Newsletter of Labor & Employment Law Section • State Bar of Michigan

LABOR AND EMPLOYMENT LAWNOTES

Volume 5, No. 1 Winter 1995

REPORT FROM THE COUNCIL

The Section's annual mid-winter meeting on January 27-28 was well attended and equally well received. Approximately 280 people attended the Friday night reception and dinner and were uproariously entertained by The Capitol Steps. About half that number attended the Saturday morning seminar, where they saw and heard MERC and NLRB Updates and a stimulating panel discussion on the decline of civility and the emergence of "Rambo tactics" in the practice. Hearty thanks to Kathryn VanDagens, who presented the MERC decisional update; MERC Chair Star Swift, who brought us up to date on Commission policies, procedures and plans; U-M Law School Professor Deborah Malamud, who presented a thorough and incisive summary of court and Board developments under the NLRA in 1994, and especially to our own Treasurer, Sheldon Stark, for putting together and moderating the panel discussion with participants Kathleen Bogas, John Brady, Carole Chiamp, Duane Ice, Tom Marshall, Steve Mazurak, Sam McCargo, Sam McKnight, Jules Olsman, Jordan Rossen, Diane Soubly, Judge Cynthia Stephens, and Donald Van Suilichem. Their discussion was dramatically assisted and focused by video-taped scenarios illustrating several possible manifestations of "Ramboism," for which more thanks go to Council Member Stuart Israel and his supporting cast. The panel discussion was audio-taped; you may obtain copies — and we urge you to do so if you were not in attendance and litigation is part of your practice — from the Member Services department at the State Bar office in Lansing.

UPCOMING: The next continuing education event sponsored by the Section is the 20th annual Spring ICLE Labor and Employment Law Seminar, which this year will feature a new format and location. The Council took over the planning for this year's seminar, and changed the format from a long succession of rather brief presentations on a very broad range of topics to a more in-depth treatment of fewer subjects of maximum interest. The two-day program will be held at the MSU Management Education Center in Troy, on Thursday and Friday, April 20 and 21. The first morning will focus on the "At-Will Tug of War," beginning with a survey of the current state of employment-at-will and wrongful discharge case law in Michigan and the 6th Circuit, presented by U-M Professor Theodore St. Antoine, after which Joe Golden and George Ashford will present plaintiff and defense perspectives on wrongful discharge litigation and there will be a panel discussion on making and beating motions for summary dismissal, featuring three practitioners and two judges. Three sessions follow on Thursday afternoon: one on recent MERC decisions and developments, with a case update by Commission Director Shlomo Sperka and a panel discussion featuring all three Commissioners and three practitioners; another on privatization and subcontracting; and an ADA update. Friday morning will feature two major presentations: one on after-acquired evidence, the other on sexual harassment issues, with a practical focus on policy formulation, complaint and investigation implementation and particular emphasis on sexual harassment issues in law firm settings. The seminar concludes Friday afternoon with three sessions: one on teacher/school labor relations issues and Act 112; one on covenants not to compete and other restrictive covenants in employment contracts; and one on voluntary arbitration of wrongful discharge and discrimination claims. Look for a mailing soon from ICLE, and please plan to attend this seminar.

PRO BONO SURVEY: As you know, the State Bar Representative Assembly adopted a Voluntary Standard for *Pro Bono* Participation by All Members of the State Bar in 1990. It states that all members should participate directly in delivery of *pro bono* legal services to the poor either by providing representational services themselves or contributing money to organized programs that deliver such services. Responding to input from the Pro Bono Involvement Committee, the Council is looking into recruitment, training and other possible efforts to increase such activity within this Section, in connection with which we call your attention to the survey form included with this issue of *Lawnotes*. Please fill out and return it to aid us in our planning.

PLAIN ENGLISH: The Plain English Committee of the State Bar gives out Clarity Awards and is looking for worthy examples of clear legal writing from all areas of practice and thus from all State Bar Sections. We need your help with this too, so if you have a sample of clear legal writing to nominate, your own or somebody else's — be it an employment contract form, a waiver, release, or whatever — please forward it to Council Member Kendall Williams in Flint.

— Paul Glendon, Section Chair

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STATEMENT OF EDITORIAL POLICY

Labor and Employment Lawnotes is a quarterly newsletter published under the auspices of the Council of the Labor and Employment Law Section of the State Bar of Michigan as a service to section members. Views expressed in the articles and case commentaries appearing herein are those of the authors, not the Council, the Section or the State Bar at large. We encourage Section members and others interested in labor and employment law to submit articles and letters to the editor for possible publication. Please send them to the editor at 320 N. Main St., Suite 400, Ann Arbor 48104.

Paul E. Glendon, Editor

COUNCIL DIRECTORY

LEGAL CONSIDERATIONS IN THE HANDLING OF EMPLOYEE MEDICAL OR HEALTH RECORDS

By Craig A. Mutch and David M. Buday
Miller, Johnson, Snell & Cummiskey, P.L.C.

INTRODUCTION

Privacy in the workplace has become an issue of great magnitude in the 1990s. Of particular significance are the increasing number of disability discrimination and invasion of privacy claims that are being filed based on an employer's use of medical exams and tests and information related to medical conditions. What medical information can an employer use in making employment decisions, and how must that information be maintained? This outline answers these questions and focuses on the legal issues surrounding the handling of employee medical or health records.

I. AMERICANS WITH DISABILITIES ACT ("ADA") 42 USC §12101 ET. SEQ.

A. ***Coverage:*** Effective July 1994 for employers in commerce with 15 or more employees. 42 USC §12111(5).

B. ***General:*** Prohibits discrimination against, and requires reasonable accommodation of, a "qualified individual with a disability"; prohibits unnecessary non-work-related medical examinations and inquiries into an applicant's health condition; and requires confidentiality of employee medical records.

1. "Qualified individual with a disability" is defined as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position held or desired. 42 USC §12111(8).
2. "Disability" is defined as:
   a. a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
   b. a record of such an impairment; or
   c. being regarded as having such an impairment. 42 USC §12102(2).
3. ADA prohibits an employer from basing any employment decision (e.g., hire, fire, promotions, etc.) on an employee's disability or perceived disability.

C. ***Provisions concerning medical examinations.***

1. Definition of medical examination:
   a. No definition in ADA or implementing regulations.
   b. Equal Employment Opportunity Commission ("EEOC") has developed the following definition:
   "Medical examinations are procedures or tests that seek information about the existence, nature, or severity of an individual's physical or mental impairment,

or that seek information regarding an individual's physical or psychological health."

EEOC Enforcement Guidance on Pre-employment Inquiries under the Americans with Disabilities Act ("EEOC Pre-Employment Inquiries Guidelines") p. D-9.

c. EEOC has identified the following factors as relevant for making a recommendation concerning whether a particular test or procedure is a medical examination:
   (1) Whether the procedure or test is one that is administered by either a health care professional or someone trained by a health care professional;
   (2) Whether the results of the procedure or test are interpreted by either a health care professional or someone trained by a health care professional;
   (3) Whether the procedure or test is designed to reveal the existence, nature, or severity of an impairment, or the subject's general physical or psychological health;
   (4) Whether the employer is administering the procedure or test for the purpose of revealing the existence, nature, or severity of an impairment of the subject's general physical or psychological health;
   (5) Whether the procedure or test is invasive (e.g., whether it requires the drawing of blood, urine, breath, etc.);
   (6) Whether the procedure or test measures physiological or psychological responses of an individual, as opposed to the individual's performance of a test;
   (7) Whether the procedure or test would normally be administered in a medical setting (e.g., a health care professional's office, a hospital); and
   (8) Whether medical equipment or devices are used for administering the procedure or test (e.g., medical diagnostic equipment or devices).

EEOC Pre-Employment Inquiries Guidelines, p. D-9.

2. ADA prohibits any pre-offer medical examination and most inquiries about a disability. 42 USC §12112(d)(2); 29 CFR §1630.13(a).
   a. Prohibition applies to:
      (1) Application forms;
      (2) Job interviews; and
      (3) Background reference checking.

EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act ("EEOC Technical Assistance Manual") p. V-5.

   b. Inquiries that are allowed:
      (1) Questions about applicant's ability to perform specific job functions, tasks, and responsibilities. See, *Lowe v Angela's Italian Food*, 2 AD Cases 1796, 1798 (DCKS 1993). ("The ADA . . . do[es] not prohibit employers from making inquiry into an applicant's ability to perform the job."); and *Loghlan v H. J. Heinz Co.*, 3 AD Cases 273, 279 (ND TX 1994) (The court held there was a fact question as to whether the employer's questions concerned the applicant's ability to perform job related functions or a disability).
      (2) Requests that *all* applicants demonstrate how they will perform tasks of job with or without reasonable accommodation.

42 USC §12112(d)(2)(B); 29 CFR §1630.14(a).

   c. Questions the EEOC has stated violate ADA:
      - Have you ever had or been treated for any of the following conditions or diseases?
      - Please list any conditions or diseases for which you have been treated in the past 3 years.
      - Have you ever been hospitalized? If so, for what condition?
      - Have you ever been treated by a psychiatrist or psychologist? If so, for what condition?
      - Have you ever been treated for any mental condition?
      - Is there any health-related reason you may not be able to perform the job for which you are applying?
      - Have you had a major illness in the last 5 years?
      - How many days were you absent from work because of illness last year?
      - Do you have any physical defects which preclude you from performing certain kinds of work? If yes, describe such defects and specific work limitations.
      - Do you have any disabilities or impairments which may affect your performance in the position for which you are applying?
      - Are you taking any prescribed drugs?
      - Have you ever been treated for drug addiction or alcoholism?

- Have you ever filed for workers' compensation insurance?

EEOC Technical Assistance Manual p. V6-V8.

d. EEOC has issued enforcement guidelines on pre-employment inquiries.
   (1) The guidelines make clear that no inquiry can be made concerning the existence, nature or severity of a disability and make clear that any inquiry or series of inquiries that is likely to elicit such information is improper.
   (2) Information volunteered by an applicant in response to a non-disability related inquiry is not objectionable. However, the employer may not make a follow up inquiry concerning the disability at the pre-offer stage.

EEOC Pre-Employment Inquiries Guidelines, p. D-3.

e. EEO Pre-Employment Inquiries Guidelines address the following 15 categories of inquiries:
   (1) ***Direct Inquiries about Disabilities:*** Such inquiries are prohibited.
   (2) ***Inquiries Concerning Performance:*** An employer can inquire about an applicant's ability to perform both essential and marginal job functions.
   (3) ***Inquiries about Impairments:*** Inquiries about impairments are not necessarily illegal because an impairment is only a disability if it substantially limits one or more major life activities. However, the EEOC recognized that questions about impairments often reveal disability related information and therefore, should be closely scrutinized.
   (4) ***Inquiries about Ability to Perform Major Life Activities and about Substantial Limitations of Major Life Activities:*** EEOC recognizes that not all questions concerning major life activities are necessarily illegal, for example, if the question is related to performance of job functions. The EEOC also recognizes that questions about substantial limitations of a major life activity are permissible. However, for both types of questions, the EEOC states that the questions are likely to elicit information concerning a disability and therefore should be closely scrutinized.
   (5) ***Requests to Describe/Demonstrate Performance of Job-Related Functions:*** These questions are permissible.
      (a) If the applicant indicates he or she can perform the job function with a reasonable accommodation, the employer must either:
         i) provide the reasonable accommodation if that does not create an undue hardship; or
         ii) allow the applicant to simply describe how he or she would perform the job function.
      (b) If the employer reasonably believes that a *known* disability would interfere with job functions, it may ask the applicant to describe or demonstrate how, with or without a reasonable accommodation, he or she would perform the job related functions. The same is true for a disability that has been voluntarily disclosed by an applicant.
      (c) Where an employer cannot reasonably know that the applicant has a disability, the employer may only ask that applicant to demonstrate how he or she would perform the job functions if *all* other applicants are asked the same question.
   (6) ***Inquiries Concerning the Need for Accommodations and Requests for Documentation if Applicant Asks for Accommodation:*** The employer can provide on its application forms or job advertisements that the applicant inform the employer of any reasonable accommodation needed to perform the job functions.
      (a) An employer may ask an applicant whether he or she can perform specific job related functions with or without a reasonable accommodation. The questions must be narrowly tailored to the applicant's ability to perform the job functions. Broad

questions such as "would you need a reasonable accommodation for this job" are listed as prohibited.

(b) When an applicant requests an accommodation, the employer may require that the applicant document his or her disability.

(7) ***Inquiries Concerning Known Disability:*** An employer may not ask about the nature or severity of a known disability.

(8) ***Inquiries Concerning Attendance:*** The employer may explain what its attendance requirements are and ask the applicant whether he or she can meet that requirement.

(a) The employer can ask about the applicant's previous attendance record.

(b) The employer cannot ask follow up questions as to why the employee may have missed a certain amount of work at his or her previous job.

(9) ***Inquiries Concerning Workers' Compensation History.*** Such questions are prohibited.

(10) ***Inquiries Concerning Drug Use:*** Inquiries to determine current *illegal* use of drugs are not likely to elicit information about a covered disability and may, therefore, be made at the pre-offer stage.

(a) Inquiries about current or prior *lawful* use of drugs is impermissible.

(b) The employer may ask an applicant whether he or she has ever illegally used drugs. However, the employer may not ask the extent of that use.

(11) ***Inquiries Concerning Certifications/Licenses.*** Such questions are permissible.

(12) ***Inquiries Concerning Lifestyle:*** The ADA allows such inquiries as long as they are not likely to elicit information about the existing nature or severity of a disability.

(13) ***Inquiries Concerning Arrest Conviction Record:*** Such inquiries are not prohibited.

(14) ***Inquiries to Comply with Affirmative Action Obligations:*** Asking applicants to *voluntarily* disclose whether they have a disability for purposes of an affirmative action program is permissible.

(15) ***Inquiries to Third Parties Regarding an Applicant's Medical Condition.*** The scope of lawful questions to a third party, (e.g., a reference check) is the same as that which the employer can ask an applicant directly.

EEOC Pre-Employment Inquiries Guidelines, p. D-3-D-9.

3. ADA allows for medical examinations once a conditional offer of employment has been made. 42 USC §12112(d)(3); 29 CFR §630.14(b).
   a. Requirements for post-offer medical examinations:
      (1) *All* entering employees in the *same* job category must be subject to the same medical examination; and
      (2) Results from the medical examination must be kept confidential (see discussion below).
   b. At post-offer pre-employment stage restrictions on questions about a disability are lifted. If the employer asks disability-related questions at the post offer stage, then the employer must ask all entering employees the same disability-related questions. See, *Russell v Frank*, 2 AD Cases 243 (DC Mass. 1991) (Interpreting substantially the same language under the Rehabilitation Act, the court rejected the argument that the employer could not ask about medical or health information that was mostly unrelated to the position).
   c. Results of a medical examination can be used to withdraw an offer *only* if;
      (1) The reason is job related and consistent with business necessity or to avoid a direct threat to health or safety; and
      (2) The performance of the essential functions of the job cannot be accomplished with a reasonable accommodation. 29 CFR 1630.14(b) and EEOC Technical Assistance Manual p. VI-6-VI-7.
4. ADA restricts medical examination of existing employees. 42 USC §12112(d)(4); 29 CFR §1630.14(c).
   a. Requirements for employee medical examinations:
      (1) Request for medical examination must be job related; and
      (2) The request must be consistent with business necessity.
   b. Examples of when EEOC has stated medical examination or inquiries of employees are lawful:
      - When an employee is having difficulty performing his or her job effectively;

- When an employee becomes disabled;
- When an examination is necessary for reasonable accommodation;
- When medical examinations, screening or monitoring are required by other laws;
- For voluntary "Wellness" and Health Screening Programs.

EEOC Technical Assistance Manual p. V113-V115.

c. Employer may not circumvent prohibition by engaging in searches of employee property at work. See *Doe v Kohn & Graf*, 3 AD Cases 1322 (DC PA 1994). (The court found that the employer unlawfully searched an employee's desk in an attempt to verify the employer's suspicion that the employee had AIDS).

D. ***Provisions Concerning Confidentiality of Employee Medical Information.***

1. ADA requires confidentiality of all employee medical information. 42 USC §12112(d)(3); 29 CFR §1630.14(b)(2) and (c)(1).
2. Confidentiality requirements:
   a. All medical information must be collected and maintained on separate forms;
   b. All medical records must be kept in separate medical files apart from personnel files;
   c. The employer must ensure security of medical information (e.g., EEOC suggests keeping medical files in separate locked cabinet and designating who will have access to medical files); and
   d. Medical information should be disclosed only to very few individuals on a need to know basis. For example:
      (1) Appropriate decision makers in the hiring process;
      (2) Supervisor and managers may be informed of work restrictions and needed accommodations;
      (3) First aid and safety personnel; and
      (4) Governmental officials and agencies.

II. THIRD PARTY ADMINISTRATION ACT, MCL §550.901 ET. SEQ.

A. ***Coverage:*** Applicable to third party administrators ("TPA") who are domiciled in this state, whose principal administrators office or headquarters are located in this state, who solicit business in this state, or who provide substantial administration services to a carrier for the carrier's business in this state. MCL §550.910(3).

B. ***General:*** Requires the licensing of and governs the practices of TPAs in Michigan.

C. ***Provision Concerning Medical Records.***

1. Requires confidentiality of all personal data identifying an individual covered by a plan. MCL §550.934.
2. The TPA can release information only if the individual executes written consent for the release. The third party to whom it is released can only disclose to others if it also obtains written consent.
3. Confidentiality requirements not applicable to a disclosure made for the following reasons:
   a. For claims adjudication.
   b. For claims verification.
   c. For other proper plan administration.
   d. For an audit pursuant to ERISA.
   e. To an insurer to purchase excess loss insurance.
   f. To the plan fiduciary or plan.
   g. To the Commission.
   h. As required by law.

   MCL §550.934(2).

III. BULLARD-PLAWECKI EMPLOYEE RIGHT TO KNOW ACT, MCL §§423.501 ET. SEQ.

A. ***Coverage:*** Employers with four or more employees.

B. ***Purpose:*** To allow employee access to personnel records and limit an employer's right to accumulate certain information in personnel files.

C. ***"Personnel Record":*** Any recorded information identifying an employee which is used, or may be used, for purposes of employment, promotion, transfer, compensation or discipline.

1. Interviewer's handwritten notes from employment interview are a personnel record because they related to candidate's qualifications for promotion. *Michigan Prof. Employees Soc. v D.N.R.*, 192 Mich App 483, 482 NW2d 460 (1992).

D. ***Exceptions:***

1. Job references identifying the person giving the reference.
2. Staff planning materials identifying more than one employee, such as salary, bonus, promotion and job assignment plans.
3. Medical reports and records made or obtained by the employer if the records or reports are available to the employee from the doctor or medical facility involved.
4. Records pertaining to criminal or grievance investigations.
5. Personal information about another person, the disclosure of which would violate that individual's privacy.

E. ***Key Privacy Provisions:***

1. If an employer knowingly places false information in a personnel record, the employee can take legal action to have information expunged.
2. Unless ordered by a court or government agency, or with the employee's consent, an employer or former employer may not disclose records of disciplinary action to a third party without written notice to the employee.
3. All disciplinary reports more than four years old must be deleted from personnel records released to third parties.

4. An employer may not keep records of an employee's associations, political activities, publications, or communications of non-work *related activities*.
5. Investigative records of suspected criminal activity which may impact the employer's property or business may be kept in a separate file. After two years, or upon completion of the investigation, the employee must be notified. If disciplinary action is not taken, the records must be destroyed.

IV. POSSIBLE COMMON LAW CAUSES OF ACTION FOR IMPROPER DISCLOSURE OR USE OF EMPLOYEE MEDICAL OR HEALTH INFORMATION.

A. ***Invasion of Privacy.***

1. ***Elements:***
   a. One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
   b. The right of privacy is invaded by
      (1) unreasonable intrusion upon the seclusion of another, or
      (2) appropriation of the other's name or likeness, or
      (3) public disclosure of embarrassing private facts, or
      (4) publicity that unreasonably places the other in a false light before the public.
   c. One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the intrusion
      (1) would be highly offensive to a reasonable person, and
      (2) concerns an area where the plaintiff has a reasonable expectation of privacy.

   Beaumont v Brown, 401 Mich. 80 (1977); *Saldana v Kelsey Hays Co.*, 178 Mich. App. 230 (1989).
2. ***Defenses.***
   a. Consent to the intrusion. *Jeffers v City of Seattle*, 597 P.2d 899 (Wash. 1979).
   b. Lack of expectation of privacy. *Texas Employment Comm. v Hughes*, 746 S.W.2d 796 (Tex. Ct. App.), *writ granted*, 31 Tex. Sup. Ct. J. 643 (1988).
   c. The employer's need to obtain information exceeds the employee's need for privacy. *Earp v City of Detroit*, 16 Mich. App. 271 (1969) (recognizing employer's right to investigate suspected illegal conduct committed in the course of employee's employment); *Leckelt v Board of Commissioners of Hospital District No. 1*, 714 F. Supp. 1377 (E.D. La. 1989), *appeal docketed* No. 89-3256 (5th Cir. Apr. 7, 1989).
   d. Limited publication of facts concerning the individual to persons with a "need to know." *Hudson v S. D. Warren Co.*, 608 F. Supp. 477 (D. Me. 1985).

B. ***Defamation.***

1. ***Elements.***
   a. To create liability for defamation there must be:
      (1) a false and defamatory statement concerning another;
      (2) an unprivileged publication to a third party;
      (3) fault amounting at least to negligence on the part of the publisher; and
      (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

   Restatement (Second) of Torts §558
2. ***Defenses.***
   a. Truth;
   b. The statement made contains opinion, not false facts;
   c. One who publishes defamatory matter concerning another is not liable for the publication if
      (1) The matter is published upon an occasion that makes it conditionally privileged.
      (2) The privilege is not abused.

   Restatement (Second) of Torts §593; *Bostetter v Kirsch Co.*, 319 Mich. 547 (1948).

C. ***Intentional Infliction of Emotional Distress.***

1. ***Elements.***
   a. One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.
   b. Liability has been found where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim, "Outrageous."

   Restatement (Second) of Torts §46.
2. ***Defenses.***
   a. The behavior was, in fact, reasonable or justified under the circumstances.
   b. Conditional privilege. *Steadman v South Central Bell Telephone Co.*, 362 So.2d 1144 (La. App. 2nd Cir. 1978) (exercise of

a right in a reasonable fashion not actionable, even where employer knew that exercise of the right would cause emotional distress.)

D. *Negligent Infliction of Emotional Distress.*

1. *Elements.*

If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor

a. should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

b. from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

Restatement (Second) of Torts §313; *Kelley v Schlumberger Technology Corp.*, 849 F.2d 41 (1st Cir. 1988).

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U.S. SUPREME COURT REVIEW

By Laureu A. Rousseau
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After-Acquired Evidence Not A Bar To Discrimination Claims

On January 23, 1995, the Supreme Court dealt a blow to employers by holding that the discovery of prior misdeeds by a former employee does not bar the employee's wrongful termination lawsuit brought under federal civil rights laws. The Court softened the blow by ruling that, while "after-acquired evidence" does not operate as a complete bar to such lawsuits, it can limit recoverable damages.

The decision resolved a split in the circuits over whether employers can use after-acquired evidence to defeat employment discrimination claims. At least four circuits (including the Sixth Circuit) had ruled that after-acquired evidence of wrongdoing served as a complete bar to such lawsuits where the wrongdoing would have resulted in termination. Two other circuits had held that after-acquired evidence does not shield the employer from liability.

The issue was presented to the Court in *McKennon v Nashville Banner Publishing Co.*, 1995 US LEXIS 699, 63 USLW 4104, 66 FEP Cases (BNA) 1192. The case arose when Christine McKennon was fired by her employer in 1990 after 39 years on the job. She was told that she was fired as part of a staff reduction, but nevertheless sued, claiming that her discharge was on account of age. During pretrial proceedings, McKennon admitted that she had taken confidential company documents while employed by the company, a dischargeable offense. The trial court dismissed the lawsuit based on the after-acquired evidence doctrine and was upheld by the Sixth Circuit on appeal.

The Supreme Court unanimously reversed the Sixth Circuit and reinstated the lawsuit. Writing for the Court, Justice Anthony Kennedy stated that the remedial scheme behind Title VII and the ADEA would not be served if employers were permitted to avoid liability for violation of those laws by focusing on employee wrongdoing. However, the Court ruled that after-acquired evidence can serve as a bar to reinstatement and front pay remedies where the employer can prove that the employee would have been fired for the wrongdoing had it been discovered earlier. In such cases, the employee's recovery is limited to back-pay from the date of the illegal termination to the date on which the evidence of wrongdoing was discovered.

Court Denies Review of Union Pre-Election Promise To Waive Initiation Fees

On December 5, 1994, the court denied review of a National Labor Relations Board decision holding that union's pre-election promise to waive initiation fees for all employees did not violate federal labor law (*VSA Inc. d/b/a/VSA Carolinas v NLRB*, 115 S.Ct 635, 130 L.Ed 2d 540 (1994). The decision sets limits on the Court's 1973 decision in *NLRB v Savair Manufacturing Co.*, 414 US 270, which set aside a union victory where the union had promised to waive initiation fees for those who signed union authorization cards before the election.

The Board distinguished *Savair* from *VSA Inc.* on the grounds that the union in Savair had linked the waiver of fees to support for the union in the election. In *VSA Inc.*, the union offered to waive fees for all employees and such waiver was not conditioned on union support.

Court Will Review Tax Treatment of Age Bias Settlement

The Supreme Court has agreed to resolve a split in the circuits by reviewing whether back pay and liquidated damages recovered under the Age Discrimination In Employment Act are excludable from income for tax purposes (*Commissioner of Internal Revenue v Schleier*, 115S.Ct 662, 130 L.Ed 2d 597 (1994). The case arises from a decision of the Fifth Circuit holding that back pay and liquidated damages totalling nearly $146,000 are exludable from income under Section 104(a)(2) of the Internal Revenue Code — as "damages received . . . on account of personal injuries or sickness."

Erich Schleier, a former pilot for United Airlines, was forced to retire at age 60. He recovered back pay and liquidated damages in 1986 as a result of the settlement of a class action lawsuit against the airline. He reported the back pay as income on his 1986 tax return, but did not report the liquidated damages. The IRS assessed a tax deficiency of nearly $36,000.

The Tax Court ruled in Schleier's favor, holding that all damages received in ADEA litigation are excludable from income. The Fifth and the Ninth Circuits have adopted the position of the Tax Court, but the Seventh Circuit has reached

the opposite conclusion. Further complicating matters is the Supreme Court's decision in *United States v Burke*, 112 S.Ct. 1867 (1992), holding that Title VII back pay awards under the pre-1991 version of the statute are not excludable from income because they constitute redress for injuries of an economic nature rather than a remedy for personal injuries.

FEDERAL COURTS UPDATE

By E. Sharon Clark

UNITED STATES DISTRICT COURT – EASTERN DISTRICT OF MICHIGAN

Executive Exemption to Overtime Requirement of FLSA Considered

The Eastern District provided guidance for meeting the "short test" for the executive exemption to the overtime pay requirements of the Fair Labor Standards Act, 29 U.S.C. §207(a) ("FLSA"), in *Vezina v Jewish Community Center of Metropolitan Detroit*, No. 93-CV-74163 (Sept. 23, 1994). Plaintiff, former Aquatics Director for the Jewish Community Center, contended that she was entitled to overtime pay because she did not meet the "short test" for the executive exemption. Even though she earned more than $250 per week and directed the work of two or more employees, she argued that her primary duty was not "management"; rather, she coordinated staff, scheduled swimming classes, and oversaw the swimming pools, duties she characterized as not "managerial." In addition, she maintained, more than 80 per cent of her time was spent on duties others could perform, and all her tasks and decisions were subject to the approval of her immediate supervisor. The Court found instead that her supervision of employees was distinctly managerial and that management was her primary duty. The Court based its analysis on 29 C.F.R. §541.103, which provides that the percentage of time spent on managerial duties alone is not dispositive if other factors are present which, the Court found, were present in this case: (1) Vezina's management duties were more important than her other duties because the Department could not function without them; (2) Vezina exercised her discretionary powers frequently in the performance of her duties; (3) she was relatively free from supervision; and (4) when her total compensation including benefits was compared to that of her employees, her compensation was greater. Accordingly, the Court dismissed plaintiff's claim.

Arbitration Award Overturned in Check-Kiting Case

In *Association of Credit Union Employees v Credit Union One*, No. 94-73304, Judge Nancy G. Edmunds vacated a labor arbitrator's award, based on a finding that the arbitrator had "dispensed his own brand of industrial justice" through an overly narrow reading of the employer's work rules and by interpreting the parties' collective bargaining agreement in a way that "add(ed) terms to the agreement." The employer discovered a nonsupervisory employee (and Association officer) was "engaging in check kiting," in violation of the Bank Fraud Statute, 18 USC 1344(1), and discharged her for violating two work rules covering "offenses (that) will normally result in immediate discharge in accordance with (a contract article) provid(ing) for immediate discharge in aggravated cases." Specifically, the cited rules covered "theft" and "unauthorized or improper use of credit union computer equipment or other technological systems." Applying "just cause elements," the arbitrator found that even though the grievant knew she was kiting checks in violation of federal law she had no specific intent to defraud the employer or specific notice that the cited rules applied to check kiting, and that the employer viewed such activity "in an exaggerated light and did not take into account extenuating circumstances particularly Grievant's long and exemplary service" as well as the "de minimis adverse financial impact" of her misconduct. For those reasons, the arbitrator concluded that the employee had been discharged without just cause and ordered her reinstatement. The court vacated the award, finding that the cited work rules "prohibit(ed) check kiting by implication," that the employee's long service could "not be considered a substantial mitigating circumstance when (she) knew she was kiting checks," and that the arbitrator had added "terms to the agreement," which had "no provision requiring that employees be given notice of the exact misconduct that results in discharge" or saying that a "'de minimis' theft will not result in discharge."

UNITED STATES DISTRICT COURT – WESTERN DISTRICT OF MICHIGAN

Court Refuses to Extend *Toussaint* to Wrongful Demotion

In *Baragar v State Farm Insurance Company*, 860 F.Supp 1257 (W.D. Mich. 1994), the Court considered plaintiff's contention that the legitimate expectations prong of *Toussaint* (*Toussaint v Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980)) should be extended to a claim of wrongful demotion. Previous cases considering the issue have reached conflicting results, and the Court observed that the Sixth Circuit has been reluctant to extend *Toussaint* beyond the wrongful discharge situation absent further guidance from the state courts of Michigan. The Court observed that the underlying public policy informing the *Toussaint* decision could conceivably apply to all employment policies, not just policies relating to discharge. The Court, however, proceeded to compare the demotion situation in *Baragar* to cases that refused to extend *Toussaint* to compensation policies and found that demotion is more closely analogous to a cut in pay than to a discharge. The Court also cited the need of businesses to retain flexibility in adjusting quickly to changing conditions in a competitive environment and to courts' traditional reluctance to interfere with management decisions. The Court concluded that, absent a clear directive from the Michigan Supreme Court, it should not extend Toussaint to "wrongful demotion" claims.

"Qualified Individual" and "Essential Functions" under the ADA

In deciding two cases under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, the Western District has provided some guidance for employers and employees on the difficult issues inherent in the definitional sections of the ADA. Central to both decisions was discussion of qualification for and ability to perform the "essential functions" of the positions in question. In *Dorris v City of Kentwood*, No. 1:94-CV-249 (October 4, 1994), a police officer was terminated when he was diagnosed with degenerative joint disease in both knees and was advised not to run, jump, or engage in other similar activities. He argued that his position as a teacher in the Drug Abuse Resistance Education program did not require him to engage in any restricted activities. The City argued that regardless of his assignment, his position was police patrol officer and the job description required the individual to be able to make forcible arrests, to climb, jump, crawl, and to enter and exit vehicles quickly. Relying on the EEOC regulations which provide that an inquiry into whether a function is essential focuses on "whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential," 29 C.F.R. Part 1630, Appendix, §1630.2(n), the Court found that a genuine issue of material fact existed because Dorris had never been called upon to perform any of the strenuous physical functions identified as essential by the City while he was in the D.A.R.E. program.

In *Ericson v Magic Steel Corporation*, No. 1:93-CV-809 (November 3, 1994), the Court granted defendant's motion for summary judgment, finding that because plaintiff, a custodian, had a medical restriction of not being on his feet for more than four hours during an eight-hour shift he was not a "qualified individual with a disability." The job description required a custodian to empty trash barrels, clean bathrooms, vacuum truck bays and main aisles, sweep up, vacuum and mop offices, mow and water the lawn, all of which, the court found, would require plaintiff to be on his feet more than four hours during an eight-hour shift. The Court found unpersuasive plaintiff's other arguments that the proffered reason for his discharge was pretextual, that he could have been transferred to a position he previously held, and that he was inadequately trained during his probationary period. Defendant had previously provided accommodations in creating a clerical position for plaintiff and transferring plaintiff to various other positions throughout his working career with Magic Steel Corporation.

UNITED STATES COURT OF APPEALS – SIXTH CIRCUIT

Effect of Racial and National Origin Prejudice in Election Campaign

In *KI (USA) Corporation v National Labor Relations Board*, 128 LC ¶ 11,182 (Sept. 14, 1994), the Sixth Circuit considered the effect of racial and national origin prejudice in an election campaign. KI (USA) is a wholly-owned subsidiary of a Japanese automobile parts manufacturer, and most of its key management positions are held by Japanese employees. On the day before the election, the union made widely available to employees a letter written by a Japanese businessman (not connected to the company) published in a national magazine expressing his negative views of American workers. The company then tried to reduce the negative impact of this letter by distributing a rebuttal letter from a different Japanese businessman published in the same magazine; however, the company's efforts were curtailed by the lack of time before the election. The union won the election, and the NLRB certified the results and ordered the company to bargain with the union. In deciding to deny enforcement of the bargaining order and overturn the certification of the union, the Sixth Circuit reasoned that to have an election set aside, specific evidence must show that unlawful acts occurred that interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election, *Kux Mgf. Co. v NLRB*, 890 F.2d 804 (6th Cir. 1989). Further, where appeals to racial prejudice are involved, the burden of proof shifts to the party using the racial message to show the truthfulness of the position asserted, *Sewell Mfg. Co.*, 138 NLRB 66 (1962). Applying the *Sewell* standard rather than the *Midland* standard that does not require an examination of the truthfulness of election representations if the material was neither forged nor altered and if its source is clearly indicated, *Midland National Life Ins. Co.*, 263 NLRB 127 (1982), the Court found that the union did not truthfully set forth the company's position on racial matters because there was no connection between the writer of the negative letter and the company's management and there was no evidence that the company in fact held anti-American views. In addition, the distribution of the letter exceeded the bounds of legitimate discussion of potential problems arising from an employer's treatment of employees based upon racial differences. The difficulty of responding to the attacks and the short time available to the company to respond to the letter were contributing factors in the Court's decision.

Sixth Circuit Applies Section 10 Statute of Limitations to WARN and Breach of CBA Actions

The applicable statute of limitations was considered by the Sixth Circuit in two cases; in both, the Court had to decide whether the timeliness of a claim should be determined by a state statute of limitations for analogous cases or a federal statute of limitations, specifically section 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). *United Mine Workers of America v Peabody Coal Co.*, 38 F.3d 850 (6th Cir. 1994) involved the Workers Adjustment and Retraining Act ("WARN"), 29 U.S.C. §§ 2102 *et seq.*, which does not contain a limitations period. The Court noted the differing results reached by other courts that had considered the question, but ultimately followed the *DelCostello v International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct 2281, 76 L.Ed.2d 476 (1983) line of cases holding that an analogous federal statute of limitations rather than a closely-analogous state statute of limitations should be applied only if three inquiries are satisfied: 1) whether uniformity is

desirable; 2) whether federal law provides a clearer analogy than state law; and 3) whether federal law significantly and directly advances the policy underlying the statute in a way that state law does not. The Court reasoned that in WARN cases uniformity is desirable to eliminate forum shopping arising from differing statutes of limitations in several states in which a single employer does business and to avoid other anomalies arising from variations in state laws. The federal law, Section 10(b) of the NLRA, provides a closer analogy than state law catchall limitations periods because of the similarity of purpose between WARN and the NLRA in protecting against job loss. Finally, the six-month statute of limitations of Section 10(b) advances WARN's underlying policy of rapid implementation of retraining and reemployment by encouraging prompt resolution before unemployment becomes a problem for individuals and communities.

In *Cummings v John Morrell & Company*, 36 F.3d 499 (6th Cir. 1994), the Court also applied the three-part inquiry of *DelCostello* in determining that the six-month limitations period of section 10(b) of the NLRA should apply to the union's claim against Morrell for breach of a collective bargaining agreement rather than the state limitations periods for breach of contract actions. Morrell closed plants in Memphis, Tennessee and Arkansas City, Kansas in 1982 but reopened the plants the following year, contending that they were "new plants," that the collective bargaining agreement no longer applied and that the UFCW no longer represented the workers. The Court described the union's claim as bearing a strong resemblance to an unfair labor practice charge; thus, the federal statute of limitations would be more closely analogous than the state limitations periods for contractual actions. In addition, the federal policies at stake, *i.e.*, protection and promotion of the collective bargaining process, would be better served by the prompt resolution dictated by Section 10(b) rather than the five- or six-year state periods. Finally, the "practicalities of litigation" favor prompt filing of a claim to avoid the delays resulting from adoption of the longer state statutes of limitation.

Predictions of Loss of Business are Not Threats of Plant Closing

The Sixth Circuit denied enforcement of an NLRB bargaining order in *DTR Industries, Inc. v NLRB*, No. 93-5784/5906 (November 15, 1994). Rejecting the NLRB's argument that DTR had committed "hallmark" 8(a)(1) violations, the Court found that the pre-election statements made by DTR's president predicting a 50% loss in business if the union won were not plant closure threats but rather were protected by section 8(c) of the National Labor Relations Act, that the majority of the other alleged plant closing threats merely repeated the observations made by the president, and that another personal reflection by a first-line supervisor about circulating her resume if the union prevailed was too inconsequential to constitute substantial evidence of a hallmark violation. The Court found the other violations identified by the Board — a wage increase granted after the election, improvements in the grievance procedure, and an isolated question to an employee regarding the identify of union adherents — were not of the hallmark variety. Finally, in deciding that the Board was not justified in rejecting the preferred remedy of a new election in favor of a bargaining order, the Court found determinative the changed circumstances resulting from the passage of time since the 1989 election and the changed composition of the bargaining unit, with only about 53 of the original 75 employees still part of the proposed bargaining unit which had grown in the intervening years to 250 employees.

Sixth Circuit Recognizes Exception to Intracorporate Conspiracy Doctrine

In *Johnson v Hills & Dales Hospital, et al.*, No. 93-1854 (December 6, 1994), the Sixth Circuit recognized an exception to the general rule that employees of a corporation cannot be liable for a conspiracy under the Civil Rights Act, 42 U.S.C. §1985(3) because a corporation cannot conspire with itself: in the event the challenged activity of the employees takes place outside the course of employment, they may be held liable for a conspiracy. The court concluded, however, that in this case the challenged activity did not occur outside the course of employment and affirmed the lower court's entry of summary judgment for defendants. Plaintiff, a black physician employed by MasterCare Corporation, a company that provides hospitals with physicians to staff emergency rooms, was reassigned when the president of Hills & Dales Hospital requested she be removed because of discord between plaintiff and the emergency room staff. Plaintiff alleged that her removal was prompted by racial bias and that a conspiracy existed between the hospital, its president, and members of the staff. She argued that the complaining employees lacked the training and competence to question her medical judgment and thus the complaints were outside the course of their employment responsibilities. The Court disagreed, finding that the staff's complaints about her medical judgment were connected to the legitimate business of the hospital and the work of its staff even though the criticism may not have been based on professional knowledge. In addition, the staff's comments were made during the course of working hours, the remarks were connected to the business of the hospital and they were forwarded to the proper managerial authorities. The Court also noted that it was not necessary that the staff's complaints be based on fact since the comments were directed to conditions that affected patient care and the morale of the hospital staff. Finally, the president's decision to request that plaintiff not be assigned to the hospital in the future was a legitimate business decision.

Requirements for Protected Area Standards Picketing Emphasized

The Sixth Circuit refused to enforce a cease and desist order in *NLRB v Great Scott, Inc.*, Nos. 93-5142/5179 (November 14, 1994), finding that the union's "area standards" picketing by non-employees did not fall within

the ambit of protected activity under section 7 of the NLRA. Union representatives picketed a non-union Great Scot grocery store in Port Clinton, Ohio and distributed handbills asserting Great Scot paid lower wages and fringe benefits to its non-unionized employees than other grocery stores in the community paid to unionized employees. In its analysis, the Sixth Circuit reviewed the standard for protected activity: the core activity protected by section 7 is the right of employees to self-organize. Under *Lechmere, Inc. v NLRB*, 502 U.S. 527, 112 S.Ct. 841 (1992), non-employees have a "derivative right" to engage in organizational activities; however, area-standards picketing warrants even less protection than non-employee organizational activity. To support protected area-standards picketing, the union must establish that its claims of substandard wages and benefits are made in good faith and are based on actual knowledge gleaned from sufficient investigation of conditions existing at the time the picketing is initiated. In this case, the Court concluded, the union failed to prove the sufficiency and timeliness of its claims because the staff organizer relied on the conclusion and representations of others made at some unspecified point in the past that the wages, benefits and working conditions at the Port Clinton Great Scot were substandard. Accordingly, the activity was not protected by section 7, and Great Scot was within its rights to order union agents to leave store property and to request the assistance of the local police and the state courts in evicting the demonstrators.

MICHIGAN SUPREME COURT UPDATE

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

***McKissack v Comprehensive Health Services of Detroit*, No 17342 (1994).**

Plaintiff-employee was injured when she fell at work. After returning to work following treatment, the employee experienced *continued pain* which affected her job performance. The employer's dissatisfaction with the employee's job performance resulted in a request for her resignation. The employee then resigned and filed a claim for benefits. The Supreme Court reversed the Court of Appeals and reinstated the Workers' Compensation Appeal Board's (WCAB) finding that the employee was unable to perform her job because of pain resulting from a work-related injury. As a result of this finding, the WCAB properly found that the employee was disabled due to continued pain, unable to work, and was entitled to receive workers' compensation benefits.

***Kosiel v Arrow Liquors Corp, et al*, 446 Mich 374 (1994).**

A 1967 workers' compensation award setting a level of benefits for nursing care "until further order of the Department" is not a final order to which *res judicata* attaches. Michigan employers are responsible for the cost of reasonable medical services which can fluctuate under different economic circumstances. The Court ruled that the benefit level awarded for nursing care in this case more specifically was contemplated to be adjusted over time and thus the employee's petition was allowed.

***Sabotka v Chrysler Corp*, No 17341 (1994).**

Plaintiff was partially disabled by a work-related injury and subsequently laid off. The Court of Appeals held that under Section 371 employers are entitled, in calculating the employee's workers' compensation benefits, to a credit reflecting the employee's residual wage earning capacity. The Supreme Court reversed. The Court held that where the unemployment of a partially disabled employee is directly attributable to a compensable injury, then the employee may be awarded maximum workers' compensation benefits. The fact finder does not have to "estimate the hypothetical extent of impairment," but may consider evidence of wages a disabled employee did earn, avoided, or refused, and other existing employability factors in making an award of benefits.

***Murphy v Michigan Bell Co*, No 17354 (1994).**

The Court, in three separate opinions, addressed the issue of a minor child's right to receive workers' compensation death benefits following the statutory 500-week benefit period. The employer paid workers' compensation death benefits to the decedent's widow until she remarried and to decedent's two children for the statutory 500-week period. A petition for continued benefits was then filed for the minor children, aged 12 and 15. The employer contested the petition, arguing there was no factual showing of continued dependency because they had since been adopted by their mother's new husband. Five Justices agree that the "conclusive presumption of dependency remains in effect until the age of 16," but disagreement over what this means following the expiration of the 500-week benefit period split the Court three different ways. See the lengthy opinion for more specifics.

MICHIGAN COURT OF APPEALS UPDATE

By Daniel Misteravich

Civil Rights Act — Arbitration

***Heurtebise v Reliable Computers*, 207 Mich App 309 (1994)**

When a plaintiff was hired, she received a copy of the employer's handbook which contained a clause stating that "any dispute, matter or controversy involving claims of monetary damages and/or employment related matters . . . including, but not limited to any and all claims relating to termination of employment" would be arbitrated. Plaintiff

signed an acknowledgment of receipt of the handbook and agreement to conform to the procedures, rules and regulations set forth in the handbook. Following plaintiff's termination, plaintiff sued in circuit court bringing a claim of discriminatory treatment under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* The employer moved to dismiss or to compel arbitration relying on the arbitration clause in the handbook. The court of appeals held that, when an arbitration clause requires arbitration of disputes "involving claims of monetary damages and/or employment related matters," the clause applies to a claim of discriminatory termination under the Civil Rights Act. The court held that when the employee signed an acknowledgement of agreement to conform to the procedures, rules, and regulations of the employer's handbook, there was a "meeting of minds" between employer and employee in regard to an arbitration clause in the handbook. In dicta, the court said that even without the signed acknowledgment, there still would have been no grounds to deny defendant's motion because mutual assent to a term of employment is not required. The court also held that public policy does not prohibit the enforcement of a valid arbitration clause in an employment handbook which provides for meaningful arbitration of claims involving the Civil Rights Act.

Handicappers' Civil Rights Act — Civil Rights Act

***Merillat v MSU*, 207 Mich App 241 (1994)**

The employer suspected that the plaintiff, a white female, had become romantically involved with a married supervisor who was African-American. The employer investigated but was unable to prove the suspicion. The employer ordered plaintiff to undergo a physical and psychological examination to determine her fitness to continue for duty as a dispatcher. Plaintiff passed the physical. She appeared twice for the psychological evaluation, but declined to the answer a questionnaire and sign a release. Plaintiff was terminated for failing to attend a third evaluation and for failing to sign releases and waivers. Neither the supervisor nor his wife was terminated. Plaintiff filed a complaint alleging violation of the Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(101) et seq., and the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* The trial court dismissed the complaint based upon MCR 2.116(C)(8), failure to state a cause of action.

The court of appeals held that plaintiff had stated a cause of action under the Handicappers' Civil Rights Act because she alleged that (1) the employer ordered her to undergo physical and psychological examination due to a perceived handicap; (2) the employer had no evidence to suggest that she was unable to perform her duties as dispatcher; and (3) the examinations were irrelevant to her performance of the job of dispatcher. As for the claims of violation of the Civil Rights Act, the court of appeals held that plaintiff had failed to make a prima facie case of discrimination under a theory of disparate treatment because, although her allegation of being white, unmarried and female satisfied the requirement of pleading membership in a protected class, she had not alleged facts to show that any person in her three groups had ever failed to undergo physical or psychological evaluation or that the employer had ever had reason to order such persons to undergo evaluation.

Wrongful Discharge — Defamation — Governmental Immunity

***Wallace v Recorder's Court of Detroit*, 207 Mich App 443 (1994)**

Plaintiff was employed by the State Judicial Council as the chief clinical psychologist. Her employment was subject to a collective bargaining agreement which provided a grievance procedure and covered matters of discipline and termination. Plaintiff was not a civil servant subject to the rules of the Civil Service Commission. Plaintiff resigned, claimed constructive discharge, and filed an action alleging wrongful discharge and defamation. The trial court dismissed her claims. The court of appeals held that because plaintiff was entitled to the protection of the grievance procedure of a collective bargaining agreement that expressly covered matters of discipline and termination and she did not exhaust her remedies under the grievance procedure, her claim of wrongful discharge was properly dismissed under MCR 2.116(C)(10). The court expressly distinguished *Manning v Hazel Park*, 202 Mich App 685; 509 NW2d 874 (1993) and *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692; 513 NW2d 230 (1994) because those cases did not involve plaintiffs covered by collective bargaining agreements. The court of appeals held that, because plaintiff did not allege facts supporting an inference that the Recorder's Court was not engaged in a governmental function when the alleged defamatory statements were made, her defamation claim was properly dismissed under MCR 2.116(C)(7).

Wrongful Discharge

***Rice v ISI Mfg*, 207 Mich App 634 (1994)**

Plaintiff was successful in his claim that he was wrongfully discharged. In a cursory opinion the court of appeals held that the trial court properly denied defendant's motions for summary disposition, directed verdict and judgment notwithstanding the verdict when the evidence showed plaintiff's supervisor gave plaintiff oral assurances that he could return to his engineering position if the sales position did not work out. The court of appeals also held that the trial court properly denied defendant's motion for a new trial when the evidence showed oral assurances by plaintiff's supervisor that he could return to his old job if his new job did not work out and a written reprimand wherein plaintiff was informed that his performance would be reviewed monthly.

Negligence — Special Relationship — Employer's Qualified Privilege

***Murdock v Higgins*, No 143235 (1994)**

Defendant Higgins was director of the Missaukee Department of Social Services. He hired defendant Kelley as the volunteer services coordinator. Higgins had suspicions

that Kelley was a homosexual having contact with young men under the age of 18 years. A police investigation did not confirm that suspicion. Kelley transferred to the Kalamazoo County Department of Social Services. Higgins did not relay his suspicions to Kelley's new supervisor. Plaintiff was a volunteer in Kalamazoo County working under Kelley. Higgins did not know plaintiff. Plaintiff sued alleging that Kelley sexually assaulted him. The court of appeals held that Higgins did not owe to plaintiff a duty based upon the theory of a special relationship when Higgins did not know plaintiff and when plaintiff had not lost the ability to protect himself. The court refused to find in an employer's qualified privilege to divulge information a duty to reveal information about a former employee.

Handicappers' Civil Rights Act — Implied Repeal

***Shirlla v City of Detroit*, No. 159927 (1995)**

Plaintiff applied for employment as a city bus driver. After Plaintiff took a physical exam, the employer informed him that he would not be hired because he was taking insulin. The employer relied upon federal regulations contained in Michigan's Motor Bus Transportation Act MCL 474.131; MSA 9.1675(31). The plaintiff sued for violation of the Handicappers' Civil Rights Act. The court of appeals held that the plaintiff did not have a cause of action under the Handicappers' Act because the act was impliedly repealed by the Motor Bus Transportation Act which prohibited diabetic persons requiring insulin from holding positions as motor carrier drivers.

Whistleblowers' Protection Act — Public Policy Tort — Wrongful Discharge

***Dolan v Continental Airlines*, No. 149512 (1995)**

Plaintiff worked at the airport where she had been told to be aware of persons fitting certain "profiles" related to drug trafficking or terrorist activity. Plaintiff reported two such persons to airport security. The Drug Enforcement Administration (DEA) told plaintiff that she would receive reward money based upon her tips. Plaintiff's supervisor posted a notice that employees were not to contact the DEA without first clearing it with him. Plaintiff was accused of violating the rule and was discharged. Plaintiff sued her employer bringing three claims: Whistleblowers' Protection Act, public policy tort, and wrongful discharge. The trial court dismissed all three claims.

The court of appeals held that Plaintiff's reporting of suspicious persons directly to the DEA was not a "protected activity" within the meaning of the Whistleblowers' Act and that the employer's refusal to allow employees to independently report profile information did not constitute criminally irresponsible behavior on the part of the business. The plaintiff did not have a public policy tort claim because she did not cite any legislation explicitly prohibiting the termination of employees for reporting suspicious passengers to the DEA, because she did not allege that she was discharged for failing or refusing to violate the law, and because she did not allege that she was discharged for exercising a statutorily conferred right. Plaintiff did not have a wrongful discharge claim because although the employer's human resources manual contained a progressive discipline system, it also vested the employer with the unilateral option for an immediate termination.

MERC UPDATE

By Kathleen Corkin Boyle
White, Przybylowicz, Schneider & Baird, P.C.

***Washtenaw Community College*, MERC Lab Op 139 (Order Dismissing Motion for Reconsideration).**

MERC held that a reasonable time limit for seeking reconsideration or rehearing of a Commission representation matter is 20 days from the date of the Commission's order. Neither PERA nor the Commission's general rules and regulations set time limits on the filing of a motion by a party to set aside or modify a Commission order. Although the Court of Appeals in *Bay City Education Association v Bay City Public Schools*, 154 Mich App 68 (1986), concluded that in an unfair labor practice case the time for filing a motion for rehearing is 60 days after the date of mailing of the final decision and order (citing the Michigan Administrative Procedures Act), MERC determined that time line not relevant to a representation matter since it is not a contested case under the APA. MERC determined that it would be unreasonable to set a longer time limit for the filing of motions for reconsideration or rehearing because that would allow a party to circumvent the statutory 20-day time limit for seeking judicial review.

***Detroit Board of Education*, 1994 MERC Lab Op 462.**

MERC affirms Administrative Law Judge Lynch's recommendation that charges be dismissed, finding that a school district's adoption of an Empowerment Plan which establishes guidelines for restructuring the management and operation of local schools is an inherent management right, beyond the scope of bargaining. In addition, MERC agreed that the Union had been involved from the beginning in the development of the concept. The Local School Empowerment Council (LSEC) was not illegal and is not comparable to the "Employee Participation Committees" unilaterally established by the employer as identified in *Electromation, Inc.*, 309 NLRB No. 163, 142 LRRM 1001 (1992) or *E. I. Dupont De Nemour*, 311 NLRB No. 88, 142 LRRM 1121 (1993). Although recognizing that the Empowerment Plan identified general concepts of incentives and sanctions regarding pay for performance, performance evaluation, promotion, demotion, and discipline, MERC nonetheless held that no unfair labor practice occurred because the plan required these matters to be in compliance with the Master Agreement.

***Capitol Area Transit Authority*, MERC Case No. C93 B-37 (October 7, 1994).**

On exceptions, MERC found that a union, by entering into a new contract containing a management rights clause and duration clause, had waived any right to insist upon the continuation of prior informal or oral practices. Administrative Law Judge Kurtz found that the past practices which the employer unilaterally eliminated did not derive from the collective bargaining agreement and that the employer had given notice of its intent to eliminate the past practices during collective bargaining sessions. Once that notice was given during negotiations, the burden to demand bargaining regarding the elimination of the practices rested upon the union.

***University of Michigan*, 1994 MERC Lab Op 391.**

On exceptions, MERC reversed the finding of Administrative Law Judge Wicking and determined that the University unlawfully eliminated ten animal aide bargaining unit positions and created ten animal technical non-bargaining unit positions. MERC found that there was no substantive change in the job content when the positions were moved and renamed, and that the employer was, therefore, not acting within the scope of its managerial prerogative. MERC noted that bargaining unit placement is neither a mandatory subject of bargaining nor a matter of managerial prerogative, but is a matter solely reserved to the Commission by PERA. MERC's remedy included restoration of the positions, making the employees whole for lost wages, and making the union whole for lost dues.

***Melvindale-Northern Allen Park Public Schools*, MERC Case No. C89 I-229, Court of Appeals Case No. 152208 (January 18, 1995), Decision and Order on Remand.**

This case was remanded by the Michigan Court of Appeals for explanation and clarification of MERC's 1992 holding. MERC affirmed its prior decision that a public employer "acts in good faith when it temporarily and reasonably suspends bargaining during the pendency of an illegal strike by its employees." MERC based its reversal of *Saginaw Township* on its reading of PERA's purpose "to prohibit public employee strikes." MERC expressly declined to decide whether an employer could be permitted to refuse to bargain even in an illegal strike provoked by the employer's own action. MERC acknowledged that mediation under Section 7(1) of PERA and fact finding would effectively be suspended during the period of any illegal strike.

Note: On October 7, 1994, the Michigan Department of Mental Health filed a Petition for Certiorari regarding *Louisiana Homes*, 1989 MERC Lab Op 51 and 1991 MERC Lab Op 491, aff'd 192 Mich App 187 (1991), *vacated and* 441 Mich 883 (1992), *aff'd on remand* 203 Mich App 213 (1993). The employer seeks a determination as to whether the NLRA preempts state court jurisdiction over a union's Petition for Election filed under state law.

NLRB: WINTER UPDATE

By George M. Mesrey

Field Attorney – National Labor Relations Board

The Board has issued a number of decisions during the last three months of which practitioners should be aware. This article shall serve to highlight some of the most important substantive and procedural developments during this period. It should be noted, however, that the views expressed in this article are those of the author and not necessarily those of the National Labor Relations Board.

PRE-ELECTION HEARINGS

In ***Angelica Healthcare Services Group, Inc.*, 315 NLRB No. 175 (January 18, 1995)**, the Union contended, in response to an Order to Show Cause, that a decertification petition was untimely because it was barred by a collective bargaining agreement. An acting Regional Director of the Board rejected the Union's contract-bar argument and administratively directed an election without conducting a hearing. The Union filed a request for review and the Board remanded the case so that a hearing could be conducted. The Board concluded that the language of Section 9(c)(1) of the NLRA and Section 102.63 of the Board's Rules and Regulations required the Acting Regional Director to provide "an appropriate hearing" prior to finding that a question concerning representation existed and directing an election. The import of this case is that, in the absence of a stipulated or consent election agreement between the parties, the Board must conduct a hearing prior to directing an election. Practitioners should note, however, that the Board declined to specify what constitutes "an appropriate hearing." Thus, it appears that the Board left open the possibility that, in certain cases, some type of summary proceeding might satisfy the "appropriate hearing" requirement.

"AREA STANDARDS" HANDBILLING/ACCESS TO PRIVATE PROPERTY

In ***Leslie Homes, Inc.*, 316 NLRB No. 29 (January 25, 1995)**, the Board considered for the first time how the Supreme Court's decision in ***Lechmere, Inc. v NLRB*, 117 L.Ed. 2d 79 (1992)**, impacts on an employer's right to bar nonemployee union representatives from engaging in "area standards" handbilling on its private property. In ***Leslie Homes*** a union engaged in "area standards" handbilling on the premises of a residential condominium development. The Employer ordered the handbillers off the property but they refused to leave. The Employer then called the police and had the Union removed from the premises. The issue before the Board was whether the Employer violated Section 8(a)(1) of the NLRA by refusing to permit the union representatives to engage in handbilling of potential home buyers on the Employer's premises and by calling the police to have the handbillers removed from the property.

The Board determined that ***Lechmere*** applies to area standards activities as well as organizing activities. Thus, as long as the Union had reasonable access to the Employer's

customers outside of the Employer's premises, the Employer could lawfully prevent the union from gaining access to its property. The Board then analyzed the "reasonable access" issue and concluded that the Union had reasonable alternative means to communicate its area standards message to potential customers of the Employer. Accordingly, the Board found that the Employer did not violate the Act by ordering the handbillers off its property and calling the police to have them removed.

MULTI-EMPLOYER BARGAINING UNITS

Issues often arise when an employer attempts to withdraw from a multi-employer association. Under ***Retail Associates*, 120 NLRB 388 (1958)**, an individual employer can withdraw from an association only if it provides "adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations." The Board further stated that "where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances." Id. at 395.

In ***Chel LaCort*, 315 NLRB No.154 (December 16, 1994)**, the Employer attempted to withdraw from a multiemployer bargaining association after negotiations for a successor agreement had commenced. The Employer defended its conduct by claiming that it did not have notice of the commencement of negotiations, and thus, that the "unusual circumstances" exception to the ***Retail Associates*** rule applied. In summarily rejecting the Employer's argument, the Board observed that the "unusual circumstances" exception under ***Retail Associates*** has historically been limited to the most extreme situations such as where the withdrawing employer can establish that it is faced with dire economic circumstances, such as imminent bankruptcy, or when the multiemployer unit has dissipated to the point where the unit is no longer a viable bargaining entity.

In another decision issued the same day, the Board concluded that the ***Retail Associates*** rules do not apply to employers who have a Section 8(f) relationship with a union. ***James Luterbach Construction Co.*, 315 NLRB No. 147 (December 16, 1994)**. Instead, the Board promulgated a two part test to determine whether an 8(f) employer has obligated itself to be bound to the results of the multiemployer bargaining. First, the Board will examine whether the employer was part of the multiemployer unit prior to the dispute giving rise to the case. If this first inquiry is answered affirmatively, the Board will then examine whether the employer has, by a distinct affirmative action, recommitted to the union that it will be bound by the upcoming or current multiemployer negotiations. It should be noted that the second part of the test requires more than mere inaction on the part of an 8(f) employer to bind it to the results of the multiemployer bargaining. According to the Board, affirmative action on the part of the employer is required in order to be consistent with the Section 8(f) principles promulgated in ***John Deklewa & Sons***, 282 NLRB 1375 (1987).

MAJOR LEAGUE BASEBALL STRIKE

On February 3, 1995 NLRB General Counsel Fred Feinstein issued the following letter to the attorneys for the Major League Baseball Players Association and the Major League Baseball Player Relations Committee dismissing the charges filed by both parties because they were then "engaged in bargaining with the presentation of modified proposals, and the employer has advised me that it will revoke its December 22 announced implementation and restore the status quo that existed prior to implemention. Thus, any alleged violation of bargaining obligations will be substantially reviewed."

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