the date set for mediation. Perhaps passions need more time to cool—on one or both sides. Distrust and suspicion may require parties to take discovery from key witnesses before they are ready to accept opposing counsel's representations of what those witnesses have to say. Sometimes parties are too deeply dug in and escalated to *hear* what the other side is saying. People may need time to digest or process what they learned. Mediation provides a golden opportunity for the exchange of information—but that information exchange will be useless unless and until the parties are ready to recognize the potential impact and risk to their desired litigation outcome. When cases do not resolve, mediators should not give up. Yogi Berra's famous aphorism, "It ain't over till it's over," is particularly instructive.

A case in point: Months ago, I mediated a difficult and highly escalated employment dispute where strong feelings existed on both sides. Neither party was prepared to concede that the other side's very different version of what happened was plausible—or equally likely to persuade a jury. Both sides were represented by experienced, able counsel. The dispute did not settle. Summary disposition was thereafter argued and denied, as were defense motions *in limine*. Months later I called the lawyers to check in and test whether attitudes toward settlement had changed. The parties remained far apart. The defense was not deterred by denial of its motions; plaintiff and counsel felt vindicated.

Later still, with a trial date looming and trial preparation proceeding apace, one of the lawyers contacted me to ask if I would get back involved. I did. The discussions and exchanges from the earlier mediation process were still fairly fresh in everyone's mind. We didn't need to spend a lot of time covering that ground again. Our 11th hour negotiations focused instead on the risk a jury, choosing between two competing and plausible versions of events, could not be predicted with any degree of certainty. During trial preparation, plaintiff's risk assessment grew more realistic; while defendant's confidence in the "righteousness" of its decision to terminate was tempered by the looming prospect of explaining its rationale to a jury. To paraphrase Samuel Johnson, nothing focuses the mind like the prospect of a hanging!

I had given up on this case. I had already followed up once some 60 days after mediation to no avail. I had closed the file and sent it to storage. It was out of my mind. It was truly the 11th hour. Could the parties have picked up the phone and negotiated a similar agreement on their own? Perhaps, but neither side was ready to "blink" while closing in on their impending trial date. Bringing the mediator back was the right call. Churchill nailed it. Never, never, never give up.

—END NOTES—

1 A "middle" category of dispute exists, of course: where the talent, techniques and approach of a good mediator reduce impediments, cause a realistic assessment of risk, help parties better appreciate potential financial and non-economic costs and guide the parties to understanding, resolution and closure.

2 Party agreement to mediation is not always evidence of an intent to settle. A party may be seeking early discovery, a better understanding of what's at stake or an opportunity to send a message. ■

ENFORCEMENT OF ARBITRATION AWARDS IN SEARCH OF AN EXCEPTION

Charles Ammeson
Member, National Academy of Arbitrators

The "final and binding" nature of private arbitration awards, as free as practicable from legal constraints, has been a bedrock concept of arbitration processes for centuries, perhaps since their inception. In 1799, George Washington personally endorsed and emphasized the virtues of private arbitration, final, binding and free from legal constraints, in his last will and testament. Washington equated final and binding with that of a Supreme Court decree, specifically providing that "all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men… which three men…shall, *unfettered by Law, or legal constructions*, declare their intent of the Testators intention; and such decision is to all intents and purposes to be *as binding on the Parties as if it had been given in the Supreme Court of the United States* (emphasis added by author).[1] Perhaps the most prominent justification for sanctioning and enforcing private arbitration procedures, free from legal constraints, and inoculating resulting awards as final and binding, is the recognition and acceptance that the "…natural right of self-regulation is a precious possession of a democratic society, for it embodies the principles of independence, self-reliance, equality, integrity, and responsibility, all of which are of inestimable value to any community.[2]

Sixteen decades later, the Supreme Court confirmed that labor arbitration awards shall be imbued with similar autonomy and finality envisaged by Washington, ruling in the *Steelworkers Trilogy* that "…plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

A Public Policy exception to the finality of arbitration awards shares a similar degree of recognition, to the point its founding cases have been referenced as the *Public Policy Trilogy.*[3] The *Public Policy Trilogy,* set forth by Supreme Court in the labor arbitration context in *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. at 766 (1983), dates as far back as 1945 to *Muschany v. United States*, 324 U.S. 49, 68 (1945), cemented in *United Paperworkers and International Union v. Misco, Inc.*, 484 U.S. 29 (1987) as a narrowly construed exception, citing *W.R. Grace & Co*. It is properly observed, despite broad deference to labor arbitration, that the Supreme Court reasonably desired a non-specific catch-all exception for innumerable anticipated and unanticipated circumstances, which exceptions it chose not to specifically prescribe, for concern that the prescription may foster the broadening of the exception rather than maintaining the narrowness intended.

As such, and not to be unexpected, lower courts have been divided in applying the exception, some taking a broad view that arbitration awards violate the Public Policy exception whenever the award benefits employees who have engaged in misconduct that violated public policy; and others taking a narrow view that arbitration awards only violate Public Policy when an award orders action that violates public policy.[4] Although *Misco* has been criticized because the Supreme Court expressly chose not to address the issue whether a court may only vacate a private arbitration award on Public Policy grounds when the private arbitration award orders action that violates a law or legal precedent (See *Misco* at footnote 12), the Court did observe and narrowly reaffirm that that the Public Policy exception "…is limited to situations where the contract as interpreted would violate 'some explicit public policy' that is "well defined and dominant," and "is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest," quoting *Muschany*. The page Supreme Court went on to state that "a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy." As will be suggested below, this particular language may have been an unfortunate choice of words, laying the seeds for unintended consequences, for the reason that *Muschany*, as cited in *W.R. Grace*, appears intended to provide definition to the stature of the public policy necessary to have been violated by the arbitration award, but not intended to suggest that the focus in labor arbitration cases is on the collective bargaining agreement. To the contrary, the focus of the Supreme Court in both *W.R. Grace* and *Misco* concerned enforcement of and upheld the underlying labor arbitration award, being relatively unconcerned about the collective bargaining agreement itself. There is clearly a distinction.

Meanwhile, it appears to be the general experience that efforts to vacate labor arbitration awards on the grounds of the Public Policy exception have been sparse, and primarily utilized concerning employee misconduct.[5] Again, the focus, as represented by both the narrow and broad views, has been whether the misconduct of the employee or results of the award effectuate a situation that violates a public policy, and not whether the reasoning of the award or the collective bargaining agreement itself is violative of Public Policy. As observed by Professor St. Antoine, in discharge and reinstatement cases, "… the key is whether the remedial action ordered by the arbitrator, not the triggering conduct of the employee, is contrary to public policy…."[6] "Stated otherwise, if the employer could, without violating some "well defined and dominant" public policy, have reinstated the employee (and there is no question that the employer in all such circumstances retains that right), then the arbitrator, by implementing the same result, has not violated public policy."[7]

Although the Public Policy exception appears to be well established in International Arbitration, and more frequently pursued than in the labor arena, the experience internationally is that the exception is not commonly sustained. In that regard, it has been observed that: "Public policy is often invoked, but its manifestations remain uncommon, and recognition and enforcement of a foreign award are rarely refused…In some countries, there are even no known decisions where the enforcement of an award was refused on the basis of inconsistency with

(Continued on page 14)

ENFORCEMENT OF ARBITRATION AWARDS IN SEARCH OF AN EXCEPTION

(Continued from page 13)

public policy."[8] "In most of the countries covered by this report, courts tend to narrowly construe violation of public policy as a ground for denying the enforcement of a foreign arbitral award: it does not suffice that public policy is offended or violated by the foreign award, but the violation must be of a certain nature or level."[9] Again, such international experience makes sense. Given the broad deference to arbitration, a non-specific catch-all exception, as opposed to a specific prescription better maintains the narrowness intended.

All in all, it seems to be fair comment that the application of the Public Policy exception to enforcement of private arbitration awards has been relatively quiescent—until now.

On April 28, 2017, in a divided decision, the United States Court of Appeals for the District of Columbia Circuit determined the collective bargaining agreement between the National Railroad Passenger Corporation (Amtrak) and Fraternal Order of Police, Lodge 189 Labor Committee (FOP) contained a specific term which, in fact and in law, violated a "well-defined and dominant" public policy, affirming a lower court's same determination and consequent vacatur of a labor arbitration award. *National Railroad Passenger Corporation v. Fraternal Order of Police, Lodge 189 Labor Committee*, 855 F.3d 335 (D.C. Cir. 2017)

In *National Railroad*, an officer of the Amtrak Police Department was fired long after being investigated for receiving a disproportionate number of assignments, commanding a higher rate of pay, from her supervisor. During the employer's investigation, including two employee interviews in early 2012, the employee maintained she was her supervisor's tenant. The employer took no disciplinary action, closing the investigation in June of 2012. However, in September of 2012, the Office of the Inspector General (OIG) interviewed the employee without recording the interview or informing the employee that she had the right to counsel or the presence of a union representative, as specifically agreed between Amtrak and the FOP in their collective bargaining agreement. The OIG investigator's report concluded that the employee had lied about being her supervisor's tenant during her earlier interviews with the employer, the OIG investigator independently determining that the employee was named as co-owner on the deed to the home where the employee resided; a co-borrower on a second mortgage for the home; and that the employee had falsified an affidavit concerning a tax exemption for the home. After receiving the OIG investigator's report, Amtrak determined to discharge the employee, effective December 3, 2012.

The collective bargaining agreement between Amtrak and the FOP contained a particular Rule 50, which procedurally required that employees be informed of the right to have a union representative present at interrogations; to be informed of *Miranda* rights if criminal conduct is alleged or suspected; and to have interrogations recorded.

The termination was privately arbitrated, and the District Court cited the Arbitrator as holding that Amtrak did not have just cause to discharge the employee because the OIG investigator failed to abide by certain procedural requirements of the collective bargaining agreement, reinstating the employee. Although the Amtrak/FOP collective bargaining agreement made no mention of the OIG, the District Court determined that the Arbitrator reasoned that the collective bargaining agreement's terms applied to OIG investigations. Shortly after the Arbitrator's award was issued, the D.C. Circuit Court of Appeals issued a decision in *U.S. Department of Homeland Security v. Federal Labor Relations Authority*, 751 F.3d 665 (D.C. Cir 2014), holding that "public sector unions and agencies can neither add to nor subtract from the OIG's investigators authority through collective bargaining".

Accordingly, the District Court reasoned in *National Railroad* that the single legal question was whether Rule 50 procedural limitations contained in a collective bargaining agreement between Amtrak and the FOP are binding on the Amtrak Office of Inspector General. The Court determined that they were not, and as such the application of the collective bargaining agreement Rule 50 provision by the Arbitrator to the OIG violated a well-defined and dominant public policy that the OIG must remain independent, citing *Homeland Security*, *supra,* as the well-defined and dominant public policy being violated. As such, the District Court vacated the labor arbitration award stating "… if the decision were enforced, Rule 50 would regulate the OIG's conduct during employee interviews," which would violate public policy, also specifically stating that "…Amtrak need not show precisely how Rule 50 would burden the OIG. The District Court stated it is enough to nullify the Arbitrator's Decision that, if the Decision were enforced, Rule 50 would regulate the OIG's conduct during employee interviews." The District Court also held, on reconsideration, that the principle of OIG independence prevails over the collective bargaining rights established by the federal labor relations statutes.

The D.C. Court of Appeals agreed and affirmed the vacatur, positing the issue as "…whether 'procedural limitations on the conduct of internal investigations contained in a collective bargaining agreement between and the FOP' bind the Amtrak Office of Inspector General," determining that Rule 50 is a provision that regulates an Inspector General's investigatory authority and holding that "…the District Court was right in refusing to enforce the arbitrator's award based on that provision".

Recognizing that further labor arbitration proceedings may be in order, the D.C. Court of Appeals further explained, because the arbitrator rendered her determination entirely on the Amtrak Inspector General's noncompliance with the collective bargaining agreement, the award must be set aside for the reason that the collective bargaining agreement, as applied by the arbitrator, amounted to an illegal contractual provision, noting that the labor arbitration award itself states in full: "The Corporation did not have just cause to discharge Grievant Sarah Bryant because the procedural safeguards guaranteed to employees by Rule 50 of the parties' agreement were not afforded her during the September 25, 2012 Amtrak

OIG interrogation. Therefore, Grievant shall promptly be reinstated to her prior position and made whole, with payment of all back pay and benefits, and restoration of her seniority."

The dissent, citing the *Steelworkers Trilogy*, contrasted the Public Policy exception with the strong federal policy supporting final and binding private arbitration of labor disputes; and the general rule that courts may not second guess arbitrators' decisions of fact or law. It also noted, during the decades since the Supreme Court described the Public Policy exception, "…neither that Court nor this one has yet to encounter a case in which it found reason to invoke it—until now."

The dissent's criticisms of the majority opinion were several-fold, primarily asserting that it is not within the purview of the Courts to scrutinize whether an arbitrator's reasoning conflicts with the claimed public policy, the Court's task being limited to determining whether the award itself, as contrasted with the reasoning that underlies it, creates an explicit conflict with the law. The dissent points out that the labor arbitration award does not require the OIG to bargain collectively or provide *Miranda* rights or the like, but instead merely invalidates Amtrak's discharge by adopting an agency report, after-the-fact, in a manner that would not comport with Amtrak's contractual requirements to provide due process. As such, the dissent observes that the award was nothing more than a ruling on evidence, which excludes Amtrak's reliance on the OIG report, and without which there was no evidence of just cause. As such, the dissent reasons that, if the arbitrator's award does not itself direct a violation of law or an identifiable, well-defined and dominant public policy, Courts have no authority to disturb it, noting as well that there is no law that prohibits the OIG from voluntarily giving warnings, recording interviews or informing employees of their right to have a union representative present.

Concluding, the dissent suggests that the Court of Appeal's decision will only serve to make private arbitration the beginning of an extended dispute resolution process rather than the end, failing to serve the role Congress intended for labor arbitration.

Reviewing and contrasting the District Court and majority opinions with the dissent in *National Railroad*, it seems apparent to this observer that the struggle centers on which public policy should prevail, the "essence" standard propounded by *Steelworkers Trilogy,* or the exception preserved by the *Public Policy Trilogy,* in this case posited as the independence of the OIG.

Returning to the *Steelworkers Trilogy*, it seems generally accepted that it is the foremost authority regarding the enforceability of agreements to arbitrate labor disputes and the consequent labor arbitration awards, clearly providing that labor arbitration awards shall be final and binding, provided they draw their essence from the collective bargaining agreement. Simplifying the rulings leaves the presumptions that voluntary arbitration procedures are to be favored over judicial resolution of such labor disputes; that awards derived pursuant to such private arbitration processes shall be enforced, provided the award falls within the authority granted by the parties to the arbitrator; and that Courts should not disturb an arbitrator's finding of facts or contractual interpretations simply because Courts disagree with them. Awards that are rationally derived from the parties' agreement shall be enforced, for the reason that the parties bargained for the arbitrator's determinations, not the Courts' determinations. Had the parties desired Court determination or review of the arbitrator's determination, they could and would have provided for same.

On the other hand, it is clear the Supreme Court recognized a countervailing Public Policy exception, but underscored the narrowness of the Public Policy exception, holding that any determined public policy upon which the exception is determined must be explicit, well defined and dominant. *See W.R. Grace & Co. v. Rubber Workers*, 461 U.S. at 766 (1983).

The concern for this observer is that neither the District Court nor the majority weighed or attempted to balance the counter-vailing policies against each other. Instead, the District Court and the majority rushed to the conclusion, without comment or balancing assessment, that the independence of the OIG must prevail over the agreement between Amtrak and the FOP. The Courts paid little or no attention to the underlying policy of the "essence" standard recognizing and supporting self-regulation, all which harkens back to the words of George Washington in his will: "…such decision is to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Courts". If, in fact, the "essence" standard is paramount policy, the Public Policy standard only being an exception, the concern should be whether any particular decision upholding the Public exception allows the exception to swallow the rule. Just because a purported excepted policy is well-defined, and dominant does not mean that it must *de facto* prevail over the "essence" standard and the policy of respecting the right of self-regulation by way of private arbitration upheld in the *Steelworkers Trilogy.*

In fairness, this observer must acknowledge that the Supreme Court's language in *Muschany*, reiterated in *Misco*, specifically stating "First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy" perhaps invited lower courts to search for and find a Public Policy exception without balancing the underlying policies of the "essence" standard.

The muddle is furthered confounded if one simply equates enforcement of a labor arbitration award arising out of collective bargaining agreement as enforcement of the collective bargaining agreement itself, an extreme broad view of the Public Policy exception. This observer notes that neither arbitrators nor their awards enforce collective bargaining agreements. Arbitrators interpret and determine collective bargaining agreements by rendering awards, but it is up to the others to enforce collective bargaining agreements and private arbitration awards. See 9 U.S.C Section 1 et seq. (1925).

(Continued on page 16)

ENFORCEMENT OF ARBITRATION AWARDS IN SEARCH OF AN EXCEPTION

(Continued from page 15)

In contrast, it is suggested that a narrow view of the Public Policy exception, as posited by the Paperworkers in footnote 12 of *Misco*, would have and should clarify the muddle whether courts must weigh the underlying policy of the purported exception against the broad countervailing policies supporting arbitration. It is suggested that the exception should only prevail after analysis that the policy promoted by the exception is clearly more important than the policies underlying private resolution of disputes through arbitration processes, and that enforcement of the private arbitration award would, in fact, undermine the stronger countervailing policy.

Applied to the present case, it is obvious the Amtrak/FOP collective bargaining agreement had a "just cause" provision, with specific due process requirements, all subject to a private final and binding arbitration clause. Just as has been noted regarding reinstatement cases under the narrow view, the proper test is not whether the employee activity is at odds with public policy, but whether the reinstatement is offensive to public policy.[10] Stated otherwise, if the employer could have reinstated the employee without violating some "well-defined and dominant" public policy, the Public Policy exception is not to be invoked.

In *National Railroad*, it seems clear that Amtrak retained such right of reinstatement, despite the suggested illegality of applying the Rule 50 to OIG investigations. If Amtrak had such right, pursuant to the narrow view the arbitrator had such authority, given the "just cause" provision.

Such simplified reasoning condenses the more complex balancing analysis with the several core benefits of labor arbitration recognized in the *Steelworkers Trilogy,* in a manner that focuses on the balance between and harmonizes the "essence" standard against the specific countervailing policy to be considered under the Public Policy exception, in this case that OIG investigations should remain independent. Those core benefits are that private arbitration, if final and binding, is by its nature faster and less expensive than proceedings before courts and best promotes the parties' autonomy to choose their own decision-maker.[11] It is what the parties chose.

Ultimately, the balancing boils down to a simple proposition, as has long been suggested by arbitrators,—does the award itself violate a statute, regulation, or other manifestation of positive law, or compel conduct by the employer that would violate such a law. Stated otherwise, if the employer could, without violating some "well defined and dominant" public policy, have reinstated the employee (and there is no question that the employer in all such circumstances retains that right), then the arbitrator, by implementing the same result, has not violated public policy.[12]

The District Court and majority holdings apply a broad view of the Public Policy exception, and as noted by the dissent, arguably undermine all the policy benefits of the "essence standard" of the *Steelworkers Trilogy,* in an over-riding effort to protect the independence of the OIG. However, as the dissent notes, the practical application of the Arbitrator's award in *National Railroad* is, in fact, fully compatible with OIG independence. The award did not require the OIG to bargain collectively, and the award did not require OIG to provide warnings or record interrogations. Moreover, the award did not prohibit criminal prosecution of the employee. The failing of the District Court and majority opinions in *National Railroad*, however, in addition to perhaps mis-construing the practical effect of the arbitration award, is that they did not weigh the balance between the countervailing public policies. By applying a broad view of the Public Policy exception in a rote manner, the District Court and the majority opinion arguably allow the exception to swallow the rule and a paradoxical outcome. Amtrak could have completed its own investigation, providing appropriate warnings and interrogation recording; could have determined not to terminate its employee, which in fact it did at first; and could have determined to reinstate its employee on its own, after it terminated the employee. Instead, Amtrak determined to close its less than thorough investigation and allow the employee to remain. However, according to *National Railroad*, none of these options was available to the Arbitrator.

All in all, the underlying facts of *National Railroad* case are unremarkable. Arbitrators regularly return employees to work when employers fail to abide by their "just cause" and "due process" agreements. What is remarkable is that the *National Railroad* Courts determined, through a broad view analysis that provides little recognition of and no deference to the *Steelworkers Trilogy,* that it is against public policy for an agreed upon private arbitration process to render the same result Amtrak could have provided on its own—a paradoxical outcome buttressed by a broad view analysis, long ago cautioned in arbitral analysis and literature. See Elkouri & Elkouri, How Arbitration Works, 10-10 (7th ed. 2012). Had the OIG never investigated, the employee would have remained, and no public policy would have been violated. Had Amtrak done a more thorough investigation, but failed itself to abide by Rule 50, the labor arbitration award would have been upheld, and no public policy would have been violated. But for the fact that Amtrak did a less than thorough investigation on its own; relied on the OIG to do a better job, albeit outside Amtrak's contractual due process agreements; and agreed to privately arbitrate the issue, an otherwise acceptable result becomes unacceptable, spawning 3 court determinations after a full private arbitration hearing, with the prospect that "Further labor arbitration proceedings may be in order", as commented by the Court of Appeals.

As such, beyond providing a paradoxical outcome, the *National Railroad* court decisions clearly subject the parties to continued litigation; delayed resolution; added expense; and an imposed determination by an unbargained-for decision-maker (a second arbitrator or a court), completely at odds with the underlying paramount policies of the *Steelworkers Trilogy.*

It is also curious to note that *National Railroad* majority

relied heavily on *U.S._Department of Homeland Security v. Federal Labor Relations Authority*, but failed to account for *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir 1986), authored by the same Justice. *American Postal Workers*, *supra*, is very similar case to the case at hand, in which an employee was reinstated because the statements which formed the fundamental basis of the employer's charges were obtained without Miranda warnings, Justice Edwards noting, similar to the dissent in the present case, "Here, the arbitrator's judgment was nothing more than a ruling on the admissibility of evidence, which drew its essence from the parties' contract and violated no established law." This observer suggests that *American Postal Workers*, *supra*, is well worth reading, being a "… a meticulous opinion…".[13]

It is also curious to note that Justice Edwards, in *American Postal Workers*, states: "There is one final point in this case that deserves mention. The Postal Service claims that, even if the arbitrator's award draws its essence from the contract, it should be set aside as violative of 'public policy.' We reject this contention as baseless under existing law," later making clear that: "There is surely no doubt that the instant case does not pose a situation requiring the invocation of a public policy exception. The arbitrator's award was not itself unlawful, for there is no legal proscription against the reinstatement of a person such as the grievant. And the award did not otherwise have the effect of mandating any illegal conduct. In other words, even if the arbitrator's view of Miranda was wrong, his decision to exclude the grievant's statements did not in any manner violate the law or cause the employer to act unlawfully." Concluding, Justice Edwards observes: "For us to embrace the employer's argument here would be to run the risk of allowing an ill-defined "public policy" exception to swallow the rule in favor of judicial deference to arbitration. We will not endorse any such blatant disregard of the teachings of *Enterprise Wheel* and *W.R. Grace*."

The above commentary is not intended to suggest that the Supreme Court improperly desires a flexible exception that will address situations that it cannot anticipate, albeit a narrow exception that recognizes and respects the long-standing underlying policies which mandate broad deference to private arbitration processes. In principle, the Supreme Court desires to preserve the cake, being the "…natural right of self-regulation …"[14] to privately and independently and conclusively resolve private disputes, which George Washington also desired. However, the Supreme Court properly desires to nibble at the cake when arbitration processes result in egregious violations of higher principles. Nonetheless, it is suggested that the simplest way to provide the delicate balance sought is to recognize that the concern is the outcome of the private arbitration procedure, and not the procedure or the collective bargaining agreement itself. Courts have plenty of tools and there are separate procedures to regulate terms of a collective bargaining agreement.[15] The past conduct of employees cannot be undone.

In conclusion, it is suggested that it should be made clear that the Public Policy exception issues, being narrow, should not focus on the triggering conduct (which cannot be undone by vacating an arbitration award) or the collective bargaining agreements that initiated the private arbitration process (which cannot be made proper by vacating an arbitration award), but should focus on the remedial action resulting from the private arbitration process.[16] The *National Railroad* Courts, by utilizing a narrow view, failed to provide any practical support for OIG independence, and unnecessarily defeated the "…natural right of self-regulation …"[17] of Amtrak and the FOP to privately, independently and conclusively resolve their dispute.

The vacatur of the private arbitration award in *National Railroad* results in the nullification of an otherwise very ordinary labor arbitration award which simply reinstates an employee who was not afforded the due process protections agreed to by the employer. A result that occurs regularly in private labor arbitrations. The result (the arbitration award) is fully consistent with the well-defined and dominant public policy of the *Steelworkers Trilogy* and its progeny. Vacatur of the *National Railroad* arbitration award does nothing to remedy the concern of OIG independence and is a situation in which the exception will have swallowed the over-riding principle.

—END NOTES—

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1 Bales, Richard C., "Compulsory Arbitration: The Grand Experiment in Employment," Ithaca, NY: Cornell University Press, 1997.

2 Frank D. Emerson, History of Arbitration Practice and Law, 19 Clev. St. L. Rev. 155 (1970), available at http://engagedscholarship.csuohio.edu/clevstlrev/vol19/iss1/19.

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4 Deanna J. Mouser, Analysis of the Public Policy Exception after Paperworkers v. Misco: A Proposal to Limit the Public Policy Exception and to Allow the Parties to Submit the Public Policy Question to the Arbitrator, 12 Berkeley. Emp. & Lab. L. 89 (1990). Available at: *http://scholarship.law.berkeley.edu/bjell/vol12/iss1/2*

5 See, by way of example, Delta Airlines v. Air Line Pilots, 861 F.2d 665 (11th Cir 1988); *Iowa Elec. Light & Power v. Electrical Workers (IBEW) Local 204*, 834 F.2d 1424 (8th Cir. 1987); *Stead Motors of Walnut Creek v. Machinists Lodge 1173*, 843 F.2d 357 (9th Cir. 1988);

6 St. Antoine, The Changing Role of Labor Arbitration, 76 Ind. L.J. 83 (2001)

7 Elkouri & Elkouri, How Arbitration Works, 10-10 (7th ed. 2012).

8 (IBA) Subcommittee on Recognition and Enforcement of Arbitral Awards (IBA Subcommittee) published a "Report on the Public Policy Exception in the New York Convention (October 2015).

9 *Ibid.*

10 Elkouri & Elkouri, *supra.*

11 Henry Drummonds, *supra.*

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13 Mary A. Bedikian, *Riding on the Horns of a Dilemma: The Law of Contract v. Public Policy in the Enforcement of Labor Arbitral Awards*, 1988 Det. C. L. Rev. 693 (1988).

14 Frank D. Emerson, History of Arbitration Practice and Law, 19 Clev. St. L. Rev. 155 (1970), available at http://engagedscholarship.csuohio.edu/clevstlrev/vol19/iss1/19.

15 National Labor Relations Act of 1935 (49 Stat. 449) 29 U.S.C. § 151–169; Railway Labor Act of 1926 (44 Stat. 557) 45 U.S.C. § 151–1659;

16 St. Antoine, The Changing Role of Labor Arbitration, 76 Ind. L.J. 83 (2001)

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MATHEMATICAL MASTERY OF THE FACTS AND "WHERE JUSTICE LAY"

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

Offering advice to neophyte advocates, I wrote in these pages that effective advocacy usually requires presenting facts in the right perspective—to persuade the decision-maker that your side has it right. I wrote that the law-fact ratio may be 80-20 in law school, but out here it's more like 20-80.[1]

Get the decision-maker in tune with your side's human story, I say, and the decision-maker often will apply the law that supports doing the right thing (for your side).

I expressed these views to Judge Avern Cohn. He opened his desk drawer and handed me a photocopy of "An Unpublished Letter of Chancellor James Kent," published in Vol. IX, No. 5 *The Green Bag* 206-211 (May 1897). Kent's letter is dated October 6, 1828. Apparently the letter remained unpublished for almost 70 years, until *The Green Bag* reproduced it for posterity.

James Kent (1763-1847) was a New York lawyer, judge, chancellor, author, and the first professor of law at Columbia College (from 1793-1798). It seems that Kent County, Michigan is named for him, apparently because he represented Michigan Territory in its dispute with Ohio over the Toledo Strip. Ohio got Toledo, of course. I am not sure which side won.

I was impressed that Judge Cohn had the Kent letter at his fingertips. I'm sure there is a story there. Anyway, the letter—written 189 years ago—supports my 2017 advice. I told you so.

Kent wrote about his decision-making: "My practice was first to make myself perfectly & accurately (mathematically accurately) master of the facts." When done with that "slow & tedious process," Kent was "master of the cause & ready to decide it." He "saw where justice lay and the moral sense decided the cause half the time." Kent then went on to "search the authorities" until he had "exhausted" his books. Though he might "once & a while be embarrassed by a technical rule," Kent "most always found principles suited" to his fact-based "views" of the "moral sense" of the case.

Facts first, then law. Win the decision-maker's heart—show "where justice lay"—and often the decision-maker will find "principles" and "authorities" suited to your views as to what Fed.R.Civ.P. 1 calls "the just, speedy, and inexpensive determination of" the "action."

Of course, this works best with decision-makers who can see "where justice lay."

—END NOTE—

1 Stuart M. Israel, "Persuasive Advocacy and the Human Story" Vol. 27, No. 3 *Labor and Employment Lawnotes* 22 (Fall 2017) ■

MERC UPDATE

Andrew J. Gordon
White Schneider PC

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

Grand Traverse County -and- Grand Traverse County Sheriff, Case Nos. C16 E-050; C16 E-051; C16 E-052; C16 E-053 (August 16, 2017).

Four separate bargaining units filed Charges against Grand Traverse County and the Grand Traverse County Sheriff (Public Employers) alleging the Public Employers violated their duty to bargain under Section 10(1)(e) of the Public Employment Relations Act (PERA). Charging Parties alleged that the Respondents repudiated the terms of their respective collective bargaining agreements when they increased the employee health insurance contribution paid by bargaining unit members from 6% to 20%. Administrative Law Judge Julia C. Stern found Respondents violated Section 10(1)(e) of PERA and Respondents filed exceptions. The Commission affirmed.

Between January 1, 2015, and February 1, 2015, Charging Parties entered into separate collective bargaining agreements with Respondents. Each agreement was to run until December 31, 2017, and contained provisions covering employees' health insurance benefits, including specifying employees were responsible for 6% of the premium share of the "base plan." The bargaining agreements then specified "the $250/$500 deductible plan" would remain the base plan.

Respondents contended that since 2011, they had made an annual choice as to their cost sharing option under the Publicly Funded Health Insurance Contribution Act, 2011 PA 152, MCL 15.561-15.569 (PA 152). Under PA 152, a public employer may choose between a "hard cap" amount under Section 3, or may choose to limit its hare of health care costs of 80% of the total annual cost of all medical benefit plans it offers for that year under Section 4. The Section 3 hard cap limits are the default contribution measure under PA 152, but the governing body of the public employer may elect by simple majority to comply with Section 4 instead. Under Section 8 of PA 152, a governing body may exempt itself from the requirements of PA 152 by a two-thirds vote of its governing body prior to the beginning of the benefit plan year, MCL 15.568. On April 27, 2016, Respondents passed

a resolution switching from the hard cap to the 80% employer share for the 2017 medical benefit plan year. This decision had the effect of substantially increasing employees' monthly premiums and deductibles.

The Commission noted that health insurance benefits are a mandatory subject of bargaining. Mandatory subjects of bargaining may only be modified during the term of a collective bargaining agreement with the consent of both parties. The Commission reviews allegations that a public employer made a unilateral change to a mandatory subject to bargaining to determine whether the employer has repudiated the contract. Repudiation only exists where there is no good faith dispute over the interpretation of the contract. In this matter, the Commission determined that the Respondents could not identify any language in the collective bargaining agreements allowing them to unilaterally change the distribution of health insurance costs.

The Commission also discussed the interaction of PA 152 and PERA. The Commission stated that a public employer has the concurrent responsibility to comply with PERA and PA 152. When a public employer ratifies a collective bargaining agreement committing to paying certain contributions to health care costs, that public employer also commits to doing what is necessary to comply with PA 152. Because Respondents ratified collective bargaining agreements providing for employer health insurance contributions in excess of PA 152 limits, the Respondents also obligated themselves to secure the two-thirds majority vote to exempt them from PA 152. Thus, PA 152 did not prohibit Respondents from having to pay the higher contributions under their collective bargaining agreements. The Commission adopted the ALJ's Recommended Decision and Order finding Respondent had violated Section 10(1)(e) of PERA.

Derek Turner -and- Police Officers Labor Council -and- Detroit Transportation Corporation, Case Nos. C17 D-015; C17 D-034 (August 24, 2017)

On April 18, 2017, Derek Turner (Turner) filed unfair labor practice Charges against his former employer, the Detroit Transportation Corporation (the Employer), and his bargaining unit, the Police Officers Labor Council (the Union), alleging violations of Section 10 of the Public Employment Relations Act (PERA). On May 16, 2017, Administrative Law Judge Julia C. Stern (ALJ Stern) issued Turner a show cause order to state why his charge against the Employer should not be dismissed.

On June 13, 2017, Turner sent ALJ Stern a letter stating that the Union was not representing him in the matter and alleged that the Employer was not following the current collective bargaining agreement regarding the grievance process. Turner further alleged the Employer would not talk to the Union about a grievance claiming he had been wrongfully terminated. Based on this letter, ALJ Stern determined that Turner had withdrawn his Charge against the Union.

Turner was hired by the Employer as a transit police sergeant on March 7, 2016, and he became a member of the Union's bargaining unit. The collective bargaining agreement provided that Turner was subject to a six-month probationary period. In some circumstances, the Employer could extend the probationary period. On September 13, 2016, the Employer sent Turner a letter stating his probationary period would be extended for sixty days. On December 9, 2016, the Employer notified Turner he was being terminated, but the Employer did not give a reason for Turner's termination. At Turner's behest, the Union filed a grievance on his behalf, but Turner did not initially tell the Union he was still on probation. The Employer verbally informed the Union that Turner's probation has been extended by three months. On February 14, 2017, the Union's grievance committee voted not to arbitrate the grievance. Turner then supplied the Union with the September 13th letter. The Union then sought documentation from the Employer on whether Turner's probation had been extended a second time but received no response. The Union then demanded to arbitrate the grievance on April 18, 2017.

Turner's Charge against the Employer alleged he was discharged without just cause and in violation of the collective bargaining agreement. ALJ Stern stated that not all discharges by a public employer violate PERA. Further, PERA does not provide employees with an independent cause of action against their employer for breach of a collective bargaining agreement. The Commission lacks jurisdiction to decide disputes absent an allegation that the Employer has otherwise interfered with activities protected under PERA, including the fairness of the Employer's actions.

In his June 13th letter, Turner alleged that the Employer was refusing to process the Union's grievance. An employer's refusal to process a grievance may constitute a violation of the duty to bargain under Section 10(1)(e) of PERA, but an individual employee does not have standing to allege a refusal to bargain by this employer. The duty to bargain is only owned to the collective bargaining respresentative, and only the bargaining representative can allege a violation of Section 10(1)(e) of PERA. Thus, Turner lacked standing to bring his Charge against the Employer.

ALJ Stern recommended dismissal of the Charges without hearing pursuant to Commission Rule 165. No exceptions were filed. ■

UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long

Enforceability of Class Action Waivers in Employment Arbitration Agreements

First on the Supreme Court's oral argument calendar this Term were the consolidated cases, *Epic Systems Corporation v. Lewis,* No. 16-285, *Ernst & Young LLP, et al. v. Morris,* No. 16-300, and *NLRB v. Murphy Oil USA, Inc., et al.*, No 16-307. The principal issue in these cases was the enforceability of a class or collective action waiver in an arbitration agreement between an employer and its employees.

The National Labor Relations Board took the position that such waivers violate employees' right to engage in concerted activity. The Justice Department, on the other hand, argued that the Federal Arbitration Act supports the enforceability of these provisions.

Employers have a significant interest in the enforceability of these clauses, especially considering the substantial expense they can incur defending, for instance, wage and hour collective actions brought under the Fair Labor Standards Act. Employees object to these clauses to the extent they restrict their ability to pursue, in a cost-efficient way, relatively small individual claims against their employers.

Court Hears Arguments on Procedural Questions

On October 10, 2017, the Supreme Court heard oral argument in *Hamer v. Neighborhood Housing Services of Chicago*, No. 16-658. The narrow issue in that case was whether a federal appeals court can grant an appellant an extension in excess of 30 days to file a notice of appeal. The petitioner argued that 28 U.S.C. § 2107(c) places no maximum limit on the length of an extension, provided the appellant files a timely motion to extend pursuant to FRAP 4(a)(5)(c) and can show excusable delay or neglect. The petitioner further argued that FRAP 4(a)(5)(c) is non-jurisdictional and can be waived or forfeited. The respondent argued that when Congress amended 28 U.S.C. §2107(c), it inadvertently excluded language stating that an appellant is not entitled to an extension in excess of 30 days. The respondent also argued that FRAP 4(a)(5)(c) is jurisdictional or, in the alternative, a mandatory claims processing rule, and that it cannot be waived or forfeited.

In *Artis v. District of Columbia,* No. 16-460*,* the petitioner had filed a federal lawsuit asserting both state and federal claims against her former employer. At the time of filing, there were two years remaining on the statute of limitations for the state claims. The federal court dismissed the federal claims and declined to exercise supplemental jurisdiction over the state claims. 59 days after the federal court dismissed her claims, petitioner filed the remaining state law claims in state court. The respondent argued that the petitioner's state claims were time barred because more than two years had elapsed in the federal court and petitioner had not re-filed her state claims within the 30-day grace period granted by 28 U.S.C. § 1367(d). The petitioner argued that, because 28 U.S.C. §1367(d) provides for tolling of the statute of limitations while a state claim is pending in federal court, she had the remaining two years of the state statute of limitations, plus the 30-day grace period. The Supreme Court heard oral argument on this issue on November 1, 2017.

Dodd-Frank Definition of "Whistleblower"

On November 28, 2017, the Supreme Court will hear oral argument in *Digital Realty Trust, Inc. v. Somers*, No. 16-276. The sole issue in that case is whether the definition of "whistleblower" in the Dodd-Frank Wall Street Reform and Consumer Protection Act, includes employees who raise concerns within their company about possible security violations, even if they do not make a report to the SEC. The federal courts of appeals are split on this issue, with two courts holding that the definition includes employees who file only internal complaints with their employers, as well as those who file complaints with the SEC, and one court holding that the definition is limited to only individuals who make reports to the SEC. ■

DOES YOUR CLIENT EMPLOY AN EXECUTIVE WHO MAY BE THE NEXT *HARVEY WEINSTEIN* NEWS STORY?

Linda G. Burwell
National Investigation Counsel

Harvey Weinstein, Bill O'Reilly, Roger Ailes, Matt Lauer, John Conyers and Charlie Rose; what did they have in common? According to media reports:

1. They were very high-ranking individuals in positions of great power;
2. They had multiple accusers (in the case of Weinstein, there were more than 80);
3. There were multiple incidents that occurred over a long period;
4. The accusers claimed the behavior was accepted by the employer, if not overtly, then implicitly; and
5. The accusers claimed their claims were ignored, and/or they feared retaliation if they complained.

In other words, there appeared to be a culture, or at a minimum, powerful or complicit individuals, allowing this behavior to continue without adequate avenues for effective complaints.

As the media reports continue, companies will likely face more actions from current and former employees. Companies may also face actions from their shareholders, as demonstrated by Twenty-First Century Fox Inc.'s recent $90 million settlement of a shareholder derivative suit relating to Roger Ailes and Bill O'Reilly. The shareholders alleged that the company's management permitted a culture of sexual and racial harassment to permeate the company, causing financial and reputational harm to the company.

According to the EEOC, "The cornerstone of a successful harassment prevention strategy is the consistent and demonstrated commitment of senior leaders to create and maintain a culture of respect in which harassment is not tolerated." *Promising Practices for Preventing Harassment,* https://www1.eeoc.gov//eeoc/publications/promising-practices.cfm?renderforprint=1. It is also true that many companies have sound policies and regular training programs in place, yet reports of harassment at the highest levels are still unfolding. The obvious question is why is there a disconnect between optimum corporate governance and reality? And, what can attorneys who advise those companies do about it?

One reason for the disconnect appears to be that when dealing with those at the very top of an organization, people may not know how, or may not be properly equipped, to respond when they see or learn about harassing behavior by a person in a position of power. This can be true even when

a company has a strong harassment policy, a clear complaint procedure and provides training to its employees. Thus, Boards of Directors, General Counsel, top executives and attorneys who advise them, are wise to examine their harassment policies as well as their own roles in this process. Are the policies as clear and as robust as they can be? Do they provide a clear and effective path to response and investigation when the claimed wrongdoer is a powerful executive?

The EEOC identified five core principles that it believes have generally proven effective in preventing and addressing harassment:

- Committed and engaged leadership;
- Consistent and demonstrated accountability;
- Strong and comprehensive harassment policies;
- Trusted and accessible complaint procedures; and
- Regular, interactive training tailored to the audience and the organization. *Report of the EEOC's Select Task Force on the Study of Harassment in the Workplace,* https://www.eeoc.gov/eeoc/task_force/harassment/ index.cfm.

Recognizing that these are not legal requirements, the EEOC recommends that leaders ensure their organizations "have a harassment complaint system that is fully resourced, is accessible to employees, has multiple avenues for making a complaint, if possible, and is regularly communicated to all employees." *Promising Practices for Preventing Harassment, supra*.

It is not enough, however, to merely have a complaint system in place. According to the EEOC, *Effective and Accessible Harassment Complaint Systems,* focus on the individuals who are responsible for receiving, investigating and resolving complaints. A designated officer may or may not be the right person to lead a complaint response or an investigation, depending upon the identity or positions of the accused, and a number of other factors. In each given case, the company would be well served to address whether the right person is on point, possessing the following qualities/qualifications:

- Is well-trained, objective, and neutral;
- Has the authority, independence, and resources required to receive, investigate, and resolve complaints appropriately;
- Takes all questions, concerns, and complaints seriously, and respond promptly and appropriately;
- Creates and maintains an environment in which employees feel comfortable reporting;
- Understands and maintains confidentiality; and
- Appropriately documents every complaint, from initial intake to investigation to resolution, uses guidelines to weigh the credibility of all relevant parties, and prepares a written report. *Promising Practices for Preventing Harassment, supra*.

The EEOC does not define what it means by individuals having the "authority, independence and resources required to receive, investigate and resolve complaints appropriately." There is no single right answer as to whom should receive, investigate and resolve complaints and they are generally not the same person. It is fact specific depending upon the issues at hand and each instance may be different. Factors to examine and questions to ask at the beginning of any investigation that may prove helpful, include:

- Is the investigator independent and objective?
- Can the investigator be impartial?
- Is the investigator in the chain of command?
- Is the investigator a "victim"?
- Will the investigator be a witness?
- Does the investigator have a vested interest, pre-existing bias or predetermined outcome?
- Will the investigator's assessment of credibility be second guessed by superiors or legal?
- Does the investigator (or witnesses) fear retaliation?
- Will there be attorney-client privilege issues to manage?
- How serious are the allegations?
- Is the alleged bad actor a high-level employee?
- Is the investigator experienced?
- Are there internal or external political pressures?
- Has the complainant hired an attorney?
- Is the investigator or decision maker too close to the alleged bad actor, complainant or witnesses?
- Is the company's regular counsel too close to the alleged bad actor, complainant or witnesses?

All the above factors should be regarded in a special context when the alleged wrongdoer is in a position of power. Moreover, a key element is the absence of fear of retaliation against both complainants and others involved in processing and investigating the complaint. This would seem to require strong and unequivocal messaging by the company to counter such fear if one complains or advances the complaint process against the icons and power brokers of an organization. Having multiple avenues for making a complaint including, perhaps access to people outside the linear chain of command (i.e.: outside counsel or board members) may alleviate this problem.

Confidentiality of the identities of both the complainant and alleged wrongdoer is also important. While it may not be possible to assure complete confidentiality or anonymity, companies are wise to take all steps possible to maintain confidentiality and anonymity to the extent possible. The case of *EEOC v. Day & Zimmerman NPS, Inc*., Civil Action

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DOES YOUR CLIENT EMPLOY AN EXECUTIVE WHO MAY BE THE NEXT *HARVEY WEINSTEIN* NEWS STORY?

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No. 3:15-cv-1416, 2017, U.S. Dist LEXIS 133918 (D. Conn, August 22, 2017) is instructive. In *Zimmerman*, the EEOC requested names and addresses of company employees who may have relevant information to a former employee's charge of disability discrimination. The company sent a letter to these employees to let them know they may be contacted by the EEOC. The letter also contained the name of the Charging Party, a description of his allegations, the medical restrictions on his ability to work, the accommodation he requested, along with the employee's right to decide if they wanted to talk to the EEOC and the name and contact information of the company's attorney. The EEOC filed suit claiming this letter constituted retaliation. The court denied summary judgment to the company stating that this letter could be retaliation since it might have a reasonable tendency to coerce or intimidate the Charging Party or other employees from providing information to the EEOC.

Likewise, in light of current events, it is clear that training could be key. Although the EEOC has not yet finalized its rules on harassment that it published in January 2017, it issued a *Press Release* launching a new "*Training Program on Respectful Workplaces.*"This was an outgrowth of the EEOC's Select Task Force on the Study of Harassment in the Workplace. Acting Chair Victoria Lipnic stated "Implementation of the Report's recommendations is key. These trainings incorporate the report's recommendations on compliance, workplace civility, and bystander intervention training. I believe the trainings can have a real impact on workplace culture…". https://1eeoc.gov//eeoc/newsroom/release/10-4-17.cfm?renderforprint=1. Coincidently, the EEOC issued its *Press Release* on October 4, 2017, the day before the Harvey Weinstein scandal broke. Congress, too, has reacted and recently passed a bill to require mandatory sexual harassment prevention and response training. *H. Res. 604,* November 2, 2017. The context of the recent news stories emphasize that there should be elements of training that focus on how to deal with complaints against persons in positions of power in the organization.

CONCLUSION

The daily revelations of alleged bad behavior by persons in positions of power suggest the need for greater awareness of, and greater commitment to, compliance by executive manage - ment and boards of directors. Review of complaint and investigation procedures, reporting channels and training, are all suggested. The consequences of non-compliance are escalating. ■

MERC NEWS

Ashley Olszewski
Bureau of Employment Relations

Training Events. Michigan Employment Relations Commission/Bureau of Employment Relations conducted a series of trainings, including: MERC Back to Basics (in late August), a joint program with the NLRB at the Bernard Gottfried Symposium (in October), and its statutorily-mandated Act 312/Fact Finder Training Program (in October). The Act 312/Fact Finder program included training on recent cases and statutes impacting Act 312 and Fact Finding; municipal and school revenue sources; and well-received panel discussions on handling difficult Act 312/Fact Finding issues and on why certain panel members are selected over others. Training materials from the program are posted at www.michigan.gov.merc.

Commission Decision Issuance Policy Amended. Commission decisions will be sent to parties within seven days after the Commission's monthly meeting. Parties then have five days to notify the Bureau of any errors/typos. Seven days after transmittal to the parties, the decision will be posted on our website. Commencing January 1, 2018, parties who request a copy of the decision will be directed to our website for retrieval and printed copies will no longer be emailed to constituents.

Annual Report. MERC's Annual Report is available on the agency's website. The Report highlights the numerous accomplishments of MERC and the Bureau, and covers the 2017 fiscal year, October 1, 2016-September 30, 2017. The Annual Report was initiated at the request of MERC Chairperson Edward Callaghan during fiscal year 2013, making the 2017 Report the fifth annual edition.

Reappointment. On October 3, 2017, Governor Snyder re-appointed Commission Chair, Edward Callaghan, to another three year term, expiring on June 30, 2020. Chair Callaghan currently serves as an adjunct professor at Oakland Community College (OCC). He previously served as President of OCC's Orchard Ridge campus and as Vice Chancellor for Human Resources and College Communications. Chair Callaghan holds a bachelor's degree in personnel from the University of Detroit, a master's degree in personnel and labor relations from Wayne State University and a Ph.D. in labor relations and education from the University, of Michigan. ■

TIPS FOR MAKING A PRESENTATION

Otto Stockmeyer
Distinguished Professor Emeritus, WMU-Cooley Law School

As lawyers, we are trained to be expert communicators. Yet speaking before a group can be an intimidating prospect for some of us, whether it's a civic club luncheon, trade association meeting, or bar association CLE program. If you are called upon to make a speaking presentation, here are some tips for making it an effective and impressive one.

- Among your first steps should be to find out exactly what your assignment is (to lecture or to moderate, for example), what you should cover, what limitations may apply, and what facilities are available to aid you in delivering your presentation.

- Some groups discourage reading a presentation verbatim. If you must do it, prepare by reading your presentation aloud several times to get your timing down, eliminate tongue twisters, and mark natural pauses. The more often you do this, the less often you will have to look down at your text—or worse, stumble over phrasing.

- At the same time, give thought to ways that gestures and movement can be used to add interest and variety to your presentation. Who first said (rightly, I think) that it takes a lot of practice to appear spontaneous? And if you intend to inject humor into your presentation, be sure to build in pauses, to avoid treading on your laugh lines.

- Run your presentation through Word's readability program. Chop up complex and compound sentences and replace long words until you can bring it in at a ninth- or tenth-grade reading level. See "Using Microsoft Word's Readability Program," in the January 2009 *Michigan Bar Journal* (www.michbar.org/file/barjournal/article/ documents/pdf4article1467.pdf). In addition, the *Writer's Diet* fitness test can assess whether your sentences are flabby or fit and offer suggestions for improvement (www.writersdiet.com/test.php). (This article is rated at grade level 10.4, with sentences assessed as "fit & trim.")

  - Do not allow yourself to be caught in a situation where you have to rush through your remarks. Identify some paragraphs that you can drop if a previous speaker hogs part of your allocated time. Another technique, if you have reached your allotted time, is to have a short bibliography ready to display that the audience can refer to for the remainder of your topic.

- Audiences expect PowerPoint slides. Take them on a thumb drive, but bring your own laptop (or iPad), power cord, and cables just in case some piece of equipment is missing or malfunctioning. If you will be using a laptop, make sure that the lectern has space for both it and your text or notes.

  - As an alternative to PowerPoint, you might want to check out new cloud-based presentation software called *Prezi*. Prezi's visual interface is great for storytelling, but is not as useful if you simply want to convey bullet points. Visit www.Prezi.com to find out more.

  - Stop by the room that you will be speaking in beforehand to check out the audio system and projector. In three of my last four presentations, some glitch needed attention (missing cable, dead remote control, lighting problem).

  - Finally, do not begin your presentation until the room is totally silent. Trying to talk over back-row chatter is a losing proposition. Once you have started talking, nothing short of shooting off a gun will quiet a noisy audience.

The successful presenter is not only an effective transmitter of knowledge, but also an impressive communicator. When an invitation to make a presentation arises, seize the opportunity and be that person.

—END NOTES—

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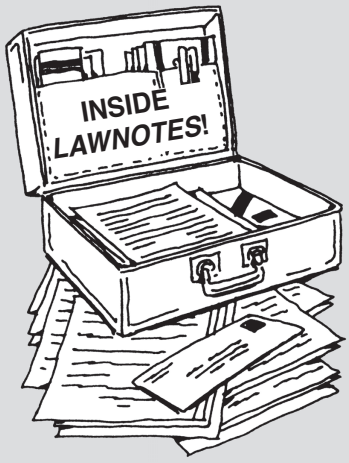

- Michelle Capezza and Adam Forman write about artificial intelligence in the workplace.
- Michigan Supreme Court Justice Kurtis T. Wilder speaks to labor and employment lawyers.
- Eric J. Pelton reports on the Trump DOL, Tom Kienbaum comments on FLSA collective actions in the Sixth Circuit, and Sonja Lengnick and Ryan Bohannon address the state of LGBT protection under Title VII.
- Mediation issues are addressed by mediation menches Lee Hornberger and Shel Stark.
- Barry Goldman says nice things about the Second Edition of Stuart Israel's deposition book and Stuart Israel writes about Chancellor Kent (of Kent County fame) and "Where Justice Lay" 1828 – style.
- Labor and employment decisions and developments from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, MIOSHA, MDCR and EEOC news, websites to visit, and more.
- Authors Charles Ammeson, Ryan D. Bohannon, Linda G. Burwell, Michelle Capezza, Regan K. Dahle, Adam S. Forman, Barry Goldman, Andrew J. Gordon, Lee Hornberger, Stuart M. Israel, Thomas G. Kienbaum, Sonja L. Lengnick, Ashley Olszewski, Eric J. Pelton, Sheldon J. Stark, Norman Otto Stockmeyer, Jr., and Kurtis T. Wilder.