Labor and Employment Law Section • State Bar of Michigan

LABOR AND EMPLOYMENT LAWNOTES

Volume 6, No. 1 Winter 1996

THE VIEW FROM THE CHAIR

Our Winter Meeting at the Ypsilanti Marriott held on January 26-27, 1996, was by all accounts a resounding success. The working session on Saturday morning began with Roy Roulhac's thorough update on recent decisions of the Michigan Employment Relations Commission, followed by Stephen Mazurak's insightful analysis of recent developments at the National Labor Relations Board. The remaining program, moderated by Sheldon Stark, was a two-part analysis of issues arising from the trial of an employment disability discrimination lawsuit. Our panel of all-stars included Adele Rapport (EEOC), Bob Vercruysse (Butzel Long), Bart Feinbaum (EEOC), Ramona Green (MDCR), Ronald Walker (Walker & Associates of Michigan), Michael L. Pitt (Pitt, Dowty & McGehee), Samuel E. McCargo (Kirk McCargo, P.C.), William Mann (MDCR), and Robert Ancell (Consultant). We owe many thanks to Virginia Metz, Art Przybylowicz, Janet Cooper, Mark Glazer and the remaining members of the planning committee responsible for this event.

Our next substantive program is the ***21st Annual Labor and Employment Law Seminar*** scheduled for April 25-26, 1996, in Troy co-sponsored by the Section, ICLE and FMCS. This program is intended to be a complete advanced level briefing for the labor practitioner. The presenters include many of the most highly recognized attorneys in the state. One of the highlights of the program is the Thursday luncheon during which the Hon. David W. McKeague, Judge, United States District Court for the Western District of Michigan, will be speaking on *Controlling Discovery Costs and Developing Discovery Plans in Employment Litigation.* The focus of the program is on a "hands on" practicing lawyer's approach to labor and employment relations issues.

In the past we have solicited your involvement in the Section and I want to make that offer again. There is a variety of opportunities for service including being a contributor to *Lawnotes,* serving as a presenter at our many programs, or service on several of the Section's committees. For those of you who are interested, please contact me or any member of the Council. We are presently planning the substantive portion of the Annual Meeting scheduled in September, 1996, and anyone with ideas for presentations should write me or call.

Best regards,
Paul M. Kara
Chairperson

THE INTERFACE BETWEEN ADA AND COLLECTIVE BARGAINING AGREEMENTS

John G. Adam

Miller, Cohen, Martens, Ice & Geary, P.C.

The interface between the Americans With Disabilities Act ("ADA"), 29 U.S.C. §§ 12101 *et seq.* and collective bargaining agreements ("CBA") is confronting arbitrators and judges with greater frequency. A year's worth of arbitration and selected court cases dealing with the interface between rights under the ADA and CBA are discussed below.

I. CAN AN EMPLOYER MAKE AN ACCOMMODATION UNDER ADA WHICH VIOLATES ANOTHER EMPLOYEE'S RIGHTS UNDER A CBA?

A. *Employer "Went Too Far" In Attempting To Accommodate Disabled Employee By Bumping Senior Employee From New Job.* "In cases involving the ADA, arbitrators must engage in a balancing and weighing of the merits underlying each case. In the case at hand, the Arbitrator finds that because the Company violated the Agreement and because the Company went too far in attempting to comply with the ADA, the grievance must be sustained". *Alcoa Building Products,* 104 LA 364 (1995). The employer removed the senior employee, who had just successfully bid for a new position, and replaced her with a less senior employee who had "lifting restrictions of 10 to 15 pounds permanently imposed by her doctor". Arbitrator Jack D. Cerone ruled that the contract was violated since the more senior employee was entitled to the job. A reasonable accommodation under ADA does not require that an employer bump another employee from his job. "This position was not vacant, and thus, it was unreasonable to bump Grievant from it in order to accommodate the disabled worker." Arbitrator Cerone distinguished Arbitrator Richard Kanner's decision in *City of Dearborn Heights,* 101 LA 809 (1993) because that case did not "involve bumping, but mere restructuring." 104 LA at 369.

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STATEMENT OF EDITORIAL POLICY

Labor and Employment Lawnotes is a quarterly 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.

Stuart M. Israel, Editor
Paul E. Glendon, Editor Emeritus

COUNCIL DIRECTORY

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B. *Company's "Compassion And Good Intentions" In Accommodating Disabled Employee Violated Contract Rights Of Senior Employees.* The company eliminated several clerk positions. The grievant, the most senior employee, was transferred to a shipping job which had a lower wage rate. The least senior clerk, who "had a long-time permanent medical restriction", was transferred to a tool room job, which position the company said was for only one year to allow the disabled employee to qualify for early retirement. Arbitrator Alvin B. King ruled that the company, despite its "good intentions", violated the contract. *Olin Corporation,* 103 LA 481, 483 (1994). "In the instant case, the manner in which the Company chose to accommodate Seaman [the disabled employee] required it to ignore Ware's [the senior employee] contractual right to recall." Accommodation under ADA, which was incorporated into the contract, did not permit the employer to violate the contract to the detriment of another employee.

C. *Shift Preference Given To Diabetic Employee Violated Agreement.* Arbitrator Fred E. Kindig ruled that a sheriff's department violated the contract by accommodating a diabetic deputy by unilaterally placing her on the day shift without posting the assignment so other employees could bid. The contract provided for shift preference based upon seniority, assigned on an annual basis. "The employer cannot ignore the collective bargaining agreement between the parties when decisions are made to provide reasonable accommodations for an otherwise qualified employee with a disability." *Clark County Sheriff's Dept.,* 102 LA 193, 196 (1994). Due to the "late date" however, the "only remedy" ordered was for the employer to properly post the slot in the upcoming bidding process. 102 LA at 197.

D. *Shift Transfer Permitted As Reasonable Accommodation Though Senior Employees Are Displaced Contrary To CBA.* Arbitrator Richard L. Kanner, denying the Union's grievance, ruled that a police department could transfer an officer from a midnight shift to a day shift to accommodate his disability (brittle diabetes) though this accommodation displaced two senior officers from the day shift and contravened seniority rights under the contract and past practice. The arbitrator stated that the CBA "factor, while of import, is not 'determinative' of the right of [grievant] to a 'reasonable accommodation' under the ADA." *City of Dearborn Heights,*

101 LA 809, 816 (1993). The arbitrator, over the Union's objection, ruled he had authority to interpret and apply ADA based upon a severability clause, though it did not incorporate external law or refer to ADA. 101 LA at 810-11.

E. *Selected Court Cases*

Milton v Scrivner, 149 LRRM 2065, 2069, 4 AD Cases 432 (10th Cir. 1995) (The duty to provide an accommodation under ADA does not require the employer to breach CBA. Plaintiff's "collective bargaining agreement prohibits their transfer to any other job because Plaintiff lacks the requisite seniority.")

Pattison v Meijer, Inc., 149 LRRM 3046, 3048 ~~n. 8~~ (W.D. Mich. 1995) (~~U.S. District Judge Gibson held that~~ an employer is not required to make an accommodation which would violate another employee's rights under a collective bargaining agreement.")

Eckles v Consolidated Rail Corp., 4 AD Cases 1134 (S.D. Ind. 1995) (Plaintiff "has insisted that the only reasonable accommodation for his disability is a special job assignment that would conflict directly with other employees' rights under the collective bargaining agreement. The ADA does not require such accommodation.")

Emrick v Libbey Owens Ford Co., 4 AD Cases 1, 3 (E.D. Tex. 1995) ("The ADA does not require that an employer create a vacancy by 'bumping' another employee. The Court, however, is of the opinion that another employee's offer to voluntarily relinquish their position and accept reassignment, thus enabling the disabled employee to have a newly vacated position, may be a valid means of attempting a reasonable accommodation". Accommodation under ADA may conflict with CBA and "the Court is of the opinion that when a reassignment of an otherwise qualified employee would conflict with an otherwise valid collective bargaining agreement or seniority system, this conflict should be weighed by the fact finder in evaluating the reasonableness of such an accommodation under the ADA.")

Courtney v American National Can Co., 4 AD Cases 1583, 1587-8 (1995) (Iowa Supreme Court ruled that interference with other employees' contract rights is a factor that makes proposed accommodation unreasonable under "Iowa law"; the proposed accommodation would "unreasonably impinge on the rights of other employees.")

II. WHAT IS A REASONABLE ACCOMMODATION?

A. *Creation Of A Permanent Part-Time Position For Employee With Back Injury Is Not Required Under ADA.* A welding inspector who had a serious back injury was permitted to work on a part-time basis, four hours a day, on a "trial basis", which lasted 21 months. After a medical evaluation, the employer contended that the employee could work eight hours a day and discontinued the four hour schedule. Arbitrator Richard W. Diggen ruled that ADA, which an earlier arbitrator had ruled was incorporated into the CBA, did not require the employer to create a new, part-time job. "Fulfillment of that expectation [8 hour day] is essential to the efficient operation of the Company's facility." *American Sterilizer Co.,* 104 LA 921, 927 (1995). ADA did not require "the creation of new job categories" and the CBA required eight hour days.

B. *Company Did Not Go Far Enough In Its Effort To Accommodate Grievant's Return to Work.* At the end of the grievant's extended medical leave of absence, she requested to return to work with restrictions. The Company demanded that she submit to a "functional capacity examination" and when grievant refused, on the advice of her personal attorney, the Company fired her because her leave of absence expired. The union grieved the discharge. Arbitrator John R. Thornell ruled that the Company violated the "disability accommodation section of the contract" by firing her. *Cessna Aircraft Co.,* 104 LA 985, 988 (1995). The Company's "termination was precipitate." A "more reasonable course would have been for the Company to specifically advise Grievant that until she submitted to the tests, she would not be reinstated." 104 LA at 688. As relief, the Company must request grievant to submit to examination and reinstate her if she qualified or accommodate her if she is not "physically qualified to do her old job." No backpay was awarded since grievant improperly refused the examination.

C. *Employer Had Duty To Make Effort To Place Grievants In Jobs.* The Employer violated the CBA, which prohibited "handicap" discrimination, and the ADA, by failing "to provide reasonable accommodation for the Grievants, who were injured on the job, when they could no longer be retained in the Patient Escort position". *John Hopkins Bayview Medical Center,* 105 LA 193, 198 (1995). The Employer failed to show it made an effort to "place the Grievants in jobs elsewhere in the Hospital" and the arbitrator ordered that grievants be reinstated to

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the "Patient Escort position" and "be reasonably accommodated by reassignment to the first available Patient Aid positions and provide appropriate training to meet the minimum qualifications of this work". 105 LA at 199.

D. *Court Cases*

Vande Zande v Wisconsin Dept. of Admin., 3 AD Cases 1636, 1640 (7th Cir. 1995) ("Wisconsin's housing division was not required by the [ADA] to allow Vande Zande [a paralegal] to work at home; even more clearly it was not required to install a computer in her home so that she could avoid using up 16.5 hours of sick leave.")

Rucker v City of Philadelphia, 4 AD Cases 1443, 1445 (E.D. Penn. 1995) ("ADA does not mandate that the employer create a 'light duty' or new permanent position." The employer was not required to accommodate youth counselor who was incapable of contact with the residents, due to back injury, since she cannot perform essential functions.)

III. HOW FAR DOES ADA PROTECTION GO?

A. *Employee Who Falsifies Application About Medical Disabilities Can Be Fired Under ADA.* An employee who failed to reveal "his prior back disability or injury during the medical interview", after the employer made a conditional offer of employment, was fired for just cause after it was learned, when he injured himself, that he falsified information on his application. *Boise Cascade Hospital,* 105 LA 223 (1995). The arbitrator ruled that the CBA, which incorporated the "terms" of the ADA, did not relieve the grievant "of the obligation to truthfully reveal his disability because of the nature of the questioning during the interview". 105 LA at 229. The ADA allows an employer to require job-related medical examinations after a conditional offer of employment is made. The arbitrator noted that "arbitrators have firmly supported employers' rights to require prospective employees to provide factually correct information during the hiring process and to enforce that right by promptly and consistently discharging employees who have intentionally falsified their employment applications." 105 LA at 229.

B. *ADA Does Not Prevent Discharge of Employee With Bipolar Disorder Which Caused Explosive Behavior.* A discharged employee who suffered from "bipolar" disorder, an imbalance in the brain causing improper nerve transmissions, was discharged for just cause where evidence showed he had "explosive behavior" that cannot be controlled, although it might be regulated with the proper treatment. Although ADA was not discussed, evidence showed the employee was direct threat to co-workers and others. *Rohm and Haas,* 104 LA 975, 977 (1995); but see *Union Carbide Chemicals and Plastics Co v EEOC,* 4 AD Cases 1409 (D.C. Ca. 1995) (It is question for the jury as to whether "working rotating shifts is an 'essential function' of the job of lab technician at the Star Plant or merely a convenient condition of employment where employee has a bipolar disorder, which Plaintiff claims, makes him unable to work a rotating shift.")

C. *Diabetic Police Officer Not Disabled And Thus Not Protected By ADA.* "We only hold that when an employee knows that he is afflicted with a disability, needs no accommodation from his employer, and fails to meet 'the employer's legitimate job expectations', due to his failure to control a controllable disability, he cannot state a cause of action under the ADA." *Siefken v Village of Arlington Heights,* 4 AD Cases 1441 (7th Cir. 1995). Diabetic probationary police officer who had a severe diabetic reaction on duty which resulted in disorientation and "memory loss" on duty was not protected by ADA. Employee's request for a "second chance" is not an accommodation.

D. *Employer Can Unilaterally Transfer Disabled Employee To Different Job.* An employer who transferred the grievant from technician to inspector because of absences due to arthritic gout did not violate the CBA, according to arbitrator Michael Paolucci. The Union argued, among other things, that the grievant's transfer was improper because he "was not given adequate accommodation for his disability pursuant to the ADA." *Dinagraphics Inc.,* 102 LA 947, 951 (1994). Even "if it would be proper for the Arbitrator to interpret the ADA, it must be found that it does not support the grievant's request to keep his position since he could not show that he had a disability or that he could perform his original job with reasonable accommodation." 102 LA at 952.

E. *Involuntary Transfer To Light Duty Job Does Not Violate ADA.* An employer properly transferred grievant, who had carpal tunnel syndrome and declared 30 percent disabled due to back injury, to light-duty job which resulted in lost overtime. *ITT Automotive,* 105 LA 11 (1995). Arbitrator Morris G. Shanker rejected the union's claim that the transfer violated "EEOC laws" and was in retaliation for her workers' compensation claim.

F. *Court Cases*

ADA Does Not Require Employer To Wait For Improvement. Bus driver who has uncontrollable diabetes, heart problems and hypertension is not qualified and employer need not wait indefinitely for improvement in driver's condition. *Myers v Hose,* 4 AD Cases 392 (4th Cir. 1995).

Failure To Meet Production Standards Precludes ADA Protection. A grocery store employee was lawfully fired because he could not meet new production standards due to his disability. "An employer is not required by the ADA to reallocate job duties in order to change the essential function of a job. An accommodation that would result in other employees having to work harder or longer hours is not required." *Milton v Scrivner,* 4 AD Cases 432, 149 LRRM 2065, 2069 (10th Cir. 1995). An accommodation under ADA does not include transferring Plaintiffs to another job "because Plaintiffs' collective bargaining agreement prohibits their transfer to any other job because Plaintiffs lack the requisite seniority". *Id.*

IV. DO ARBITRATORS LOOK TO ADA TO DETERMINE JUST CAUSE?

A. *Arbitrator Refuses To Determine Whether ADA Was Violated.* "Whether or not the company violated the ADA is not within the province of the Arbitrator to hear and decide." *Multi-Clean Inc.,* 102 LA 463, 469 (1993). Nevertheless, arbitrator John Miller looked to ADA to ascertain a reasonable and fair meaning of the operative phrase in the contract, "reasonable accommodation", since it was not defined in the CBA. 102 LA at 467. The arbitrator found that the company had a duty, before discharging the grievant, to determine if the CBA's "reasonable accommodation" requirement could be met. The arbitrator retained jurisdiction and remanded back to the parties "to determine whether there are reasonable accommodations that can provide the grievant with a job." 102 LA at 467, 469.

B. *Arbitrator Looks To ADA To Determine Just Cause.* "Reasonable accommodation, the fundamental employer's obligation under the [ADA], has long been recognized as an element of just cause by arbitrators." *Thermo King Corp.,* 102 LA 612, 615 (1993). To decide if the employee's discharge was for just cause, arbitrator Jonathan Dworka looked to ADA "for guidance." *Id.* The arbitrator found just cause to discharge the grievant for absenteeism due to depression which was caused by current "alcohol/drug dependency." 102 LA at 616-7.

PROMPT TERMINATION OF HARASSING SUPERVISOR CAN RELIEVE EMPLOYER OF LIABILITY FOR SEXUAL HARASSMENT

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In giving advice to employers it is becoming clear that the conservative approach in sexual harassment cases is the termination of the repeat offender.

An employer can often negate liability for hostile work environment sexual harassment if it responds adequately and effectively once it gains knowledge of the harassment by taking appropriate and prompt disciplinary action against the harasser. Hostile work environment sexual harassment occurs when a harasser's conduct unreasonably interferes with an employee's work performance or creates an intimidating, hostile, or offensive working environment. The harassing conduct must be so severe that it alters the conditions of an employee's employment. In cases where the harassment has been severe, an employer who terminates a supervisor due to the harassment can use the termination as a complete defense.

In one case, the Sixth Circuit held that the employer was not liable for a supervisor's sexual harassment because it terminated the supervisor soon after learning of the harassment. In 1991, Shan Harris became the supervisor of the complaining employee. Before this occurred, the employee alleged that Harris had given her an unwanted kiss and asked her to sleep with him. After Harris became her supervisor, the employee alleged that he pressured her to have sex and twice touched her inappropriately. The employee also alleged that Harris targeted sexual comments at other female employees and discussed lewd activities. None of these activities was reported to the employer.

The supervisor's advances culminated in a sexual assault. The employee reported that assault to the employer. The employer promptly investigated the incident and interviewed both the employee and Harris. On the basis of the investigation, the employer fired Harris.

The employee argued that the employer was liable despite the firing because the employer both allowed a sexually charged workplace to exist and was on notice that Harris acted rudely, albeit in a non-sexual nature. The court rejected these arguments and found that the termination adequately and effectively eliminated any sexually hostile environment that Harris created. The court also found that the employer's firing was not "untimely" and that the employer failed to have notice before the assault that Harris was committing sexual harassment. Thus, the court held that the employer was not liable for sexual harassment. *Reed v Delta Air Lines, Inc.,* 19 F.3d 19 (6th Cir. 1994), cert. den., 115 S. Ct. 190 (1994).

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PROMPT TERMINATION OF HARASSING SUPERVISOR CAN RELIEVE EMPLOYER OF LIABILITY FOR SEXUAL HARASSMENT —

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Likewise, in another case, an employer negated any liability for a supervisor's sexual harassment when it fired the supervisor upon learning of the harassment. The employee underwent a breast enlargement surgery. Upon her return to work, her supervisor repeatedly kidded her about the surgery and assigned her to a more difficult job. The employee reported this conduct to the employer. The employer investigated the conduct and fired the supervisor the day after receiving the employee's report. The court held that the investigation and firing relieved the employer of any liability. *Kaufman v Allied Signal, Inc.*, 970 F.2d 178 (6th Cir.), cert. denied, 113 S. Ct. 831, 121 L. Ed. 2d 701 (1992).

In contrast to the above two cases, an employer can be liable for a supervisor's sexual harassment if it acts too slowly after discovering the harassment. For instance, a former employee reported to management that her supervisor called her sexually derogatory names. The employer told the supervisor to apologize. Unsatisfied with the apology, the employee filed a discrimination complaint. This action caused the employer to further investigate. The investigation resulted in the supervisor receiving a written reprimand for sexually assaulting the employee.

The supervisor continued to sexually harass the employee. The employee again told management. Management asked her to transfer shifts. She declined. Management later transferred her to a different shift. The employer fired the supervisor four months later for sexually harassing another employee. The employer defended the suit by claiming that the supervisor's firing absolved it of liability for his sexual harassment. The court found that the employer failed to seriously investigate the employee's claim and fired the supervisor only after the employer determined that the supervisor's behavior could become a "serious legal liability." The court held the employer liable for the sexual harassment. *Steiner v Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994).

Recently, the Sixth Circuit rejected a reverse discrimination claim by a supervisor who had been demoted for sexual harassment. In that case, Thomas Pierce was a supervisor of three offices of Commonwealth Life Insurance Co. and Capital Holding Corp. In March of 1991, Debbie Kennedy, an office administrator, complained to human resources personnel that Pierce had sent her sexually suggestive cards. Pierce admitted he sent the cards but claimed that Ms. Kennedy flirted, made sexual comments, and shared sexual jokes and cartoons in the office. Commonwealth demoted Pierce but did not punish Kennedy.

In rejecting Pierce's claim that he was subject to reverse discrimination because he was punished more severely than a subordinate, the Sixth Circuit found that his status as a supervisor was important. As a supervisor he could have caused his company to be liable for his actions under Title VII or state law. Because of that status, his demotion under the circumstances was not reverse discrimination. *Pierce v Commonwealth Life Insurance Co.*, (Case No. 93-6004, November 29, 1994), 1994 U.S. App. LEXIS 33426, 66 FEP 600 (6th Cir. 1994).

An employer can negate a claim that results from a supervisor's hostile work environment sexual harassment if the employer takes appropriate and timely corrective action against the supervisor. If the harassment is severe, the appropriate corrective action may constitute termination. Employers should be aware that the failure to timely investigate and correct claims of sexual harassment can lead to liability for the harassment.

THE INTERNET FOR LABOR AND EMPLOYMENT LAWYERS: A PRIMER

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Unless you live an enviable life of seclusion and solitude, chances are that by now you've heard a lot about the Internet and the World Wide Web. Discussion of the Internet seems to be inescapable. If you're a computer user, you may have even ventured onto the Internet to see what all the talk, not to say hype, was about. This article will describe what the Internet is, review its primary utilities for lawyers, list some valuable Internet resources for labor and employment lawyers and briefly discuss how one "gets connected". While there is an abundance of both legal and non-legal information on the Internet, it is not yet a substitute for other on-line legal research services. It can however be a valuable and very inexpensive supplement to those services while serving as a tremendous means of quick and very inexpensive communication between lawyers and between lawyers and clients.

OK, Just What is the Internet? Put simply, it is a vast, de-centralized and global network of computers (and of computer networks) all linked together and communicating with each other electronically. Anyone with a computer, a modem and some necessary software can link to the Internet and thereby communicate via e-mail, upload and download files and access the plethora of information and images to be found there. There is no central clearinghouse or "control unit" for the Internet and for one very good reason...it was developed by the U.S. government to survive and function after a nuclear attack. For many years it was the exclusive domain of government agencies, educational institutions, and large corporations which used it for communication on research and defense projects. In recent years the Internet was opened up for public and commercial use, and with the development of the World Wide Web, with its capability for attractive graphics and hypertext-links, the past two years have seen an explosion in Internet connections and usage.

The Internet can be used many different ways. In addition to the World Wide Web, the features of the Internet most pertinent for lawyers include e-mail, listservs, and gopher files. There are other features of the Internet (such as relay-chat and News Groups) that have less utility for lawyers and consequently are not discussed here.

E-Mail

You may already be using electronic mail to communicate with others within your office. The Internet allows you to communicate easily and inexpensively via e-mail to individuals across town, across the state or on the other side of the world, all for the price of a local phone call (plus any fees charged by the Internet service provider you select – see below). With appropriate software, computer files can be attached to e-mail and opened and read or downloaded by the recipients. As more and more lawyers and clients access the Internet, e-mail will become an essential means of communication, quicker and less expensive than regular mail and more efficient and without the aggravation of "telephone tag". It should be noted, however, that the Internet is not yet a secure means of communication. Steps need to be taken to ensure the confidentiality of client-related matters. There are various encryption methods which are utilized for this purpose.

Listservs

Listservs are another method of communicating by e-mail, and are potentially one of the most valuable Internet applications for lawyers. A listserv is dedicated to a single topic of interest. Internet users interested in that topic can "subscribe" to the listserv by sending an e-mail message to the manager of the listserv. Once subscribed, subscribers can post messages to the listserv which will be sent automatically by the listserv manager to all other subscribers. Similarly, the subscriber will receive via e-mail the postings of the other subscribers. This can be a highly efficient means of transmitting information of interest to the listserv members and of getting questions answered. As one commentator has noted, "A post to the right listserv is the electronic equivalent of tapping a few hundred colleagues on the shoulder to help with a problem." (D. MacLeod, *The Internet Guide for the Legal Researcher* (1995)). It is not unusual for members of active listservs to post a question or comment and receive answers within minutes or hours of the posting. As a result, listservs are an excellent means of receiving the benefit of the wisdom and suggestions of other lawyers from around the country. They are also a superb method of quickly disseminating news of legislative actions, court decisions and other developments of interest. For example, in the past few months, a listserv devoted to employment law has been able to keep its members up to date on the status of congressional legislation that would tax employment litigation damage awards, in addition to reporting the release of new EEOC guidelines governing the use of after-acquired evidence and other matters of interest.

Listservs can be designed to be restricted to members of the organizations who established them, or can be set up simply to serve a self-defined group of Internet users. For example, if a group of employment lawyers in different cities across the state of Michigan wished to establish their own listserv, accessible only by them, in order to discuss privately employment law developments and strategies or any other matters of common interest, this would be possible with the appropriate Listserv software.

Listservs can also be "moderated" meaning the founders of the listserv have reserved the right to review and screen all postings before transmitting them to the other members. And because listservs with many members can generate an unusually large amount of e-mail, many listservs allow members to subscribe to "digest" editions, in which all postings to the listserv for a defined period of time are collected by the listserv manager and delivered in one e-mail message to the member's computer.

Gopher

Gopher is an Internet menu-based search tool that allows the user to examine and look through large amounts of information organized in a descending hierarchy of files. Many entities, including governmental organizations, have posted tremendous amounts of information to the Internet accessible via gopher searches. Using gopher, the Internet user uses their computer mouse to point and click on menus of file names presented by the host computer and "burrows" down through increasingly specific layers of files to discover the information he or she is looking for.

The World Wide Web

The World Wide Web is the Internet home of graphics, sound and text linked together through a graphical hypertext interface. Hypertext is a highlighted word or phrase that links you from one point in a document to another, or to another web page entirely. The purpose is to link ideas together so that, by clicking on highlighted text, you can jump to another section of text (or another document) that follows up on an idea. Hypertext provides the power to link documents on the web together.

With software known as a "web browser" the user is able to type in the address (the "URL" or "Universal Resource Locator") of any web page or "home page" on the Internet and call it up on his or her computer screen. Almost all web pages have several clearly marked hypertext links pointing the user to related information elsewhere on the World Wide Web, and some have hundreds. By pointing and clicking the computer mouse on any hypertext link, the user is quickly connected to the web page represented by that link. That web page will contain the information generally indicated by the hypertext link and in addition will undoubtedly contain its own set of hypertext links (selected by creators of that web page) leading to web pages on other computers. Any page on the World Wide Web can link to any other via hypertext link. It is literally possible to visit computers (and have access to the information posted on their homepages) all over the globe by following hypertext links – hence the name "World Wide Web".

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The amount of information on the World Wide Web is staggering, and growing by leaps and bounds. Almost all of it is free, posted by individuals, universities, governmental departments and agencies, businesses and private organizations interested in making the information accessible as a public service or to further their individual or organizational purposes. Indeed the amount of information is so overwhelming that various search tools have been developed to aid WWW users in finding information. These search engines are also freely available on the Web. Once you find the information you are looking for, you can send it to your printer or download it and save it as a file. In addition, when you find a valuable Web site that you want to visit again, most Web browsers will allow you to "bookmark" it and save it to a list of your favorite sites so you don't have to retrace your steps across the World Wide Web the next time you want to visit it.

Legal Information on the Internet

The Internet is not yet a substitute for legal research conducted via the traditional on-line commercial services. These services are much better equipped to locate all court cases or statutes relating to any particular topic.

However, legal information is coming onto the Internet quickly and it must be said, somewhat haphazardly, originating from hundreds of different points. The text of all U.S. Supreme Court cases since 1990 are readily available, along with the decisions of most of the U.S. Circuit Courts of Appeals (with varying "start dates") and some state courts. If you know the name or court of the decision you are looking for, the Internet can be the quickest and least expensive means at your disposal to obtain a copy. (At this moment, unfortunately, neither Michigan state court decisions nor Michigan statutes are available on the Internet. We can only hope that Michigan will elect to follow the examples of states such as New York and Indiana which make their court decisions and statutes freely available to their citizens on the Internet.).

Also available is the United States Code, the Code of Federal Regulations, the Federal Register, the Congressional Record and information from a multitude of federal cabinet departments and agencies, including the Department of Labor.

Finally, many law firms around the country, including some in Michigan, have created home pages on the World Wide Web as a means of publicizing their services both to the general public and the legal community. Many of these firm sites are very impressive and elaborate and themselves contain valuable legal information as well as links to other legal sites on the WWW.

General Legal Sites

Many web sites are devoted to identifying, categorizing and linking to other web sites with legal information. Some of the most prominent and comprehensive sites are:

Site	*URL*
The Cornell Legal Information Institute (LII)	*http://www.law.cornell.edu*
Indiana University School of Law – the WWW Virtual Library	*http://www.law.indiana.edu:80/law/lawindex.html*
Chicago-Kent College of Law: Lawlinks: A Comprehensive Guide to Internet Law	*http://www.kentlaw.edu/lawnet/lawlinks.html*
Washburn University School of Law Library	*http://www.law.wuacc.edu*
Yahoo! Directory of Legal Resources	*http://www.yahoo.com/Government/Law*
Legal Research Network (LERN)	*http://witness.net*
Lexis Counsel Connect LawLink	*http://www.counsel.com*
Law Journal Extra	*http://www.ljx.com/nlj*
The SEAMLESS WEBsite	*http://seamless.com*
Hieros Gamos	*http://www.hg.org*
FindLaw	*http://www.findlaw.com*

In Michigan, the Institute of Continuing Legal Education has its own webpage located at *http://www.umich.edu/~icle*. The Institute's web page will link you directly to the sites listed above and many other valuable legal resources on the World Wide Web. You can use the Institute's web page as your "bookmark" or gateway to other major legal web sites. A copy of the Institute's webpage is appended to this article. Underlined text represents a hypertext link to either another part of the Institute's page or another page on the World Wide Web. (Note: at this writing the Institute's web pages are being refined even further. By the time of publication, the pages may have a substantially different appearance.) The State Bar of Michigan has also announced plans to have a home page on the World Wide Web in 1996.

Labor and Employment Law Sites of Interest

World Wide Web sites of particular interest to labor and employment law attorneys include the following:

U.S. Department of Labor ..... http://www.dol.gov/

Occupational Safety and Health Administration
..... http:www.osha-slc.gov/

Bureau of Labor Statistics ..... http://stats.bls.gov

American Arbitration Association ..... http://www.adr.org

The Federal Web Locator
..... http://www.law.vill.edu/Fed-Agency/fedwebloc.html
Links to all known U.S. Government sites, including decisions of the U.S. Supreme Court and the U.S. Circuit Courts of Appeals, and cabinet departments and agencies.

Thomas (U.S. Congress) ..... http://thomas.loc.gov
Full text of current legislation, updated several times a day. Congressional Record updated daily. Other frequently updated information about activity in the U.S. Congress.

Employee Relations Web Picks
..... http://206.2.192/~garnet/labor/misc.html
Managed by the Public Employment Reporter, with links to a multitude of labor and employment law articles, organizations and resources on the Internet.

Americans with Disabilities Act Document Center
..... http://janweb.icdi.wvu.edu/kinder/
Created and maintained by Duncan Kinder, a St. Clairsville, Ohio attorney. An extraordinary amount of information about disabilities and disability law made available on the World Wide Web.

BenefitsLink(TM)
..... http://www.magicnet.net/benefits/index.html
Created by David Baker. Links to a vast amount of information on employee benefits.

Disability Resources on the Internet
..... http://disability.com/cool.html#dis
Created and mantained by Evan Kemp & Associates. Comprehensive links to information and organizations concerned with disabilities.

Empoyment Statistics
..... gopher://una.hh.lib.umich.edu:70/11/ebb/employment/
Gopher files maintained by the Harlan Hatcher Library at the University of Michigan containing information on employment statistics, including major collective bargaining settlements, CPI information, unemployment data and average wage and compensation tables.

Martin P. Catherwood Virtual Library
..... http://www.ilr.cornell.edu/othersites/
An index of internet sites related to the field of industrial and labor relations, maintained at the Martin P. Catherwood Library, Cornell University School of Industrial and Labor Relations.

Listservs

..... ADA-Law@vml.nodak.edu
Devoted to discussion of the ADA. To subscribe, send the following message to *listserv@vml.nodak.edu:* subscribe ada-law Your Name

..... Employlaw@webspan.com
Moderated by Don Nichols and devoted to discussion of employment law matters, with a plaintiff-oriented bent. To subscribe, send the following message to
majordomo@webspan.com: subscribe employlaw
end

..... NetLawyers@lawlib.wuacc.edu
Moderated by Lewis Rose. Devoted to the use of the Internet in legal research and the practice of law. A very active listserv – the place to be if you're really interested in using the Internet in your law practice.
To subscribe, send the following message to
listproc@lawlib.wuacc.edu: SUBSCRIBE
First Name Last Name

How to Get Connected

Although they are not part of the Internet per se, the major commercial on-line providers (America on Line, Compuserve, Prodigy) all have gateways to the Internet. For those just beginning exploration of the Internet, one of these might represent the best option. For about $10 - $20 per month, each will generally provide 5 hours of on-line time, with additional time during the month billed at about $2.95 per hour. (Caution: Depending on the provider, you may also pay extra to enter certain parts of the provider's own network.) The commercial providers offer the advantage of a very well-designed, user-friendly interface and good customer support. On the other hand, they control their gateway to the Internet and consequently may not offer or permit access to everything that is on the Internet, although they will support e-mail and listservs and provide access to the World Wide Web.

If you're more than a novice computer user and find yourself using the Internet more than 15 - 20 hours per month, you might consider connecting via an Internet Service Provider. ISPs provide you with a standard phone line connection to the Internet. For $20 - $40 per month, you can purchase 40 - 80 hours per month or even unlimited time on the Internet, depending on the provider you select. There are things you will need to watch out for in evaluating ISPs; for instance, you'll want one that provides a local access number in order to avoid long distance charges. You'll also want to be sure the provider supports your modem speed, that they will provide you with adequate installation and service support, and that the speed of the provider's own connection to the Internet is satisfactory.

Finally, you'll need to be sure your own computer has the necessary features to support a satisfactory Internet connection. Generally you'll want a 100mhz Pentium

(Continued on page 10)

THE INTERNET FOR LABOR AND EMPLOYMENT LAWYERS: A PRIMER —

Continued from page 9

processor, with at least 8MB of RAM (16MB is better). You'll also want at least a 540MB hard drive. Your modem should be at least 14.4 bps, and 28.8 bps is better. And naturally, you'll need a phone line. You can use the same phone line that you use for voice communication, but that can be inconvenient. Instead, consider installing a phone line that is dedicated to the modem connection.

Conclusion

The best way of understanding the Internet and its implications for legal practice is to experience it. It is already a repository of a vast amount of information, both legal and non-legal. It is *very easy* to access and use. Although the Internet is not yet an adequate substitute for the commercial on-line legal research services such as Lexis and WestLaw, it can be an invaluable supplement to standard legal research methods. Perhaps more importantly, it is an excellent and inexpensive means of communication, use of which will only continue to expand as more people "get connected". The three words "inexpensive", "information" and "communication" effectively sum up the salient features of the Internet, and their utility will not be lost on most lawyers.

Bibliography

There is an abundance of information available both on and off the Internet concerning the Internet and the legal resources located on it. In addition to sources on the Internet itself, these publications were consulted in composing this article:

The Internet Guide for the Legal Researcher by Don MacLeod (1995, Infosources Publishing)

The Lawyer's Guide to the Internet by G. Burgess Allison (1995, Section of Law Practice Management, American Bar Association)

The Internet and Your Law Practice: An Introduction in Plain English (ICLE, 1995)

Thanks also to the colleagues on the NetLawyers and EmployLaw listservs who responded to requests for information and assistance with this article.

Karl F. Brevitz welcomes comments regarding this article. Contact him at the Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI 48109-1444 via the Institute's web page at *http://www.umich.edu/~icle* or to *karl@icle.law.umich.edu*.

(Also see following appendix, ICLE's webpage.)

- ☐ Environmental Protection Agency
- ☐ EDGAR Project – Electronic SEC Filings
- ☐ Government Printing Office [UPDATED] Federal government information online, including *The Federal Register, The Congressional Record,* Congressional Bills, Public Laws, History of Bills, and the United States Code.

☐ General Federal Information
- ☐ The Federal Web Locator – Villanova University School of Law's extensive collection of federal resources on the Web.
- ☐ FedWorld – Provided by the National Technical Information Service as a one-stop location for U.S. Government information.
- ☐ LEGI-SLATE Gopher Service – Combined federal legislative and regulatory service; portions available by subscription only.

☐ Statutes and Regulations
- ☐ United States Code
- ☐ Federal Register
- ☐ 1995-1996 Federal Register
- ☐ Code of Federal Regulations

Federal Courts

Decisions

☐ Supreme Court Decisions: Project Hermes. Available through *Cornell Law School's Legal Information Institute (LII).* U.S. Supreme Court decisions beginning in November 1990, indices, information about the court and its justices, and e-mail services for distributing syllabi of the current term's decisions.

☐ United States Courts of Appeal
- ☐ First Circuit (not available)
- ☐ Second Circuit
- ☐ Third Circuit
- ☐ Fourth Circuit
- ☐ Fifth Circuit
- ☐ Sixth Circuit
- ☐ Seventh Circuit
- ☐ Eighth Circuit (not available)
- ☐ Ninth Circuit
- ☐ Tenth Circuit
- ☐ Eleventh Circuit
- ☐ Federal Circuit
- ☐ DC Circuit
- ☐ Search U.S. Circuit Courts of Appeals – Search full-text opinions through Cornell Law School
- ☐ ShepNet – Shepard's Dial-Up Bulletin Board. Full-text opinions from Circuits 1-10 downloadable from Shepard's BBS (719-481-7930).
- ☐ Law Journal EXTRA – U.S. Court of Appeals Cases

Rules

☐ Federal Rules of Evidence

☐ Federal Rules of Civil Procedure

State of Michigan

☐ State of Michigan Web Site

☐ Governor's Office

☐ Michigan House of Representatives – Pending Legislation

☐ Michigan Senate – Pending Legislation

☐ State Government Information *(University of Michigan gopher site)*

☐ The Michigan Constitution

☐ Departments on the Web
- ☐ Department of Education
- ☐ Department of Mental Health
- ☐ Department of Natural Resources
- ☐ Department of Transportation
- ☐ Department of Treasury
- ☐ Secretary of State
- ☐ Insurance Bureau

Law Libraries/Legal Research Sites

☐ The University of Michigan Law School

☐ Case Western Reserve University School of Law

☐ Cornell Legal Information Institute (LII)

☐ Chicago-Kent College of Law: Lawlinks: A Comprehensive Guide to Internet Law

☐ John Marshall Law School, Chicago

☐ Indiana University School of Law – The WWW Virtual Library: Law

☐ Law Journal EXTRA

☐ LawLinks: The Internet Legal Resource Center

☐ Legal Research Network (LERN)

☐ LEXIS Counsel Connect LawLink

☐ Library of Congress

☐ Saint Louis University School of Law

☐ The SEAMLESS WEBsite

☐ Villanova Center for Information Law and Policy

☐ Washburn University School of Law Library

☐ Yahoo! Directory of Legal Resources

Technology Resources for Lawyers

☐ ABA Law Practice Management Section Computer and Technology Division

☐ ABA Legal Technology Resource Center

Business Resources

☐ U.S. Business Advisor – Includes a searchable "regulatory assistance section" with information about laws and regulations affecting businesses, such as taxes, labor, environment, safety, and immigration.

☐ *Business and the Law: A WWW site of Reinhart, Borener, Van Deuren, Norris & Rieselbach, S.C.* of Milwaukee, Wisconsin

☐ Chicago-Kent College of Law: Lawlinks: A Comprehensive Guide to Internet Law

☐ U.S. Economic Bulletin Board

☐ Uniform Commercial Code

Lawyers and Legal Organizations on the Internet

☐ ALI-ABA [NEW]

☐ The American Bar Association

☐ Hieros Gamos

☐ The National Center for State Courts

☐ West's Legal Directory

Services for Lawyers

Arbitration

☐ American Arbitration Association

☐ Global Arbitration Mediation Association

Experts

☐ The Experts Page – The Seamless Web

☐ Expert Witness Information

☐ Lawmall

Legal Journals

☐ Money & Investing – The Wall Street Journal

☐ Mutual Funds Magazine Online

☐ U.S. Law Week

☐ New York Law Journal

Publishers

☐ Lawyers Cooperative Publishing

☐ West Publishing

Research

☐ FIND/SVP

Other Interesting Links

☐ U.S. Postal Service [NEW] Provides 9-digit zip codes, postal rates, and other information.

☐ Stock Market Charts

We'd like to hear from you. Please e-mail your questions, comments and suggestions for other sites to icle@umich.edu.

EMPLOYMENT DISABILITY DISCRIMINATION CASES – ISSUES IN LITIGATION

Michael L. Pitt

Pitt, Dowty & McGehee, P.C.

1. **USE OF EXPERTS**

a. **ACCOMMODATION EXPERT**

In preparing a failure-to-accommodate case, a qualified rehabilitation specialist or disability architectural specialist is required. The old adage "seeing is believing" should be followed. The expert should be brought to the work site early in the litigation for analysis of the work station and environment. The workplace inspection should be videotaped. Additionally, the expert should work with the vocational/medical experts to establish the appropriate correlation between functional ability and work tasks. The testimony of this type of expert is essential to overcome the employer's good-faith exception established under the ADA. 42 U.S.C. §12188(b)(5).

b. **VOCATIONAL EXPERT**

A qualified vocational expert can provide the jury with valuable insight into the actual functional, intellectual and physical abilities of the plaintiff. The vocational expert should make a work-site inspection to evaluate the working conditions, job set-up and overall environment so that a correlation between the plaintiff's physical, functional and intellectual abilities can be made relative to the job duties under scrutiny. The vocational expert is competent, with appropriate foundation, to render an opinion as to whether plaintiff is able to perform the essential functions of a particular job and can opine on other related issues.

Be conscious of the power of co-worker testimony. Co-worker testimony can make or break a case.

c. **MEDICAL EXPERT**

The best medical expert is the plaintiff's treating physician. Before taking a case, you should interview the treating physician, preferably in person. Whether the treating physician is amenable to working in litigation, demonstrates a cooperative attitude and will help advocate for his or her patient must be determined early on. If the treating physician is a "dud", a qualified independent expert witness is necessary to explain to the jury the nature and extent of the plaintiff's disability. Jurors tend to believe the medical expert who has worked the closest with the plaintiff. The treating physician is, by far, the most persuasive witness you can offer, and usually is less expensive than a retained independent expert.

d. **ECONOMIST**

We often forego the retention of an economist because of the cost factor. However, there are cases where the individual has lost a substantial position and it is unlikely that a comparable position will be found. In those cases where the potential economic injury is substantial, the retention of an economist is recommended. Keep in mind that economist reports are usually admissible into evidence and are persuasive in the jury room during deliberations. The bottom line phenomenon occurs when the defense retains its own economist to counteract the opinions of the plaintiff's economist. My experience has been that the jury will usually accept one bottom line or the other in rendering a plaintiff's verdict. The economist report can be presented in segments so that the jury can accept or reject portions of the report and draw its own conclusions based on the opinions of the economist.

2. **NON-ECONOMIC VS. ECONOMIC DAMAGES**

A recent non-scientific review of reported jury verdicts from 1990 through 1994 revealed that in wrongful discharge/discrimination cases, the non-economic damage portion of the award frequently exceeded the economic portion of the award. Do not underestimate the jury's ability to value the non-economic injury to your client in dollar amounts much greater than you envisioned. Under the ADA, certain caps exist. Whenever possible, a claim under the MHCRA should be joined with an ADA claim to override the caps. Expert testimony can be persuasive in presenting the non-economic aspects of a disability discrimination case.

3. **SPECIAL ISSUES IN DISCOVERY**

Try to force the large employer to assert an economic hardship defense. If the large employer does assert this defense, exploit it to the maximum by requiring the defendant to produce all its financial records, etc. Most defendants, once they realize what you are up to, will abandon the economic hardship defense because the $2,000 accommodation cost is ridiculously low in comparison with its $100 million dollar annual revenue.

Be aware of the shifting job description phenomenon. If the job description is not written down, what duties the plaintiff was required to perform will shift depending on who you ask. In many cases, countless depositions are taken simply to establish what the essential functions of the plaintiff's job were. Countless hours of questioning often take place regarding the employer's ability to assign non-essential tasks to other workers, modify the job, or other types of accommodations dealing with the job description.

Be conscious of the power of co-worker testimony. Co-worker testimony can make or break a case. On the other hand, management testimony against the plaintiff is usually not harmful because the jury expects that testimony. Co-worker testimony which is adverse to the plaintiff can destroy the credibility of the plaintiff's case.

Ethical Considerations: Current members of management cannot be contacted *ex parte*. Former members of management or non-managerial employees can be contacted *ex parte*. If such interviews are undertaken after litigation has commenced, be prepared for an attack by the defense attorney that you have engaged in unethical conduct. The *Michigan Ethics Opinions* clearly allow you to make contact with current non-managerial employees and former managerial employees, as long as you properly identify yourself, state

the purpose for the contact, and provide the witness an opportunity to contact the company before making any statements to you. Disclose *ex parte* contacts with these employees when requested through interrogatories or deposition. Failure to disclose these contacts may preclude offering the witness testimony. *See* CI-535, 6/18/80; RI-44, 2/1/90; and R-2, 4/21/89.

Early on-site inspection is necessary. Not only do you get a good start on discovery, but you get a "feel" for the work environment so that your interrogation of co-workers or members of management is better organized, more focused, and generally more effective.

4. **SUMMARY DISPOSITION ISSUES**

Disability claims are often easier to defend because proving bias is not an element of a failure-to-accommodate claim.

In termination/failure-to-hire/failure-to-promote claims, the element of bias is established easily by demonstrating the economic motivation in taking adverse action against a disabled employee. In deposition, you can usually establish the increased medical insurance costs of employing disabled workers or the workers' compensation aspects. Many members of management are judged in their performance evaluations by their workers' compensation experience. Management often rewards its supervisors when they keep the workers' compensation costs to a minimum. This is powerful evidence to support a claim of improper motivation in terminating an injured worker or refusing to hire or promote a disabled person.

5. **SETTLEMENT AND TRIAL**

Be aware of the proposed revisions in the tax law which change the definition of "personal injury" for purposes of determining what constitutes reportable gross income to specifically exclude emotional distress as a form of personal injury. This means that allocation of settlements to the mental anguish/emotional distress components of discrimination cases will not eliminate federal income-tax consequences. The new proposal deals with all settlements that were consummated and money received after December 31, 1995. The latest news is that President Clinton has changed his mind and may not agree to these changes. You should carefully track the developments of this change in the tax law.

Under the MHCRA, there is a workers' compensation offset. MCL 37.1606(4). Under the ADA, there is availability of punitive damages. Be aware of the caps under the ADA. 42 U.S.C. §12188(a). There are no caps under the MHCRA.

Exploit the natural jury appeal of a disability case. There is a difference between an appeal to sympathy for a disabled worker and educating the jury about the nature of the disability, plaintiff's efforts to overcome the disability, his or her persistence and drive to become a productive member of society. Every disability discrimination case should have a central theme which maximizes these elements of this type of case. Your willingness and ability to articulate the case in these terms will enhance both settlement and trial results.

EMPLOYMENT DISABILITY DISCRIMINATION CASES FILED WITH THE MICHIGAN DEPARTMENT OF CIVIL RIGHTS – ISSUES BEFORE SUIT

William J. Mann

Michigan Department of Civil Rights

I. **COMMENCEMENT OF THE CASE**

A case is initiated with the Michigan Department of Civil Rights (MDCR) by the filing of a complaint pursuant to Rule 37.4 of the Michigan Civil Rights Commission (MCRC) and Michigan Department of Civil Rights Rules Governing Organization, Practice, and Procedure. Rule 37.4 specifies the form and time period for the filing of a complaint.

The filing of a complaint should be distinguished from the issuance of a charge, which occurs only if, after investigation, the MDCR determines that sufficient grounds exist.

II. **PRE-FILING DISCOVERY**

Section 602(d) of the Elliott-Larsen Civil Rights Act (ELCRA) authorizes the MDCR to require answers to interrogatories, order the submission of books, papers, records, and other materials pertinent to a complaint, and require the attendance of witnesses, administer oaths, take testimony, and compel, through court authorization, compliance with its orders or an order of the commission.

Rule 37.4(10) of the MCRC and MDCR Rules contains identical language to Section 602(d) of the Elliott-Larsen Civil Rights Act.

The following are by way of example, and by no means exhaustive, of the materials that an investigative file should contain prior to the completion of legal review:

- Employment application – Review for any unlawful pre-employment inquiries.
- Position description – If there is a position description for the job in question, does it accurately depict the duties and requirements of that job.
- The results of any medical examinations administered on behalf of the employer and any recommendations or restrictions made pursuant thereto.
- The results of any medical examinations administered by the claimant's physician and any recommendations or restrictions made pursuant thereto.
- The claimant's employment history and general life activity history insofar as it may be related to the job duties of the employment at issue.
- Any policies the employer has which relate to the hiring, classification, discharge and other aspects of employment based upon handicap.

(Continued on page 14)

EMPLOYMENT DISABILITY DISCRIMINATION CASES FILED WITH THE MICHIGAN DEPARTMENT OF CIVIL RIGHTS – ISSUES BEFORE SUIT — .

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III. **PRE-FILING SETTLEMENT**

Rule 37.5(1) of the MCRC and MDCR Rules states that the respondent may be invited, at any time, to participate in a conference and conciliation in an endeavor to eliminate the alleged discrimination, and shall be invited to participate in such a conference prior to the issuance of a charge.

Factors to be considered in pre-filing settlement:

- The strength of the case in terms of liability.
- The extent and nature of the damages which the claimant has sustained.
- The existence of any employer policy or practice that has implications for handicappers beyond the individual claimant.

IV. **CASE SELECTION**

Rule 37.6(1) of the MCRC and MDCR Rules states that if, after investigation, the department determines that there are sufficient grounds, a charge shall be issued.

V. **CHOICE OF FORUM**

Pursuant to Article 6 of the ELCRA and Rule 37.12 of the MCRC and MDCR Rules, the forum for a hearing or a charge issued by the Michigan Department of Civil Rights is the Michigan Civil Rights Commission.

VI. **PREPARING THE COMPLAINT**

Rule 37.8 of the MCRC and MDCR Rules states, with respect to the form and content of a charge, only that the charge shall be in writing, in such form and content as the department determines.

As a practical matter, many of the same considerations that go into the preparation of a court complaint apply to the preparation of an administrative charge. The charge should include the following:

- The identity of each of the parties and their location.
- A statement identifying the claimant's handicap(s).
- The alleged discriminatory action or actions which the respondent engaged in based upon handicap, including any unlawful pre-employment inquiries concerning handicaps, unlawful physical or mental examination, or failure to accommodate.
- An allegation regarding any policy or practice which has the purpose or effect of discriminating on the basis of handicap.
- A prayer for any appropriate relief including, but not limited to, a cease and desist order, hiring, reinstatement, upgrading, back pay, and emotional distress damages.

MERC STATISTICS REPORTED BY ALJ ROULHAC

Administrative Law Judge Roy L. Roulhac presented the MERC update at the Labor and Employment Law Section's mid-winter meeting on January 27, 1996. Judge Roulhac discussed significant cases and developments at MERC and reviewed some of MERC's 1995 statistics.

Judge Roulhac reported that MERC ALJs are to issue opinions no later than six months from the date briefs are received. Judge Roulhac distributed statistics showing 24 outstanding opinions as of December 31, 1995:

ALJs	Kurtz	Lynch	Roulhac	Wicking	
Months pending					Total
6	1	2			3
5	1	1			2
4		2			2
3	2	1		1	4
2	1	2		1	4
Less than 60 days	1		2	6	9
Total	6	8	2	8	24

Judge Roulhac presented statistics that confirm it is difficult to get the Commission to reverse ALJ decisions. He reported that the four MERC ALJs decided 59 C and CU cases in 1995. Exceptions were taken in 27 of them, 46% of the cases decided by the ALJs. The Commission affirmed in 23 of those cases, 85% of those in which exceptions were taken. Eight of the cases were appealed to the Michigan Court of Appeals.

Judge Roulhac also compiled a list of 1995 Michigan Court of Appeals Decisions addressing MERC cases, totalling 21, of which, one (4.8%) was dismissed as moot, three (14.3%) were reversed, two (9.5%) were reversed in part and affirmed in part, and 15 (71.4%) were affirmed. That list, summarizing each case, follows.

1995 MICHIGAN COURT OF APPEALS DECISIONS INVOLVING MERC

Roy L. Roulhac

Administrative Law Judge
Michigan Employment Relations Commission

AFSCME Council 25 v City of Pontiac, (No. 150992 & 151092) (1992 MERC Lab Op 234 & 245), Unpublished, *1/5/95*. Affirms. No violation of PERA when city failed to sign and implement agreement ratified by council after newly-

elected mayor objected to its terms. City violated PERA by refusing to implement skilled trades agreement negotiated pursuant to a memo of understanding included in prior contract.

Clare-Gladwin ISD/MESPA v Clare-Gladwin ISD, (No. 150852) (1992 MERC 213). Unpublished, 1/23/95. Affirms. Management rights clause contains waiver of right to bargain over reduced working hours.

DMH v Cencare and AFSCME, DMH v Passages & AFSCME, DMH v Community Residential Group and AFSCME, (No. 158923, 158925, 158926) (1992 MERC Lab Op 653, 659, and 656). Unpublished, 2/23/95. Affirms. DMH is co-employer with residential group home providers.

Rodgers v County of Washtenaw, (209 Mich App 73, 2/22/95) (1992 MERC Lab Op 471). Published. Affirms. Statute not tolled because wrongful discharge suit filed in circuit court.

Macomb County Prof. Deputies Ass'n County of Macomb, (No. 145390) (1991 MERC Lab Op 542). Unpublished, 2/27/95. Affirms. Corrections officers not eligible for Act 312.

Gibraltar Ed. Ass'n v Gibraltar School Dst., (No. 167107, 167109) (1993 MERC Lab Op 493 & 510). Unpublished, 2/28/95. Affirms. Unilateral termination of COLA payments after contract expired violated PERA.

AFSCME v DMH & 6 Residential Care Facilities, (Nos. 138363-6, 138387, 154966) (1991 MERC Lab Op 79, 82, 85, 92, & 101; 1992 MERC Lab Op 522). Unpublished, 3/10/95. Affirms DMH is co-employer with residential group home providers.

Lansing Schools Ed. Ass'n v Lansing P.S., (No. 161745) (1993 MERC Lab Op 18). Unpublished, 3/15/95. Affirms. Substitute teachers not included in teacher unit because of temporary/casual status.

AFSCME v Bay-Arenac Comm. Living Facility & DMH, (No. 166716) (1993 MERC Lab Op 461). Unpublished, 3/16/95. Affirms. DMH is co-employer with residential group home providers.

Int'l Alliance & Local 274 v Lansing Comm. College, (No. 149060) (1991 MERC Lab Op 613, 1992 MERC Lab Op 1). Unpublished, 3/16/95. Affirms. Petition for separate unit of alleged craft employees dismissed.

City of Grandville v Grandville Mun. Exec Ass'n, (213 Mich App 586, 4/12/95). (1993 MERC Lab Op 206). Published. Reverses. Executive employees are entitled to bargaining. Lv to appeal filed 7/13/95.

Univ. of MI v IUOE, Local 547,.(No. 167048) (1993 MERC Lab Op 479). Unpublished, 4/13/95. Affirms. Utility systems techs accreted to existing unit rather than to unit classified as technical by employer.

Scarlett Hanson-Birkhold et al v Kent County Ed Ass'n, (No. 173032) (1994 MERC Lab Op 110). Unpublished, 5/5/95. Dismissed as moot. Taxpayers lack standing to bring bad faith bargaining charges based on an illegal strike.

City of Detroit & Mich. Dist. Council 77 v Goolsby, (211 Mich App 214, 5/26/95, lv to appeal filed 6/15/95) (1993 MERC Lab Op 268). Published. Affirms and reverses in part, MERC decision on remand from S. Ct. Affirmed that Charging Party not entitled to damages, no violation of contract. Reversed $20,000 award of attorney fees and costs. MERC has no authority to order.

DPOA, DFA & DPLSA v City of Detroit & Police and Fire Retirement Systems, (212 Mich App 383) (1993 MERC Lab Op 424). Published. Affirms. The City unilaterally altered a longstanding past practice when the Retirement System Board removed the Medical Review Board's authority to determine whether a retirement applicant's disability was duty-related. S. Ct. granted leave to appeal on 9/25/95.

Kenowa Hills P.S. v Kenowa Hills Ed Ass'n, (No. 167834) (1993 MERC Lab Op 637). Unpublished, 8/29/95. Reverses Commission. Principal did not change a teacher's evaluation because she filed grievance.

Sault St. Marie P.S. v MEA, (No. 170381) (1993 MERC Lab Op 895). Published, 9/1/95, 213 Mich App 676. Affirms. K-12 unit clarified to exclude "per diem" substitutes. Upheld conclusion that hearing not necessary.

U of M, Flint AAUP v U of M Flint, (No. 168013) (1993 MERC Lab Op 615). Unpublished, 9/8/95. Affirms. Petition seeking separate unit of U of M Flint faculty dismissed.

Clerical-Technical Union of MSU v MSU, (No. 165131, 165835) (1992 MERC Lab Op 120 and 1993 MERC Lab Op 409 & 345 on the remedy). Reverses and remands. MERC had no authority to refrain from ordering return to status quo after finding employer guilty of unilateral removal of unit positions. MERC erred by failing to make findings re illegal assistance and appropriate unit for bargaining. Leave to appeal filed with Supreme Court 12/12/95.

Tucker v Mich Ass'n of Public Employees, (No. 166914) (1993 MERC Lab Op 546). Unpublished, 12/15/95. Affirms, in part. Remands. MAPE breached duty of fair representation by failing to process grievance after it was replaced by Teamsters while grievance was pending. Both unions took position that other was responsible. Remanded to determine whether contract was violated. MAPE will now, presumably, have to defend by arguing that the contract was not breached although this is contrary to the position it initially took with employer.

Village of New Haven & New Haven Housing Comm v AFSCME Council 25, (No. 158153) (1002 MERC Lab Op 608). Unpublished, 12/28/95. Reverses MERC's finding that the New Haven Housing Commission is a separate employer. Commission filed to give adequate consideration to enabling legislation. Affirms finding that the discharge of two employees was not motivated by their union activity or by protected concerted activity.

FEDERAL CIRCUIT COURT PROHIBITS EMPLOYEE RELEASES IN EARLY RETIREMENT WINDOWS

Christopher L. Rizik

Dickinson, Wright, Moon, Van Dusen & Freeman

In a surprise and rather dubious decision, the U.S. Court of Appeals for the Ninth Circuit has issued a ruling that, if followed elsewhere, will radically change the way in which early retirement incentives and other workforce reduction packages are offered by employers. Currently, it is common for employers to condition all incentive benefits upon the execution by the retiring employee of a waiver and release of employment-related claims. This is to prevent a retiring employee from suing his or her employer after receiving a substantial early retirement package. However, in *Spink v Lockheed,* 60 F.3d 616 (CA 9, 1995), the Ninth Circuit recently ruled that the waiver and release of age discrimination and other employment claims as a condition for receiving an early retirement benefit under a pension plan is a "prohibited transaction" under the Employee Retirement Income Security Act (ERISA).

In 1990, Lockheed offered a voluntary early retirement "window" program designed to provide increased pension benefits to employees who elected to retire during June of 1990. However, to receive the increased pension benefits, each employee was required to sign a release of all claims that the employee might have with regard to his or her employment with Lockheed. Paul Spink retired from Lockheed during 1990, but refused to sign a release because of a dispute that he had with regard to the calculation of his pension benefits. Lockheed therefore refused to grant him the increased benefits.

Spink sued, arguing that Lockheed's requirement that an employee sign the waiver in order to receive enhanced pension benefits was a "prohibited transaction" under ERISA. It is illegal under ERISA for a plan fiduciary to "transfer to, or use by or for the benefit of, a party in interest, any assets of [a pension] plan." Because a pension plan fiduciary's duty under ERISA is to plan participants and their beneficiaries, the use of assets by the fiduciary for the benefit of Lockheed or any other "party in interest" is automatically deemed "prohibited." Spink argued that the benefit that the waiver provided to Lockheed was essentially "purchased" with plan assets, thereby constituting a prohibited transaction.

Surprisingly, the court not only accepted the argument that the waiver requirement was a prohibited transaction, it went a step further and held that the amendment of the plan by Lockheed that created the early retirement window (and specifically required the signing of a release) was itself a prohibited transaction.

The *Spink* ruling is disturbing not only because it expands the accepted scope of the ERISA prohibited transaction rules, but also because it arguably holds that Lockheed was acting in a "fiduciary" capacity when it amended the pension plan. This is contrary to countless decisions which have held that employers are *not* acting in a fiduciary capacity when they create or amend employee benefit plans, but are then acting solely in a plan sponsor or "settlor" capacity. A logical extension of the *Spink* court's ruling could be that every change an employer makes to a plan must be made solely in the best interests of participants and beneficiaries, as opposed to the financial, business or other relevant interests of the sponsoring employer.

While it is not expected that the full scope of the *Spink* decision will be followed in other jurisdictions, the holding that a required waiver in connection with an early retirement or workforce reduction program constitutes a prohibited transaction is a troubling development which may rear its head again in the future. This could significantly change the way in which these programs are offered. Rather than remove the use of waivers and releases, this ruling could effectively eliminate increased pensions as a substantial part of incentive programs. Until the fallout from the *Spink* case has settled, employers should be cautious in creating any early retirement or workforce reduction programs that could arguably be deemed prohibited transactions under the *Spink* rationale.

ANNUAL ICLE LABOR AND EMPLOYMENT LAW SEMINAR AGENDA

Plan to attend the Twenty-first Annual Labor and Employment Law Seminar, co-sponsored by The Institute of Continuing Legal Education, the Federal Mediation and Conciliation Service, and the State Bar of Michigan Labor and Employment Law Section.

The Seminar will be held Thursday, April 25 and Friday, April 26, 1996 at the Michigan State University Management Education Center in Troy. The Seminar includes a luncheon featuring speaker U.S. District Judge David W. McKeague and a late afternoon reception hosted by the Labor and Employment Law Section on Thursday, two days of cutting-edge information and the usual indispensable collection of papers.

For additional information contact ICLE, 1020 Greene Street, Ann Arbor, MI 48109-1444. Telephone (313) 764-0533 or fax (313) 763-2413.

21st Annual Labor and Employment Law Seminar Schedule (see page 17)

TWENTY-FIRST ANNUAL LABOR AND EMPLOYMENT LAW SEMINAR

COURSE SCHEDULE

DAY ONE — Session One

Essential Updates for the Labor and Employment Law Practitioner
Moderator: *Paul M. Kara*
Chairperson, Labor and Employment Law Section, State Bar of Michigan

Morning Session: (9:00 a.m. - 12:00 Noon)
9:00 a.m. - 9:10 a.m.
Welcome and Introduction to the Annual Seminar
Paul M. Kara
9:10 a.m. - 9:45 a.m.
Recent Decisions and Developments in Wrongful Discharge Employment Litigation: Michigan, Sixth Circuit and U.S. Supreme Court Review
Joseph J. Vogan
Varnum, Riddering, Schmidt & Howlett
Grand Rapids
9:45 a.m. - 10:20 a.m.
Recent Decisions and Developments Under the ADA and Employment Discrimination Update
* ADA regulations and case law update
* ADA compliance questions and strategy – significant developments in race, gender and other discrimination litigation
Adele Rapport
U.S. Equal Employment Opportunity Commission; Detroit
10:20 a.m. - 10:35 a.m. — **Break**
10:35 a.m. - 11:20 a.m.
Family Medical Leave Act Update
* Regulations and recent case law
* Current compliance questions and strategies
Eileen Nowikowski
Sachs, Waldman, O'Hare, Helveston, Bogas & McIntosh, PC; Detroit
Jeffrey J. Fraser
Varnum, Riddering, Schmidt & Howlett
Grand Rapids
11:20 a.m. - 11:50 a.m.
NLRB Update
* Recent Decisions
* Recent directions in NLRB policy
George M. Mesrey
National Labor Relations Board; Detroit
11:50 a.m. - 12:00 Noon
Questions and Answers
12:00 Noon - 1:30 p.m. — **Luncheon Program:**
Controlling Employment Litigation Expense
* Rule 16 conferences
* Facilitated mediation
* Staged and limited discovery
Hon. David W. McKeague
Judge, United States District Court
Western District of Michigan; Lansing
Jon G. March
Miller, Johnson, Snell & Cummiskey
Grand Rapids

Session Two

Case Development and Case Settlement in Employment Litigation

Afternoon Session: (1:30 p.m. - 4:30 p.m.)
1:30 p.m. - 2:45 p.m.
Planning and Taking the Key Witness Depositions in Employment Litigation
* Essential pre-deposition preparation and organization
* Effective deposition techniques
* Handling recalcitrant or uncooperative deponents . . . and their counsel
* Essential information to extract during the deposition

How to Prepare the Plaintiff for Deposition
Sheldon J. Stark
Stark & Gordon; Royal Oak
How to take the Plaintiff's Deposition
Kendall B. Williams
Gault, Davidson; Flint
How to Prepare the Defendant for Deposition
Kendall B. Williams
How to Take the Defendant's Deposition
Sheldon J. Stark
2:45 p.m. - 3:00 p.m. — **Break**
3:00 p.m. - 4:00 p.m.
Effectuating Settlement in Employment Litigation
* Structuring the settlement and structured settlements.
* Taxation of employment litigation settlement monies.
* Drafting the settlement agreement: the key elements to include from plaintiff and employer perspectives
John F. Brady
Brady Hathaway; Detroit
Kathleen L. Bogas
Sachs, Waldman, O'Hare, Helveston, Bogas & McIntosh, PC; Detroit
4:00 p.m. - 4:30 p.m.
Panel Discussion and Questions and Answers
4:30 p.m. - 5:30 p.m.
Reception Sponsored by the Labor and Employment Law Section, State Bar of Michigan

DAY TWO — Session Three

Labor and Management Crossroads in 1996
Moderator: *Clifford T. Suggs*
District Director
Federal Mediation and Conciliation Service

Morning Session: (9:00 a.m. - 12 Noon)
9:00 a.m. - 9:45 a.m.
Representation and Union Organizing Issues
* The new union organization push: what to expect
* New and current organizing efforts and tactics
* Management response tactics
Kevin M. McCarthy
Miller, Canfield, Paddock & Stone, PLLC
Kalamazoo
Leonard R. Page
United Auto Workers; Detroit
9:45 a.m. - 10:30 a.m.
Strikes in the '90s and Beyond
* Striker replacements and their rights — what happens when the strike is over?
* Injunctions
* Strike-related violence issues
* Secondary picketing
* Employer security forces
Robert J. Battista
Butzel Long, PC; Detroit
Samuel C. McKnight
Klimst, McKnight, Sale, McClow & Canzano, PC; Southfield
10:30 a.m. - 10:45 a.m. — **Break**
10:45 a.m. - 11:45 a.m.
Ask the Arbitrators: Effective Advocacy Techniques and Trends in Labor and Employment Arbitration
* Current issues/trends in labor arbitration
* Arbitration of non-labor contract disputes
* Tips from the panel on effective arbitration preparation and presentation
* Arbitrator/Attorney crossfire
Panel Moderator: *Stuart M. Israel*
Miller, Cohens, Martens, Ice & Geary, PC
Southfield
George T. Roumell, Jr.
Riley & Roumell; Detroit
Paul E. Glendon; Ann Arbor
Elaine Frost; Grosse Pointe
Mark J. Glazer; Bloomfield Hills
11:45 a.m. - 12:00 Noon
Questions and Answers
12:00 Noon - 1:15 p.m. — **Lunch**

Session Four

Labor and Employment Law Practice Today

Afternoon Session: (1:15 p.m. - 5:00 p.m.)
1:15 p.m. - 2:15 p.m.
Labor and Employment Law on the World Wide Web: What the Internet Can Do for Your Practice
* Internet basics and how to get connected
* Internet capabilities: e-mail, newsgroups, listservs and the World Wide Web
* A guide to labor and employment law resources on the Internet
Lynn P. Chard
Director, The Institute of Continuing Legal Education; Ann Arbor
2:15 p.m. - 3:00 p.m.
Employee Privacy in the Information Age
* E-mail privacy and e-mail discovery
* Employee surveillance on and off the job
* Substance abuse testing
* Employee off-duty conduct
Roger J. McClow
Klimst, McKnight, Sale, McClow & Canzano, PC
Andrea Roumell Dickson
Butzel Long, PC; Detroit
3:00 p.m. - 3:15 p.m. — **Break**
3:15 p.m. - 4:00 p.m.
Employee Benefits Law for the Employment Lawyer
* Recognizing causes of action
* Reporting and disclosure requirements
* Employer compliance and self-audits
* ERISA pre-emption
* Common pension and profit-sharing problems
* COBRA issues
Daniel G. Galant
General Motors Coporation; Detroit
John J. Bobrowski
Miller, Cohen, Martens, Ice & Geary, PC; Southfield
4:00 p.m. - 4:45 p.m.
Legal Aspects of Workplace Violence
* Employee v Employee violence and the role of the Union
* Legal Preventative measures: TROs, probation and more . . .
* Practical guidance
John P. Hancock, Jr.
Butzel Long, PC; Detroit
Stanley T. Dobry; Warren
4:45 p.m. - 5:00 p.m.
Questions and Answers

Adjourn

RECENT NATIONAL LABOR RELATIONS BOARD DEVELOPMENTS

Professor Stephen A. Mazurak

University of Detroit Mercy School of Law

I. **Jurisdictional Decisions.**

A. **Union "Salts" Are Employees Under the Act.**

NLRB v Town and Country, 56 CCH S. Ct. Bull. B229 (1995) – Court defers to the Board's determination that an individual may be both an employee of an employer under Section 2(3) of NLRA as well as an individual paid by the union to organize the workers of the employer.

B. **Air Freight Carriers.**

Federal Express Corp., 317 NLRB No. 175 (1995) – Board will continue to follow its general rule that in cases of possible concurrent jurisdiction with the National Mediation Board ("NMB") the matter will be referred initially to the NMB for a determination of its jurisdiction.

United Parcel Service, Inc., 318 NLRB No. 97 (1995) – Board will continue to assert jurisdiction, however, over an employer which has traditionally been governed by the NLRA in absence of proof that the trucking service provided was an integral part of the air service. Board did not refer matter to NMB for initial determination because of long history of NLRB jurisdiction over employer.

C. **Entities Significantly Related to Exempt Government Agencies.**

Management Training Corp., 317 NLRB No. 190 (1995) (3-1-1) – Board overrules *Res-Care, Inc.*, 280 NLRB 670 (1986), and asserts jurisdiction over employers which operate pursuant to contracts with exempt governmental agencies if they otherwise meet the criteria of employers under Section 2(2) of the NLRA and qualify under the applicable monetary jurisdictional standards. Stephens concurs; Cohen dissents.

II. **Representation Decisions.**

A. **Timely Delivery of Election Notices.**

Club Demonstration Services, 317 NLRB 349 (1995) (4-1) – Election must be set aside where Regional Office did not mail election notices in timely manner pursuant to Section 103.20(a). Employer was not estopped pursuant to Section 103.20(c) for failure to notify Regional Office at least five working days prior to day of election of failure of receipt of copies of notice of election because of ambiguous rule, but rule changed prospectively by Board in the decision. Regional Offices are to notify employers of this clarification of their notice-posting duties. Gould dissents, in part.

B. **Requirement for Hearing Prior to Election.**

Angelica Healthcare Services Group, Inc., 315 NLRB 1320 (1995) – Section 9(c)(1) of NLRA and Section 102.63(a) of Board Rules and Section 101.20 of Board Procedures require "an appropriate hearing" prior to the direction of an election.

Barre-National, Inc., 316 NLRB 877 (1995) (3-1-1) – Employer was permitted to present evidence as to supervisory status of group of workers prior to election and not required to agree to curtail hearing as requested by Regional Director and permit those employees to vote subject to challenge. However, in instant case remand for hearing was not required since employer could file objections to elections after the results were revealed in order to best effectuate the purpose of the NLRA. Stephens concurs; Cohen dissents.

C. **Snow Storm did not Require New Election.**

The Glass Depot, Inc., 318 NLRB No. 94 (1995) (2-2-1) – Fact that four of nineteen voters could not reach the polls due to a heavy snow storm did not require a new election even though the four votes were determinative. Plurality opinion of Stephens and Cohen refuses to provide an exact percentage figure, but suggests that less than a fifty percent showing in a manual election might require a new election. Gould in concurrence would adopt standard of political elections that such acts are not material. Browning and Truesdale dissent, stating that the representative complement test of the plurality is unworkable and invites unnecessary litigation. See analysis and examination of case at 150 LRR 105 (1995).

III. **Unfair Labor Practice Decisions.**

A. **Employer's Good Faith Doubt of Loss of Union's Majority Status.**

Auciello Iron Works v NLRB, 64 USLW 3404 (1995) (U.S. Sup. Ct. No. 95-668) – Supreme Court granted certiorari to determine whether employer can raise issue of good faith doubt as to union's majority status by refusing to sign agreement premised upon events prior to the union's acceptance of proposal. *See Auciello Iron Works, Inc.*, 303 NLRB 562; remanded 980 F.2d 804 (1st Cir., 1992); on remand 317 NLRB No. 60 (1995); enf'd 60 F.3d 24 (1st Circ., 1995).

B. **Grievance Committees and Section 8(a)(2).**

Keeler Brass Automotive Group, 317 NLRB 1110 (1995) (4-0-1) – Board applied the two-prong approach of *Electromation, Inc.*, 309 NLRB 990 (1992) and found that the group was a labor organization as defined by the NLRA. Employer's conduct toward the group was violative of Section 8(a)(2) since employer dominated and unlawfully supported the group. Gould concurs.

Note Teamwork for Employees and Managers Act (HR 743) passed by House in September designed to change NLRA. *But see,* discussion at 1996 DLR 15 (Jan. 24, 1996) concerning effect of the possible legislation.

C. **Successor Employer's Duty to Bargain Initial Terms.**

Canteen Company, 317 NLRB 1052 (1995) (2-2-1) – Plurality of Browning and Truesdale find that successor employer violated Section 8(a)(1) and (5) by setting initial terms and conditions of employment without bargaining with union where it was "perfectly clear" that predecessor's employees would be hired. Gould

concurs, but finds that the perfectly clear test of *Spruce Up Corp.*, 209 NLRB 194 (1974) represents a misreading of *NLRB v Burns Security Services,* 406 U.S. 272 (1972). Stephens and Cohen dissent, stating that successor should be free to set initial terms and conditions of employment.

D. **Union Access to Employer Property.**

Leslie Homes, Inc., 316 NLRB 123 (1995) (2-2-1), aff'd sub nom *District Council of Carpenters v NLRB,* 150 LRRM 2641 (3rd Cir., 1995) – Plurality of Stephens and Cohen with concurrence of Gould find that employer may restrict union access to private property for area standards handbilling as well as the direct organizational activity found in *Lechmere, Inc. v NLRB,* 112 S. Ct. 841 (1992). Browning and Truesdale dissent. *See also Makro, Inc.*, 316 NLRB 109 (1995) (2-2-1) and *Oakland Mall, Ltd.*, 316 NLRB 1160 (1995) (2-1).

E. **Prohibition of Dissident Union Material.**

Laborer's Union Local No. 324, 318 NLRB No. 66 (1995) (3-2) – Union violated Section 8(b)(1)(A) when it adopted and maintained a no-solicitation/no-distribution rule precluding the distribution of dissident union material and threatened to have arrested and removed from the hiring hall an individual distributing the material. Browning and Truesdale dissent, in part, finding that the by-law itself was not violative of NLRA and that the Board's prohibition in this case was an unprecedented and unjustifiable intrusion into internal union affairs.

F. **Withdrawal from Multiemployer Unit.**

Plumbers Local 669, 318 NLRB No. 32 (1995) (3-2) – Union violated Section 8(b)(3) when it refused to bargain separately with an employer who had withdrawn from a multiemployer bargaining unit, notice of which was given to the union by the absence of the employer's name on a list of 300 employers given to the union on the first day of bargaining. Browning and Truesdale dissent and would find that there was not the requisite notice to the union of the withdrawal. See analysis and discussion of case at 150 LRR 41 (1995).

G. **Permanent Subcontracting During Lockout.**

International Paper Co., 1996 DLR 3 (Jan. 4, 1996) – Employer which had engaged in lawful lockout violated Section 8(a)(3) when it permanently subcontracted work in order to bring economic pressure in support of its bargaining position.

IV. **Rule-MakingAuthority.**

See Federal Register, Vol. 60, No. 228, at pages 61036-37 (November 28, 1995) on six areas of proposed rule-making by the NLRB (*See American Hospital Ass'n v NLRB,* 499 U.S. 606 (1991). The six areas are: (1) misconduct by attorneys, (2) a review of certain representation case procedures, (3) the appropriatieness of single location bargaining units, (4) modification of role of ALJs, (5) statutory duties of labor organizations pursuant to *Communication Workers v Beck,* 487 U.S. 735 (1988), and (6) codification of certain remedial provisions.

V. **General Counsel Advice.**

Employers may possibly violate NLRA by requirement that employees submit matters to binding alternative dispute resolution provision in lieu of legal remedies. *See* General Counsel Authorization of Complaint in *Bentley Luggage Corp.*, 12-CA-16658 (unpublished).

See discussion by former General Counsel Jerry M. Hunter critical of this approach as a detriment to use of ADR in nonunion setting. 1995 DLR 185 (September 25, 1995). In general, see discussion by various authors concerning statutory claim deferral to ADRs in Vol. 5, No. 4 (Fall 1995) of Labor and Employment Law Lawnotes. *See also,* Mazurak, Alternative Dispute Resolution of Employment Claims: Exclusivity, Exhaustion, and Preclusion, 64 U. Det. L. Rev. 623 (1987).

MERC BEGINS QUARTERLY NEWSLETTER

Michigan Department of Labor, Employment Relations Commission/Bureau of Employment Relations, popularly (and sometimes unpopularly) known as MERC, has begun publication of a quarterly newsletter. Volume 1, Number 1, dated January 1996, has columns by Commission Chair Maris Stella Swift and Bureau Director Shlomo Sperka, summaries of significant MERC and court decisions by MERC attorney Julia Stern, a list of 1995 Act 312 and fact finding decisions, and other news and features.

Swift writes: "The Commission has worked hard to be more receptive to the needs of our constituents and hopefully with this newsletter we [will] keep everyone better informed."

MERC will make the newsletter available at no charge to subscribers. To be added to the newsletter mailing list, write or fax Director Sperka at MERC, State of Michigan Plaza Building, 1200 Sixth Street, Suite 1400 N, Detroit, Michigan 48226-2480. The fax number is (313) 256-3090.

NLRB PRACTICE AND PROCEDURE

William C. Schaub, Jr.

Regional Director, Region 7

Whatever I had planned for this issue of *Lawnotes* was preempted by the government shut-down and the many practice and procedure questions this raised. As most of you know, the NLRB was shut-down from November 14 through 19, 1995 and again from December 18, 1995 through January 8, 1996. The Detroit Regional office was staffed by me alone answering "emergency" telephone calls from Michigan, Ohio and Indiana. The regional offices in Ohio and Indiana were totally closed. A number of you called me during these periods with questions about cases, service of documents, Equal Access to Justice Act and section 10(b). While I hope that another shut-down will not occur, as I write this column the possibility still looms. Therefore, I am going to use this opportunity to answer some of the practice and procedure questions that were raised.

With regard to pending cases, case activity was canceled on a week to week basis. Thus, for example, if you had a trial, election or representation case hearing scheduled during the week of January 1 through 5, 1996, it would have been canceled on Friday, December 29, 1995. Of course some matters had to be canceled or rescheduled even after we resumed operations because notices of elections had not been posted, voter eligibility lists had not been sent, or the time remaining was not sufficient. Similarly, all activity on unfair labor practice investigations was canceled during the shut-down. In the event of another shut-down, I presume the same procedures will be followed.

With respect to the service of documents, the Board, in September 1995, published in the Federal Register a notice of procedures to be followed in the event Board offices are closed due to a lack of appropriated funds. The Board indicated that it was granting *sua sponte* "an extension of time to file or serve any document for which the grant of an extension of time is permitted by law. The terms of the extension are that for each day on which the agency offices are closed for all or any portion of the day, one day shall be added to the time for filing or the service of the document." Section 10(b) and Equal Access to Justice Act situations raise slightly different problems and the Board stated that "extensions of time for filing cannot apply to the six month period provided by section 10(b) of the Act for the filing of charges . . . or to applications for awards and fees and other expenses under the Equal Access to Justice Act. However, with respect to time computations for filing and serving charges filed pursuant to Section 10(b) or applications filed pursuant to the Equal Access to Justice Act, the Board hereby gives notice of its intention to construe the phrase "Saturdays, Sundays or a legal holiday . . . to encompass any day in which the agency offices are closed . . . due to a lack of appropriated funds."

Parties were "cautioned that the operation of Section 10(b) during an interruption in the Board's normal operations is uncertain." Therefore, parties were advised to "attempt" to file charges with the region and reminded of their responsibility to personally serve a copy of the charge on the charged party. Such "attempted" service on the region could be by mail or by facsimile transmission, Fax, on the region. The Board has recently revised its Rules and Regulations to allow for the filing by Fax of unfair labor practice charges, representation petitions and objections to elections. The revised rules require that in addition to the Fax transmission the filing party must also file an original for the agency's records. The agency's receipt of the document by Fax, however, constitutes filing with the agency. The failure to file or timely serve a document will not be excused because the region's Fax machine was not operating, was busy or unavailable for any reason. The Fax machine in every regional office was operational during both shut-downs.

While I am sure that the above does not answer every question, hopefully it provides some guidance in the event of another shut-down of the NLRB.

The Board, citing the agency shut-down, has extended by two weeks the time for public comment on its proposed rule-making on the appropriateness of requested single location bargaining units and also extended the experiment involving the use of settlement judges by one month. Comments on the proposed rule-making should be addressed to the NLRB's Executive Secretary, 1099 14th Street, N.W., Room 11600, Washington, D.C. 20570.

The next meeting of the local practice and procedure committee will be held on April 18, 1996, at 2;30 p.m. at the NLRB's regional office, 477 Michigan Avenue, Detroit, Michigan. If you have questions or issues you would like the committee to consider, please contact me at (313) 226-3210 or any member of the committee.

U.S. SUPREME COURT REVIEW

Lauren A. Rousseau

Office of General Counsel, Ford Motor Company

Supreme Court Agrees To Review Age Discrimination Elements of Proof

On November 13, 1995, the Supreme Court granted certiorari to review whether a plaintiff asserting discrimination under the Age Discrimination in Employment Act must prove that he was replaced by a person outside of the protected class in order to establish a prima facie case, or whether it is sufficient for him to prove only that he was replaced by a younger person (*O'Connor v Consolidated Coin Caterers Corp*, 116 S.Ct. 472, 133 L.Ed.2d 401). The case arose from the dismissal of a 56 year-old North Carolina employee in the context of a reduction in force. The district court had dismissed the case on summary judgment, finding that the plaintiff had failed to make a prima facie showing under

McDonnell Douglas Corp. v Green, 411 U.S. 692 (1973), as modified for reduction in force cases. The Fourth Circuit affirmed, emphasizing that the plaintiff had not been replaced by someone under the age of 40. In fact, the plaintiff had been replaced by a 40 year-old employee. In his petition for certiorari, the plaintiff argued that the Circuit Court's under-age-40 requirement is irrational, stating, "[i]t is illogical to allow [age animus] to be proved when a 40 year-old is replaced by a 39 year-old, but not when a 69 year-old is replaced by a 40 year-old."

The Supreme Court denied certiorari as to the second question raised in the plaintiff's petition concerning the significance of age-related remarks. In responding to the employer's summary judgment motion, the plaintiff had presented evidence of age-related remarks by a supervisor that the plaintiff was too old to play 18 holes of golf five days in a row and that he was "too old for this kind of work". Plaintiff also presented evidence of another comment allegedly made on the plaintiff's 50th birthday that it was "about time we get some young blood in this company". The district court found that the remarks were not made in the context of terminating the plaintiff and were not probative of discrimination; the Fourth Circuit affirmed.

Supreme Court Will Decide Whether Unions May Pursue WARN Act Claims On Behalf Of Members

On October 16, 1995, the Supreme Court agreed to decide whether a union can sue an employer on its members' behalf for failing to give notices of layoff or plant closings as required by the Worker Adjustment and Retraining Notification Act ("WARN") (*United Food and Commercial Workers Local 751 v Brown Group, Inc.*, 116 S.Ct. 335, 133 L.Ed.2d 234). While the WARN Act permits unions to file lawsuits on behalf of their members, the Eighth Circuit held that in order to do so, a union must have "standing"; that is, that it must meet the case or controversy requirements of Article III of the United States Constitution. The Eighth Circuit upheld the lower court decision that the United Food and Commercial Workers union lacked standing because it failed to claim any injury to itself. The Eighth Circuit further noted that the back pay and benefits sought by the union for its members required individualized proof, and that therefore, individual union members should have been named as parties to the lawsuit.

In its petition for review, the union argued that five other courts of appeals have allowed lawsuits filed by unions on behalf of its members under WARN to proceed. It also noted that unions have filed a large number of the cases litigated under WARN so far.

Supreme Court Denies Review of Ninth Circuit WARN Decision

On November 27, 1995, the Supreme Court refused to decide whether the sale of a unionized business to a nonunion company that offered jobs to the seller's employees for reduced compensation and benefits falls within the coverage of the WARN Act (*International Alliance of Theatrical and Stage Employees and Moving Picture Machine Operators v Compact Video Services, Inc.*, 116 S.Ct. 514, 133 L.Ed.2d 423). The decision left intact a Ninth Circuit ruling that the sale of the business and the reduction in compensation was not an event covered by WARN. The court held that reductions in pay and benefits do not constitute an "employment loss" as that term is defined under WARN, even where the purchasing entity refuses to recognize the union and regards the seller's employees who accept jobs with the purchaser as "at will".

Ninth Circuit Decision Reversing Order Compelling Arbitration Left Intact

On October 2, 1995, the Supreme Court denied review of a Ninth Circuit decision that overturned a lower court order compelling arbitration under the terms of a securities registration form signed by the employee plaintiffs (*Prudential Insurance Company of America v Lat*, 116 S.Ct. 61, 133 L.Ed.2d 24). The case arose in 1990, when two female plaintiffs sued their employer and immediate supervisor in state court, claiming that the supervisor had raped, harassed and sexually abused them. The employer responded by filing a separate suit in federal court to compel arbitration, relying on U-4 registration forms signed by the plaintiffs that included a promise "to arbitrate any dispute, claim or controversy." The federal judge stayed the state court proceedings and granted the employer's motion to compel arbitration. On appeal, the Ninth Circuit reversed, finding that the U-4 agreements were not binding because the employees had not been given a chance to read the agreements before signing them and had never received copies of the manual containing the terms of the arbitration agreement. Moreover, the U-4 forms did not make any reference to employment disputes or to Title VII claims. The Court noted that employees cannot be required to submit discrimination claims to binding arbitration unless they knowingly waive their statutory rights to a judicial forum and a jury.

Supreme Court Denies Review of Hostile Environment Sexual Harassment Case

The Supreme Court on November 13, 1995, rejected an invitation to examine whether a union newsletter satirizing women on the police force was sufficient to establish a sexually hostile work environment under Title VII of the 1964 Civil Rights Act (*DeAngelis v El Paso Municipal Police Officers*, 116 S.Ct. 473, 133 L.Ed.2d 403). The Court's decision left intact a Fifth Circuit opinion reversing a district court ruling in favor of the plaintiff, a female police officer. The Fifth Circuit found that the few derogatory references toward women in the local police union newsletter were insufficient to satisfy the test set forth by the Supreme Court in *Meritor Savings Bank v Vinson*, 477 U.S. 57 (1986), noting that the newsletter comments were "not so frequent, pervasive or pointedly insulting . . . as to create an objectively hostile working environment." The Fifth Circuit further noted that Title VII "cannot remedy every tasteless joke or groundless rumor that confronts women in the workplace".

(Continued on page 22)

U.S. SUPREME COURT REVIEW —

Continued from page 21

Supreme Court Denies Union Member's First Amendment Appeal Concerning Campaign Shenanigans

The Supreme Court on December 11, 1995, refused to grant the certiorari petition of a union member who claimed that his actions during a union election campaign, in which he superimposed a female candidate's photograph onto pornographic pictures and distributed copies to co-workers, were protected by the First Amendment (*Heller v Bowman*, 133 L.Ed.2d 530). The Court left intact a Massachusetts Supreme Judicial Court decision holding that the pictures fell outside the ambit of First Amendment protection because they were not intended to influence the election and because the union candidate was not a public figure. The lower court awarded the union candidate, who had filed suit against the union member on various grounds, $35,000 for reckless and intentional infliction of emotional distress.

The union member was represented in his appeal to the Supreme Court by law professor Alan Dershowitz, who argued that the union candidate became a public figure by running for union office and that his client's pornographic pictures were "political caricatures" to which the First Amendment protections should apply. The Association for Union Democracy supported the petition for review, but on statutory grounds, arguing that the state court decision conflicted with the rights of union members to express their views about candidates for office under federal labor law.

Supreme Court Leaves Intact First Circuit Decision Condemning Union Sponsorship Requirement

On October 2, 1995, the Supreme Court denied review of a First Circuit decision finding sufficient evidence that a union sponsorship requirement disparately impacted minorities (*Steamship Clerks Union Local 1066 v EEOC*, 116 S.Ct. 65, 133 L.Ed.2d 27). The union required applicants to be sponsored by incumbent union members. The evidence established that there were no African-Americans or Hispanics among the new members accepted by the union local during a six-year period, despite the fact that these groups comprised between eight and 27 percent of the relevant labor pool. The First Circuit agreed with the EEOC that these statistics were sufficient to show discriminatory disparate impact. In its petition for certiorari, the union noted that the EEOC had failed to provide evidence of the exclusion of or the application of a single minority. The union argued that it would be improper to find a violation of Title VII based on such "suggestive circumstances". The EEOC countered that evidence of specific, rejected applicants was not an "absolute prerequisite" to a finding of discrimination because the all-white union's practice of admitting only "close relatives of current members" likely discouraged minorities from applying at all.

FEDERAL COURTS UPDATE

E. Sharon Clark

UNITED STATES DISTRICT COURT – EASTERN DISTRICT OF MICHIGAN

Elliott-Larsen Claim Not Removable on Basis of Preemption

In *Willett v General Motors Corp.*, 904 F.Supp. 612 (E.D. Mich. 1995), the court held that a wrongful termination action brought under the Elliott-Larsen Civil Rights Act by a unionized employee is not removable to federal court on the basis of preemption by the Labor Management Relations Act. Plaintiff filed a grievance pursuant to the collective bargaining agreement, alleging that she was harassed and wrongly terminated by her supervisor on the basis of race. Rather than exhausting her appeals through the grievance procedure, she filed an action in state court, and General Motors removed the case. In its analysis the court followed *Caterpillar Inc. v Williams*, 482 U.S. 386 (1987), *Lingle v Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), and their progeny in the Sixth Circuit such as *Tisdale v United Ass'n of Journeymen*, 25 F.3d 1308 (6th Cir. 1994). Under the "well-pleaded complaint rule," federal jurisdiction exists when a federal question is presented on the face of the plaintiff's properly pleaded complaint. An action may not be removed on the basis of a defense that raises a federal question, including the defense of preemption. However, under the "complete preemption" doctrine, certain complaints that allege state claims are treated as alleging a federal claim for purposes of the well-pleaded complaint rule because federal law has preempted the state claim. Section 301 of the Labor Management Relations Act preempts state law claims requiring interpretation of collective bargaining agreements, and federal preemption exists to ensure uniformity in the interpretation of these agreements; however, not all employment-related matters involving unionized employees must be resolved through collective bargaining. *Lingle* teaches that as long as the state law claim can be resolved without interpreting the collective bargaining agreement, the claim is independent of the agreement for §301 preemption purposes. Turning to whether plaintiff's claim under the Elliott-Larsen Civil Rights Act was independent of the collective bargaining agreement, the court reasoned that the resolution of the relevant factual issues in the state law claim, *i.e.*, the conduct of the plaintiff and the conduct and motivation of the employer, did not require interpretation of the collective bargaining agreement. The court found unpersuasive defendant's argument that even though §301 does not preempt Elliott-Larsen claims, plaintiff's complaint is still so intertwined with contract issues that removal is appropriate. The complaint was not founded on the denial of rights defined solely by contract but rather alleged only the denial of rights defined by Michigan's civil rights statutes, which are unaffected by the collective bargaining agreement.

Defendant's additional argument that plaintiff's "overt act of forum manipulation" should not be condoned was also unpersuasive. The Supreme Court in *Caterpillar* expressly recognized a plaintiff's ability to avoid federal jurisdiction by eschewing potential federal claims.

UNITED STATES COURT OF APPEALS – SIXTH CIRCUIT

Reinstatement and Front Pay Are Alternative, Not Cumulative, Remedies

The Sixth Circuit affirmed a judgment of discriminatory discharge but remanded for clarification of the ordered remedies in *Suggs v ServiceMaster Education Food Management,* No. 94-5596 (January 2, 1996). Plaintiff Sharon L. Suggs was fired from her position as director with responsibility for the ServiceMaster account at Tennessee State University. ServiceMaster's proffered reasons for Suggs' discharge were client dissatisfaction, operational problems and failure to meet financial and budget commitments. Applying the clearly erroneous standard, the Sixth Circuit agreed with the district court that the stated reasons for termination were pretextual and that Suggs was actually terminated because she was a female. She was qualified for the position she held; she was replaced by a man and was not offered another position with the company when she was removed from the TSU account and later terminated, although positions at other locations were available. Male directors who had been ranked below Suggs for profitability and client satisfaction were offered transfers and relocations; in addition, Suggs' supervisor made comments including "a woman shouldn't have been running the magnitude of [a] complex like that" and that the operation was run better with a man in charge after Suggs was fired. The Sixth Circuit also found appropriate the award of reinstatement and back pay from the date of termination through the date of trial, less her earnings in substitute employment. However, the district court's order of reinstatement and "additional back pay" (actually front pay) from the conclusion of trial until the date of an offer of reinstatement by ServiceMaster in effect awarded cumulative remedies of reinstatement and front pay when they should be awarded as alternative remedies. As of the time of the Sixth Circuit's decision, ServiceMaster has not made an offer of reinstatement, so the award of front pay was not specific as to duration and amount and was not reduced to present value. This did not meet the Sixth Circuit's criteria for front pay awards, including the employee's duty to mitigate damages, the appropriate duration of the award based on availability of alternative employment opportunities and the employee's work and life expectancy, and the applicable discount to present value. The Sixth Circuit remanded for determination whether reinstatement was appropriate or feasible and, if not, for consideration of front pay. The court concluded that the language of the district court's order must "clearly reflect what remedy is being awarded so that the result is reasonable and comports with the goal of Title VII" and case law that "employees who suffer discriminatory discharge be made whole but not receive windfalls."

Ban on Slogans Violates NLRA Section 8(a)(1)

In *NLRB v Mead Corporation,* No. 94-6250 (January 8, 1996), the Sixth Circuit enforced the NLRB's cease and desist order against Mead by finding the employer had violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) by its ban on certain button, t-shirt and decal slogans. Section 8(a)(1) declares it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" under Section 7 of the Act which protects concerted activities for collective bargaining or other mutual aid or protection. Employees' rights to wear union-related insignia while at work to show support for the Union and fellow Union members is protected under Section 7. The slogans prohibited by Mead's ban resulted from its unilateral implementation of operating flexibility plans ("Flex I" and "Flex II") following an impasse in contract negotiations. Mead argued that the anti-Flex and other slogans did not fall within the protections of Section 7; however, the court found that the slogans were directly related to the labor contract negotiations or to specific incidents arising out of the management-labor dispute. Mead also argued that Union members waived their right to campaign against the Flex programs when they ratified the collective bargaining agreement, but the court found that there was no "clear and unmistakable" waiver of statutory rights under Section 7. Mead also argued that special circumstances necessitated the banning of the slogans to: (1) maintain discipline in the workplace; (2) discourage perpetuation of labor unrest; and (3) prevent derogatory messages from being conveyed to the public. In dismissing the maintaining discipline argument, the Sixth Circuit declined to follow the Seventh Circuit's *per se* rule that the term "scab" is inherently disruptive in the workplace and may legitimately be banned by employers. The court also found unpersuasive Mead's further justifications of toolbox tampering, graffiti, sabotage and heated discussions between employees; these incidents were ongoing and unrelated to the labor dispute. The court found that the slogans "Hey Mead-Flex This," "Just Say No – Mead," and "Remember Wagner '89" did not, as Mead argued, "blatantly urge insubordination, destructiveness and defiance." In dismissing Mead's argument that the ban served the legitimate purpose of discouraging perpetuation of labor unrest, the court recognized that the slogans may have been a "constant irritant" to management but did not imply Mead's "coming apart" or defective product as required by *Midstate Telephone Corp. v NLRB,* 706 F.2d 401 (2d Cir. 1983). Similarly, the Sixth Circuit found unpersuasive Mead's contention that the slogans presented a substantial negative image to customers and visitors to its plant; the slogans did not contain profanity, did not denigrate Mead's product and did not ridicule the company itself. Any negative effect the slogan "Just Say No – Mead" arguably could have had was negligible because Mead employees were seldom in contact with the public. Judge Avern Cohn, sitting by designation, dissented, stating that the potential loss of discipline caused by the button wearers' protests of the two-level pay scale and

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accusations of fellow workers of being "scabs" was the necessary special circumstance. In Judge Cohn's view, the employer was taking preventative measures to maintain discipline in the workplace.

Test for Amusement or Recreational Establishment Exemption from FLSA Construed

The exemption from the overtime requirements of the Fair Labor Standards Act, 29 U.S.C. §§ 201-210, for amusement or recreational establishments that operate for fewer than eight months per year was held inapplicable to the Cincinnati Reds in *Robert R. Bridewell, et al. v the Cincinnati Reds,* No. 94-3562 (October 12, 1995). The Reds' maintenance employees, plaintiffs in this litigation, work at Riverfront Stadium during the regular baseball season, but also work in the Reds' other activities that continue throughout the year, including advertising sales, scoreboard operations, cleaning and concession operations during both the Reds' and the Bengals' games. The Reds employ about 700 people from April through September and approximately 120 people on a year-round basis. An entity seeking exemption from the overtime requirement must (1) be an amusement or recreational establishment and (2) not operate for more than seven months in a calendar year. The court enunciated the proper inquiry in this case as follows: assuming that the Reds are an amusement or recreational establishment, whether they operate for more than seven months per year, rather than whether the Reds provide amusement or recreation for customers for more than seven months per year. Based on the stipulated facts, the Reds operate year round and, the court held, were not eligible for the exemption.

NLRB: WINTER UPDATE

George M. Mesrey
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.

Duty of Fair Representation/Beck Issues

In 1988 the United States Supreme Court issued its landmark decision in *Communication Workers v Beck,* 373 U.S. 734 (1988). While the courts, the General Counsel of the Board and administrative law judges have addressed this controversial area of the law, the Board issued its first decisions addressing the myriad of unsettled issues under *Beck* on January 26, 1996. The decisions were made in December, 1991 but withheld because of the government shutdown.

In *California Saw & Knife Works,* 320 NLRB No. 11 (December 20, 1995), the Board dealt with the *Beck* decision at length. Initially, the Board announced that it will analyze cases involving *Beck*-type issues under duty-of-fair-representation standards; i.e., whether a union breaches its duty of fair representation if its actions are arbitrary,discriminatory or in bad faith. The Board held that basic considerations of fairness obligate a union to notify newly hired nonmember employees of their rights under *Beck* and *NLRB v General Motors Corporation,* 373 U.S. 734 (1963), at the time the union first seeks to obligate these newly hired nonmember employees to pay dues. In reaching this decision, the Board concluded that presenting employees with both a union membership application form and a dues-checkoff form in the absence of concurrent notification of *Beck* rights and the right under *General Motors* to be and remain nonmembers might mislead these newly hired nonmember employees to believe that payment of full dues and assumption of full membership is required.

The Board went on to elucidate the following minimum requirements that a union must satisfy when it seeks to obligate an employee to pay fees and dues under a union security clause. Specifically, the union must inform the employee that he or she has a right to be or remain a nonmember and that nonmembers have the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections. If the employee chooses to object, he or she must be apprised of the percentage of the reduction, the basis for the calculation, and the right to challenge these figures.

The Board also spoke at length concerning the thorny "chargeability" issues raised under *Beck.* As an initial point, the Board held that the duty of fair representation does not require unions to calculate their *Beck* dues reductions on a unit-by-unit basis. The Board further held that a union does not breach its duty of fair representation by charging objecting employees for litigation expenses as long as the expense is for "services that may ultimately inure to the benefit of the members of the local union by virtue of their membership in the parent union." Thus, a union may lawfully charge for litigation expenses that do not directly involve the bargaining unit in question such as jurisdictional dispute cases which may impact future cases involving different bargaining units represented by the union. The Board cautioned, however, that it was not giving unions carte blanche to charge an objecting employee for litigation costs which have only a remote or theoretical benefit to the objector's bargaining unit. The Board also held that a union can lawfully rely on staff auditors to calculate the portion of dues related to collective bargaining rather than require outside auditors to review and verify the data.

In a companion decision issued on the same date, the Board held that the same policy considerations relied upon in *California Saw* require that current union members receive such notice as well if they did not receive notice of their *Beck* and *General Motors* rights at the time they entered the bargaining unit. *United Paperworkers International Union*, 320 NLRB No. 12 (December 20, 1995). In addition, the Board stated that this notice requirement is satisfied by giving unit employees notice once and is not a continuing requirement. Moreover, the Board concluded that the union meets its notice obligation as long as it has taken reasonable steps to notify employees of their *Beck* and *General Motors* rights. The administrative law judge also recommended that the Union be required to reimburse the Charging Party for all dues collected since his or her resignation from membership and filing a *Beck* objection. The Board disagreed and concluded that, since the Union was still entitled to collect dues for expenses related to its representational activities, it was required to reimburse only the dues determined to be in excess of the amount the Union could lawfully collect under *Beck*.

Management Rights Clause

In *Klein Tools, Inc.*, 319 NLRB No. 93, 151 LRRM 1015 (November 14, 1995), the Employer unilaterally implemented a no-smoking policy. In subsequent unfair labor practice proceedings, the Employer defended its conduct on the ground that the management rights clause in the parties' contract permitted it to: "adopt and enforce such policies, plant rules and regulations as it may believe are necessary for efficient control and direction of its employees ..." The Board rejected this argument and concluded that the Employer failed to demonstrate a belief that its no-smoking policy was necessary for the efficient control and regulation of its employees. Moreover, the Board emphasized that the contract was silent as to the no-smoking issue. Practitioners should note that this case appears to reaffirm the Board's narrow interpretation of management rights clauses; i.e., they probably will not be effective unless they specifically address the conduct in question.

Employer Conduct During Lockouts

In *International Paper Co.*, 319 NLRB No. 150, 151 LRRM 1033 (December 18, 1995), the Board was faced with an issue of first impression: May an employer that has lawfully locked out its employees and has lawfully subcontracted their work on a temporary basis take the further step of subcontracting their work on a permanent basis in order to bring economic pressure to bear in support of its bargaining position in contract negotiations? In a lengthy decision, the Board concluded that such conduct violated Section 8(a)(3) of the NLRA because it is inherently destructive of employees' Section 7 rights and because the asserted business justification does not outweigh the harm to those rights.

While this case deals with a number of interesting issues, the most important aspect appears to be the Board's discussion of the guiding principles for determining whether inherently destructive conduct has occurred. In particular, the Board distilled the "inherently destructive" doctrine into four fundamental guiding principles: (1) the severity of the harm to employees exercising their rights and the severity of the harm on the statutory right being asserted; (2) the temporal impact of the employer's conduct; (3) the extent that employer conduct is inimical to the process of collective bargaining versus support of a bargaining position; and (4) the extent that employer conduct discourages collective bargaining in the sense of making it seem a futile effort in the eyes of employees.

MICHIGAN SUPREME COURT UPDATE

David A. Rhem

Varnum, Riddering, Schmidt & Howlett LLP

Leave Granted in *Heurtebise* Mandatory Arbitration Case

The Michigan Supreme Court recently granted leave to appeal in *Heurtebise v Reliable Business Computers, Inc*, 207 Mich App 308 (1994). *Heurtebise* stands for the proposition that an employer can require employees to arbitrate statutory civil rights claims arising out of the employment relationship through a final and binding arbitration provision contained in an employee handbook. The briefing process in the case is expected to be completed by March 12, 1996.

"Catch-All" Hearsay Exception Adopted.

By a 4-3 margin, the Michigan Supreme Court approved a "catch-all" exception to the hearsay rule. The amendment to MRE 803 and 804, which tracks the federal "catch-all" hearsay exception, will take effect April 1, 1996.

MICHIGAN COURT OF APPEALS UPDATE

Daniel Misteravich

Thirty day time period in MCL 421.38; MSA 17.540 is not jurisdictional – Employer control of vacation during shut-down makes employees ineligible for unemployment benefits – Labor-Management Relations Act does not preempt unemployment compensation appeal

In *Smith v Hayes Albion and MESC*, No. 165647, October 20, 1995, the collective bargaining agreement between Hayes Albion and its employees provided a vacation formula and also reserved to the employer the right to schedule all

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vacations during the time the plant would be shut down. Hayes Albion exercised its right and posted notice of shutdown and notice that vacation time and vacation pay would be allocated to the shutdown period. Some of the employees filed for unemployment benefits. The MESC referee found the claimants ineligible. The MESC board reversed. The employer appealed to the Clinton Circuit Court, then by motion had the case transferred to Calhoun Circuit Court. The order of transfer came after the 30-day period provided in MCL 421.38; MSA 17.540. The court denied the claimants' motion to dismiss for lack of jurisdiction. The Circuit Court reversed. The Court of Appeals affirmed.

Held: The trial court did not lack jurisdiction to review the appeal board's decision even though the action was not filed in the proper venue within the 30-day time period provided in MCL 421.38; MSA 17.540.

Held: When a collective bargaining agreement contains a provision which gives the employer control over scheduling vacations during shutdown periods, then the employees are ineligible for unemployment compensation.

Held: Section 301 of the Labor-Management Relations Act, 29 USC 185, does not preempt an unemployment compensation appeal from a decision of a MESC referee in a dispute which involves the interpretation of a Michigan statute and does not involve the interpretation of a collective bargaining agreement.

No cause of action under Whistleblower's Protection Act when employee alleges belief or perception of employer without actual report to authority

In *Chandler v Dowell Schlumberger, Inc.*, No. 16600, October 24, 1995, a new regulation went into effect in 1992 which required the employer, Dowell Schlumberger, to obtain certification for vehicles which would transfer hazardous waste on public roads. Chandler, an employee, complained to agents of the employer that the company was inconsistent in its compliance with the regulation. The employee did not report the violation to any public authority. Afterwards, the employer was cited by the Michigan Department of Transportation for violating the regulation based upon an anonymous tip. Shortly thereafter, the employer terminated Chandler.

Chandler filed an action alleging violation of the Whistleblower's Protection Act, MCL 15.361; MSA 17.428(1). The trial court dismissed finding that as the employee had not reported illegal conduct to any public authority he had not engaged in protected activity and could not state prima facie case. The Court of Appeals affirmed.

Held: An employee does not state a cause of action under the Whistleblower's Protection Act when he did not actually report illegal conduct to any public authority even though the employee may have been terminated based upon the belief or perception of the employer that the employee had made the report.

Civil service exam may be opened to those not meeting statutory qualifications when there is only one qualified candidate

In *Woloszyk v Charter Township of Clinton*, No. 167657, November 14, 1995, the Charter Township of Clinton sought to fill a vacancy of Sergeant I. The township scheduled an examination for the position. MCL 38.512; MSA 5.3362 provided that promotion by competitive examination was available to officers who had held the next lower rank to the position to be filled for a period of two years and who had five years of service with the department. There were three Sergeants II eligible to take the exam. Plaintiff Woloszyk was the only applicant. Rather than list plaintiff as the sole candidate, the township opened the examination to six other candidates of the same rank as plaintiff who had less experience in the department. The plaintiff scored fourth on the exam and did not receive the promotion. Plaintiff sued to compel his promotion. The trial court granted summary disposition in favor of the township.

Held: A township civil service commission did not violate MCL 38.512; MSA 5.3362 by opening an examination to candidates who did not meet the statutory requirements for candidates when there were three candidates who met the statutory requirements but only one of them applied to take the examination.

Claim under Civil Rights Act accrues on last day employee actually worked regardless of employer's records

In *Parker v Cadillac Gage Textron, Inc.*, No. 179411, November 14, 1995, three employees filed an action alleging age and sex discrimination in violation of the Elliot-Larsen Civil Rights Act. MCL 37.2101 et seq.; MSA 3.548(101) et seq. The trial court dismissed the complaint for failure to file it within the three year statute of limitations. The Court of Appeals affirmed.

The employer gave the three employees official written and oral notice of layoff. Plaintiffs' deposition testimony established that the last day that the employees actually worked was December 21, 1990. However, the employer's records indicated that the last day worked was January 4, 1991 and stated that the "effective date of separation" was January 7, 1991. Plaintiffs filed their complaint on January 7, 1994.

Held: When a claim of discrimination under the Elliot-Larsen Civil Rights Act is based upon termination of employment, the cause of action accrues on the last day the employee actually worked, even though the employer's documents may state that the "effective date of separation" was a later date.

Limitation of actions for recovering unemployment benefits is three years from date of determination requiring restitution

In *MESC v Westphal*, No. 156990, *MESC v Bussell*, No. 170094, November 14, 1995, the defendants each received unemployment benefits to which they were not entitled according to a later determination by the Michigan

Employment Security Commission. In both cases, the MESC issued determinations requiring restitution; and in both cases, the MESC filed complaints for restitution more than three years from the date of the determinations requiring restitution. Defendants argued that the actions were barred by the period of limitations. The trial court granted the defendant's motions for summary disposition. The Court of Appeals affirmed.

Held: When the MESC issues a determination requiring restitution of unemployment benefits, an action for restitution filed beyond three years from the date of the determination is barred by the statute of limitations, MCL 421.62(a); MSA 17.566(a).

Obligatory non-binding grievance procedure in collective bargaining agreement must be exhausted before filing suit – Six year period of limitation of actions for breach of collective bargaining contract is tolled during exhaustion of grievance procedure

In *American Federation of State, County and Municipal Employees, AFL-CIO, Michigan Council 25 and Local 1416 v Board of Education of Highland Park,* No. 170915, October 31, 1995, plaintiffs filed grievances over actions taken by the school board. The collective bargaining agreement provided for non-binding arbitration of disputes and provided that the grievance procedure "shall" serve to settle the complaints of the union. The grievances were denied. The plaintiffs submitted the claims to arbitration. The arbitrator ruled in favor of the plaintiffs, but the ruling was not binding. Plaintiffs filed an action in the circuit court for breach of contract. The school board moved for summary disposition based upon the statute of limitations. The circuit court granted summary disposition. The court of appeals reversed.

Held: When a collective bargaining agreement provides that a grievance procedure which includes non-binding arbitration "shall" serve to settle disputes between the parties, then exhaustion of the grievance procedure is required before a party can bring an action in circuit court for breach of contract.

Held: The six year limitation of actions for an action for breach of collective bargaining contract is tolled while the parties exhaust remedies required by the terms of the collective bargaining agreement.

MERC must state valid statutory reasons for not restoring status quo ante when unfair practice found – MERC cannot decline to address charges in petition

In *Clerical-Technical Union of Michigan State University v Michigan State University Board of Trustees and Michigan State University Administrative-Professional Association,* Nos. 165131 and 165835, October 20, 1995, after an agreed-upon and jointly-funded classification study, the board of trustees began to implement the results of the study by sending employees notices of changes in job title, grade level, and bargaining unit. The Clerical-Technical Union filed a unit clarification petition and a charge of unfair labor practice and a charge that the transfer of personnel constituted unlawful assistance to the Administrative-Professional Association.

Another action arose when the trustees, having placed the Financial Aid Officer I position in the Clerical-Technical union based upon the study, transferred the position back to the Administrative-Professional Association at the Association's request. The Clerical-Technical Union filed suit alleging unfair labor practice and unlawful assistance of the Administrative-Professional Association.

MERC found the trustees had committed unfair labor practices in both cases. MERC issued cease and desist orders but did not order the return to status quo ante. MERC did not decide the charges of unlawful assistance and dismissed the unit clarification petition. The Court of Appeals reversed and remanded.

Held: MERC is authorized to remedy an unfair labor practice by issuing only a cease-and-desist order.

Held: MERC erred when it refused to return the parties to the status quo ante for the reason that one party may have relied upon previous MERC rulings and that such relief would cause hopeless confusion.

Held: MERC erred in refusing to decide a union's charge that an employer gave unlawful assistance to another bargaining unit, even though MERC ruled in favor of the union when it found that the employer was guilty of an unfair labor practice.

Held: MERC erred in refusing to decide a union's unit clarification petition even though MERC ruled in favor of the union when it found that the employer was guilty of an unfair labor practice.

No private cause of action for violation of Prevailing Wage Act – Union cannot claim misrepresentation for contractor's statement to owner

In *International Brotherhood of Electrical Workers, Local Union No. 58 and Raleigh Scott Cornwall v John E. McNulty and McNulty Electric, Inc.,* No. 157354, November 28, 1995, McNulty Electric bid on electrical for two Rochester schools and represented that it would pay the prevailing wage and benefit rates as required by the Prevailing Wage Act. John McNulty is president of McNulty Electric. McNulty Electric received the contract. After an investigation by the Michigan Department of Labor found that the contractor had violated the act, the union and Cornwall filed an action alleging that they had suffered damages as a result of the contractor's noncompliance with the act and its misrepresentation to the school board when making its bid. The trial court granted defendants' motion for summary disposition. The Court of Appeals reversed.

Held: The trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) when the defendants did not specifically identify the issues for which they claimed that there was no factual dispute and when they did not submit any documentary evidence establishing the nonexistence of material facts but only submitted evidence in support of their allegations of fact.

Held: There is no private cause of action to enforce the Prevailing Wage Act.

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Held: A union does not state a cause of action for fraud against a contractor when it alleges that the misrepresentations were made to the owner of a project, a third party, not to the union itself.

Held: The trial court does not abuse its discretion in refusing to permit a party to amend its complaint after the granting of summary disposition when the party does not indicate how it would amend its complaint.

Held: When defendants who are appellees have not filed a cross appeal, the argument of the defendants that the trial court erred in not granting summary disposition on one ground when it did grant summary disposition on another ground is not properly before the court of appeals.

Settlement of grievance by union and employer does not bar employee's civil rights action

In *Marsha Florence v Department of Social Services,* No. 169058, January 16, 1996, the defendant employer hired the plaintiff as a College Trainee IV knowing that she had a severe hearing problem. According to the plaintiff, the employer refused to accommodate her handicap. After the training, plaintiff was unable to perform the work. The employer discharged her. Plaintiff filed a grievance through her union. Eventually, the union and the employer entered into a settlement agreement which provided that the employer would change its records to reflect that the plaintiff resigned. Plaintiff did not sign the agreement. It was signed by the union and the employer.

Plaintiff sued the employer for violation of the Handicapper's Civil Rights Act MCL 37.1202(1)(b); MSA 3.550(202)(1)(b) and the Civil Rights Act MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). The trial court granted summary disposition. The Court of Appeals reversed.

Held: A settlement agreement between a union and an employer over contractual rights contained in a contractual grievance which settlement is not signed by the employee does not bar the employee from bringing a cause of action against the employer for violation of the Handicapper's Civil Rights Act or the Civil Rights Act.

Held: For purposes of the statute of limitations in a case bringing civil rights claims, a settlement of a contractual grievance which established that plaintiff resigned for contractual purposes does not establish a resignation for purposes of the civil rights claims.

Arbitrator's findings of truthfulness of charges against police officer estop tort claims based on same issues – No privacy right regarding a police officer's misconduct

In *Mark A. Porter v City of Royal Oak et. al.,* No. 164109, December 1, 1995, the plaintiff, a police sergeant, was disciplined for his failure to dispatch police officers to the scene of a gunshot when he had received numerous calls supporting a conclusion that a man in his home with a handgun was suicidal. The City revealed to the press the charges against the plaintiff and the discipline. The factual basis for the charges was established by an arbitrator. Plaintiff sued. The complaint alleged defamation, false light invasion of privacy, and violation of public policy. The trial court granted summary disposition in favor of the defendants. The Court of Appeals affirmed.

Held: A plaintiff in a civil action is estopped from contesting factual determinations made by an arbitrator in a grievance proceeding.

Held: The trial court properly granted summary disposition of a claim of defamation based upon allegations contained in a memorandum of charges of misconduct when the truth of the charges was established by an arbitrator in a grievance proceeding.

Held: The trial court properly granted summary disposition of a claim of false light invasion of privacy when the plaintiff relied upon the publication of a media memorandum containing charges against him which were determined to be true by an arbitrator in a grievance proceeding.

Held: The trial court did not err in granting summary disposition of plaintiff's claim of violation of public policy when the issue of whether the plaintiff was disciplined for refusing to illegally enter a home was resolved against him by an arbitrator in an arbitration proceeding.

Held: The trial court did not err in granting summary disposition of plaintiff's claim that the defendants tortiously invaded his privacy by revealing to the public charges against him for breach of his duties as a police officer in the line of duty.

MERC lacks jurisdiction over petition by union concerning employees who may be jointly employed by state and by private employers who retain some significant control of terms and conditions

In *AFSCME v Department of Mental Health, et al.,* No. 158997, etc., January 12, 1996, consolidated cases, two unions petitioned the MERC to be certified to represent workers in certain group homes. The record indicated that the provider retained some control over the essential terms and conditions of employment. The unions alleged that the providers of the group homes and the Department of Mental Health were joint employers of these employees, thus requiring the Department to bargain in good faith with the unions. The MERC so found. On appeal, the Department argued that because the providers are private employers, MERC did not have jurisdiction over the claims which were preempted by the National Labor Relations Act. The Court of Appeals vacated the MERC decision.

Held: When private employers join with a state employer to provide group homes, and when the private providers retain some control over the essential terms and conditions of employment, then the MERC lacks subject matter jurisdiction over petitions from unions seeking to represent the employees of the providers.

MERC UPDATE

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White, Przybylowicz, Schneider & Baird, P.C.

Employer Unlawfully Repudiated Subcontracting Provision of Expired Contract

In *Gibraltar School District,* MERC Case No. C94 F-145, MERC reversed the decision of ALJ Kurtz and held that the employer had committed a ULP when it refused to comply with a "meet and confer" provision prior to subcontracting bargaining unit work. The collective bargaining agreement had been terminated during the course of bargaining for a new contract, but impasse had not been reached. When the contract was terminated, the employer stated that it would honor only the salary and benefit provisions of the prior agreement. MERC held that the negotiated provision regarding subcontracting constituted a "term and condition" of employment to which the employer was required to adhere until it reached impasse or a new agreement. MERC distinguished the decision in this case from *Grand Rapids Public Schools,* 1995 MERC Lab Op 26, where there was an established practice of permitting the employer to subcontract work without consulting the union. MERC adopted the other recommendations of the ALJ, and agreed that the facts did not sustain the other ULP violations charged. A motion of the charging party for reconsideration was denied.

Part-time Clerical Position is an Independent Contractor

In *Charter Township of Northville,* MERC Case No. UC94 H-33, MERC dismissed a unit clarification petition filed seeking to add a part-time clerical position. The position was established to take and transcribe minutes at township zoning board of appeals meetings and at the meetings of the township planning commission. The employer claimed that the "transcriber" was an independent contractor. The position required approximately 20 hours of work per month, which was spent attending meetings of the zoning board and the planning commission, as well as preparing transcripts from tapes and notes made at the meetings. The recording devices were provided by the township, but the transcripts were prepared on the transcriber's own equipment, at her home. The transcriber had no direct supervision by the employer, was paid a flat hourly rate without benefits, and paid her own taxes. MERC noted that an employer must retain more than control over the "final product" (*i.e.,* the transcribed minutes), but must also maintain control over the manner and means of performing the work. MERC also noted that the transcriber's only contact with the employer was attendance at the meetings, and all other work was performed on her own. For these reasons, MERC determined that the transcriber is an independent contractor.

Timeliness – Objection to Error in Collective Bargaining Agreement

In *City of Muskegon Heights,* MERC Case No. C94 J-274, C94 J-276, and C94 J-277, MERC adopted the recommended order of ALJ Roulhac, dismissing three unfair labor practice charges filed by the union. The union had filed a charge in October, 1994, protesting an error in a collective bargaining agreement that had been ratified in August, 1993. ALJ Roulhac determined that this charge was not filed in a timely manner, because the statute of limitations began to run on the date that the contract was ratified. In two other charges that were filed within the six month time limit, the union charged that the employer had improperly omitted from the new contract sick leave payout and insurance for retirees provisions that had been included in a prior contract between the employer and a predecessor union. The Administrative Law Judge noted that (1) there was nothing in the contract to indicate that provisions contained in the former contract were to be carried forward into the new agreement, and (2) the "zipper clause" in the current agreement made it clear that the signed agreement superseded and repealed any prior agreements between the city and the employees.

Employer Properly Withdrew Recognition Based on Receipt of Employee Petition

In *Calhoun County Probate/Juvenile Home,* MERC Case No. C95 B-25, on exceptions, MERC rejected the recommended order of ALJ Roulhac and dismissed an unfair labor practice charge filed by the union representing a unit of 30 employees. MERC noted that the charging party had been certified as bargaining representative for the employees in August, 1993, and that no contract had been reached as of December, 1994. At that time, the employer received a petition, signed by 16 of the 30 bargaining unit members, which read: "I do not wish to be represented by Michigan AFSCME Council 25. Please consider my signature as support of a recall of this union." The employer informed the charging party that it was withdrawing its recognition based on the petition. MERC stated that during the year following the union certification, there was an irrebuttable presumption of the union's continuing majority status, but that after one year, the presumption of the union's majority could be rebutted by clear and convincing proof either that the union did not in fact represent a majority or that the employer had a good faith and reasonably grounded doubt of the union's continued majority status based on objective considerations. MERC found that the petition, which had been signed by a majority of the employees, constituted objective considerations sufficient to rebut the presumption of continued union majority status. MERC disagreed with the finding of the ALJ that the statement, "Please consider my signature as support of a recall of this union." raised a question of the signers' intent. MERC held that the signers of the petition clearly wanted the union to cease representing them, and that the employer did not commit an unfair labor practice by withdrawing recognition of the union based on the receipt of the petition.

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No Duty to Bargain When Increased Training is Imposed in Order to Maintain Required Certification

In *Township of Meridian,* MERC Case No. C94 J-257, MERC adopted the recommended order of ALJ Wicking, dismissing an unfair labor practice charge filed on behalf of fire fighters who were required to be licensed as paramedics. In 1990, the licensing authority imposed a new requirement that all paramedics undergo three days of advanced cardiac life support training. Four fire fighters did not want to undergo this additional training and asked that they be allowed to be licensed as emergency medical technicians (EMTs), which would not require them to have advanced cardiac life support training. MERC held that the employer had no duty to bargain with respect to requirements of the licensing agency, because the change in requirements did not affect the employees' obligation to maintain their existing licenses.

A Checklist of Labor Decisions Issued By The Michigan Court of Appeals (Volumes 209-214)

Michael J. Bommarito

Miller, Cohen, Martens, Ice & Geary, P.C.

MERC six-months limitation period not tolled by state lawsuit

Rodgers v Washtenaw County, 209 Mich App 73 (1995) (PERA's six-month limitation period not tolled by breach of contract lawsuit.)

Unemployment denied for four weeks pay in lieu of notice

Vanderlaan v Tri-County Community Hospital, 209 Mich App 328 (1995) (unemployment insurance case; payments made in lieu of notice are wages which disqualify claimant from unemployment benefits; such payments are different from termination, separation, severance or dismissal allowances which are not wages for unemployment purposes.)

MERC can assert jurisdiction over public and private, non-profit joint employer

AFSCME v Cencare Corp, 210 Mich App 618 (1995) (MERC properly asserted jurisdiction over joint employer.)

Striker cannot re-qualify for unemployment benefits with "make work" job

Empire Iron Mining Partnership v Asmund, 211 Mich App 118 (1995) (striking worker can get unemployment benefits only if he obtained "good faith interim employment" for at least two weeks, not "make work" employment.)

Striker can re-qualify with work for multiple employers

Empire Iron Mining Partnership v Orhanen, 211 Mich App 130 (1995) (Striking worker who works for at least two consecutive weeks with one or multiple employers requalifies for unemployment benefits.)

Manager can sue for breach of public policy where fired at union's request

Garavaglia v Centra, Inc, 211 Mich App 625, 628 (1995) (a manager successfully sued for discharge in breach of public policy where his employer fired him to achieve labor peace with the union, which demanded discharge; the employer admitted it "terminated Plaintiff's employment because of union pressure that there would be no labor peace unless Plaintiff was removed".)

PERA amendments affecting public school employees

Michigan State AFL-CIO v MERC, 212 Mich App 472 (1995) (addresses amendments to PERA concerning public school employees.)

City's pension plan cannot be amended without union approval

Detroit Police Ass'n v Detroit, 212 Mich App 383 (1995) (upheld MERC ruling that the unilateral change in the method of determining eligibility for duty-related disability retirement was a ULP; unions argued a trustees' resolution violated the CBA because the CBA "adopted by reference relevant Detroit City Charter provisions, including Charter pension provisions, subject to agreement and relied upon 'maintenance of conditions' clause.")

Not all representation cases at MERC require hearing

Sault Ste Marie Public Schools v MEA, 213 Mich App 176 (1995) (representation proceedings are investigatory; whether to hold hearing is within discretion of MERC.)

Refusal to submit to drug test was not misconduct for unemployment purposes

Korzowski v Pollack Industries, 213 Mich App 223, 230 (1995) (Reversing MESC, court ruled employee not disqualified for refusing test or because he had "glassy eyes" or was seen smoking marijuana as there was no evidence "to show claimant's physical or mental faculties were disturbed by his alleged use of marijuana".)

MERC allows executives and supervisors to organize

Grandville Municipal Executive Ass'n v City of Grandville, 213 Mich App 586 (1995) (MERC should have permitted executive and supervisory public employees to petition for election; PERA permits them to organize, but not in unit with other employees.)

If employer commits ULP, MERC must grant remedy

Clerical-Technical Union v MSU, 214 Mich App 42, 50-51 (1995) (MERC erred in refusing to award a remedy where it found ULP; employer cannot be "granted the benefit of its wrongdoing" and employer's reliance on "prior administrative decisions is not a defense to traditional remedies for unfair labor practices".)

Six-year statute of limitation for suit for breach of CBA

AFSCME v Highland Park, 214 Mich App 182 (1995) (six-year limitation period applies to actions for breach of CBA and period is tolled while internal remedies are pursued; CBA clause contained non-binding advisory arbitration award.)

Supreme Court Holds That "Salters" Are Protected By The NLRA

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On November 28, 1995, the Supreme Court unanimously held that persons engaged in "salting" are protected under the National Labor Relations Act (NLRA) *(National Labor Relations Board v Town & Country Electric, Inc. & Ameristaff Personnel Contractors, Ltd.,* 116 S.Ct. 450, 133 L.Ed.2d 371). Salting occurs when union organizers obtain employment at nonunion companies for the purpose of organizing the companies' employees. The organizers receive payment from the union for their organizing activities, and receive compensation as employees from the employer, as well. The Supreme Court held that such organizers meet the definition of "employee" under the NLRA.

The case arose when 11 members of local unions applied for jobs at Town & Country, a nonunion electrical contractor. Town & Country refused to interview ten of the union members. The company hired the eleventh member, but discharged him after only a few days on the job. The union members filed a claim with the National Labor Relations Board, asserting that Town & Country had discriminated against them on the basis of their union membership. Town & Country responded by pointing to the union's practice of salting. The Board held that the union members met the NLRA's definition of "employee" and that it was irrelevant that they would be paid by the union while trying to organize the employer's work force. The Board further found that Town & Country had committed unfair labor practices.

The Eighth Circuit reversed the Board, holding that paid union organizers are not employees under the Act. The Supreme Court granted certiorari on this issue and upheld the Board. The Court then remanded the case to the Eighth Circuit to determine whether the Board's decision that Town & Country committed unfair labor practices was lawful.
