LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

Volume 11, No. 3 Fall 2001

TWELVE CRITICAL QUESTIONS THAT MUST BE ASKED TO SUCCESSFULLY REPRESENT AN EMPLOYEE AGAINST A FORMER EMPLOYER SEEKING TO ENFORCE A NON-COMPETITION AGREEMENT

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When undertaking to represent an employee, Joe or Sally Six Pack, against their former employer, International Mega Corporation, in connection with litigation to enforce a non-competition agreement, it's best to remember one important historical lesson: The mighty United States lost the Vietnam War to a rag tag army of impoverished peasants who dressed in black pajamas, ate only rice and lived in tunnels.

While International Mega Corporation may be huge, powerful, wealthy and influential, frequently it (like many other employers) is arrogant, aloof and uncaring toward its employees, like Joe and Sally. International Mega Corporation's focus is to meet Wall Street analysts' profit projections. In contract, Joe and Sally are middle class folks focused on making the monthly mortgage, credit card and car payments, paying their kids' college tuition and keeping their head above water economically. These are powerful contrasting images that frequently reflect reality in the courtroom.

It is a tough challenge to beat International Mega Corporation head-to-head when it seeks to enforce its comprehensive, detailed and generally onerous agreement restricting Joe or Sally's right to compete. The courtroom battle over International Mega Corporation's demand for injunctive relief will typically be decided before a middle class judge (who frequently earns less than most of the lawyers appearing before her). The Michigan Antitrust Reform Act (MCL 445.777a) gives a judge broad discretion to determine whether the limitations on competition are reasonable and whether/how to enforce those limitations. Further, the court exercises its equitable powers in considering a petition for an injunction and must weigh the relative harm in granting or refusing to grant the injunction as between the employer and employee. If that judge is reasonably fair minded, objective and most importantly, has not lost touch with real people struggling to make a living, International Mega Corporation's petition for an injunction can be defeated.

The key to victory for the employee is to find one or two weak points in the former employer's attack strategy and to counter-attack ferociously, carefully avoiding the wasteful expenditure of precious and limited resources. victory for the employee is not necessarily persuading the judge to throw out the non-competition agreement in its entirety, but rather in persuading the judge to use their discretion under the law, to severely limit the scope, duration and other terms of the agreement. Remember, the Viet Cong won the Vietnam War by successfully employing guerrilla warfare tactics, skillfully and patiently using their limited resources to score isolated but strategically important victories.

The focus on this article is to present thoughts and suggestions as to how develop a strategy to successfully represent Joe and Sally Six Pack against International Mega Corporation's effort to enforce a non-competition agreement. Developing a successful strategy begins with asking your client the right questions and, then, deciding where to attack.

1. How Educated, Experienced and Sophisticated Is Your Client?

Most frequently, employees are asked to sign non-competition and trade secret agreements immediately upon being hired. On the first day on the job without any prior warning, the human resource representative presents the nervous employee with numerous forms and papers which require their signature. Among those medical, life and dental insurance forms, tax withholding forms and the employee handbook acknowledgement, is one more seemingly innocuous piece of paper entitled perhaps "Agreement" or maybe "Confidential Information Agreement."

The *New York Times* in a February 11, 2001 article entitled: "How Long Is the Reach of Your Former Employer?" noted that in the "dot-com world" the practice of having employees sign non-competition and trade secret agreements has "become common." The article noted that many of the "dot-com world" employees signing such agreements "are young and inexperienced." This practice of having employees sign such agreements is also widespread in Michigan's "auto industry world."

Frequently employees who sign non-competition and trade secret agreements either do not read them carefully or they do not understand them (what a shock, given the fine print and multi-page format of such agreements). In addition, many employees believe that limitations on their right to compete are unenforceable (remember, most people naively believe that in America's capitalist economic system, employees are free to move from job to job). The author of the *New York Times* article quoted above, perpetuated this myth by informing readers: "Though some high-level employees may effectively be barred from competing with former employers,

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generally because of their knowledge of proprietary information, many others are not, regardless of their agreements may say, according to legal experts."

The less educated, experienced and unsophisticated your client is, the higher the likelihood that the Court will cut them a break in deciding whether to enforce the non-competition or at least to cut it back based on geographic scope, time etc. If your client is highly educated, experienced and sophisticated, chances are that the court is going to be far less sympathetic toward them. This is especially true if the covenant not to compete is contained with their individually negotiated employment contract, pursuant to which the executive received substantial compensation and benefits. It only gets worse if your client happened to be represented by an attorney in negotiating that contract.

2. Was Your Client Really a Critical or Important Player Within the Former Employer's Organization?

Generally, the higher the level employee within the former employer's organization, the greater the likelihood the former employer's request for injunctive relief will be successful. In *Kelsey-Hayes Co. v. Maleki,* 765 F. Supp. 402 (ED Mich 1991), vacated by settlement, 889 F. Supp. 1583 (ED Mich 1991) the court denied the employer's request for injunctive relief to enforce a two-year non-competition restriction. The court specifically noted in its opinion certain significant characteristics about the defendant-employee: "Defendant Ali Maleki graduated from Saginaw Valley State University in 1988 with a Bachelor of Science degree in Electrical Engineering . . . Defendant then accepted a job with Kelsey-Hayes at its Ann Arbor Research and Development center, at the rate of $31,800 per annum, *as an entry level microprocessor programmer.* He worked there from July 31, 1989 through June 7, 1990." (p. 403) The court in *Kelsey-Hayes* also discussed the fact that in his "entry level" position, defendant had little (if any access) to any of plaintiff's confidential business information.

In contrast, in *PepsiCo v. Redmond,* 54 F3rd 1262 (CA 7, 1995), the court found that because defendant held such a high level position within the company and had broad access to its business plans relating to "distribution, packaging, pricing, and marketing," injunctive relief restricting defendant's ability to accept another high-level position with a competitor was required *even when defendant had never signed an agreement limiting his right to compete!* Defendant worked as an executive in PepsiCo's "sports drink" division, resigned and took a job as president of a direct competitor's sports drink division. The Court found that ". . . PepsiCo finds itself in the position of a coach, one of whose players has left, playbook in hand, to join the opposing team before the big game." (p. 1270) The *PepsiCo* Court reasoned that despite defendant's claims that he would not use the confidential information learned in his former job, it was inevitable that in his new position he would draw upon such knowledge. Thus the Court fashioned what is known as the "doctrine of inevitable disclosure" as the justification for enjoining defendant from accepting the presidency of a direct competitor.

A significant question exists as to whether Michigan courts would embrace the "doctrine of inevitable disclosure" to impose limitations on a former employee's right to compete where there is no written non-competition agreement. The Michigan statute permitting the imposition of limitations on an employee's right to compete, specifically states "[A]n employer may obtain from an employee *an agreement or covenant* which protects an employer's reasonable competitive business interests . . ." (MCL 445.774). Further, the Uniform Trade Secrets Act as enacted in Michigan prohibits only "actual or threatened misappropriation" of trade secrets; it is silent relative to "inevitable disclosure." (MCL 445.1901 et seq.)

The significance in these cases lies in the common sense distinctions a court is likely to make when International Mega Corporation seeks to enjoin an entry level employee with relatively short tenure and limited knowledge about its confidential business information as compared with a senior executive with broad and substantial knowledge of its confidential business information.[1] Typically, International Mega Corporation will paint your client with a broad brush, purposefully exaggerating his importance, influence and knowledge in connection with his former position. As an attorney representing Joe Six Pack, it is critical to find and then emphasize the truth relative to Joe's former position and the knowledge he gained of confidential business information.

3. Did Your Client Receive Any Real Consideration (i.e., a Bonus, Stock Options, etc.) for Entering into the Non-competition Agreement?

In an unpublished decision entitled *Lawley v. A & M Logestix, Inc.,* Case no. 97-74582, (ED Mich, 1999), Judge John Corbett O'Meara refused to enforce a non-competition agreement because the only consideration supporting the agreement, was defendant-employee's continued employment. The agreement specifically provided that defendant was terminable at-will. The court held: "The question for this court is whether the agreement not to compete is enforceable after the employer fires an at will employee without 'cause.' The court finds that this agreement is unenforceable for lack of legally sufficient consideration. When the employer exchanged an undefined period of continued employment for an agreement by the employee not to compete and then terminated the employee the consideration dissipated." This is potentially powerful argument given that many employers do not provide additional consideration to support such agreements while also maintaining an at-will employment policy.

Frequently, employers are either too cheap, stupid or both to pay employees some form of "real consideration" (i.e. a bonus, pay increase, right to stock options etc.) at the time the employee is asked to sign a non-compete agreement. If it is important enough to the company to limit the employee's right to compete, then some form of "real and substantial" consideration should be paid. This is especially true given that such restraints typically contained in the non-compete agreement are real and substantial in limiting the employee's future employment opportunities and may cause the employee substantial hardship (i.e. being out of work for an extended period of time).

Not all courts have accepted this argument. Most notably, Judge Gerald Rosen rejected it in *Robert Half International, Inc. v. Van Steenis,* 784 F. Supp. 1263 (ED Mich, 1991). Defendant-employee worked as a recruiter for plaintiff-employee recruitment firm and executed the non-compete agreement the day he began work. The court stated that defendant-employee testified that he read the contract, that his "post-secondary education in accounting and finance included specialized training in contracts, and that he would not sign a contract unless he understood and agreed with its terms." (p. 1267) The court concluded: "As to lack of consideration, continued employment constitutes sufficient consideration for the Defendant's execution of the restrictive covenants in the Employment Agreement — where, as here, the Defendant's employment is otherwise 'at will.'" (p. 1273)

4. Did Your Client Sign an Agreement Limiting Her Right to Compete?

In an unpublished decision, the court in *Computer Training & Support Corp. v. Graves,* Court of Appeals Case No. 211079 (9-28-99), upheld the dismissal of plaintiff-employer's petition for injunctive relief to enforce an agreement limiting defendant-employee's right to compete. The trial court found that the "confidentiality/non-competition agreement was neither signed nor dated" and therefore, there was no agreement.

The statute (MCL 445.777a) specifically refers to "an agreement or covenant" limiting an employee's right to compete. Without a written and signed agreement specifically limiting the employee's right to compete, it is highly unlikely that a court will enjoin the employee from competing against it.

In contrast, under Michigan's common law (i.e., *Hayes-Albion Corp. v. Kuberski,* 421 Mich 170 (1984)) and the Uniform Trade Secrets Act (MCL 445.1901 et seq.), a written and signed agreement is not required to limit an employee's right to use and disclose the employer's trade secrets and confidential business information.

5. Is the Agreement Ambiguous?

Most frequently, the employer requests (insists) that the employee execute its "standard form" non-compete agreement. There is no negotiation involved. International Mega Corporation drafted the non-compete agreement and now is seeking to enforce it. Many large corporation use the same form for all employees (except perhaps the highest level executives). As a result, these generic agreements many times are vague and not clearly applicable to your client's particular situation.

"The rule of construction that a contract will be strictly construed against the drafter needs no citation." *Detroit Bank & Trust Co. v. Coopes,* 93 Mich App 459, 464 (1979). This most basic and elementary point of law may be critically important in defeating an employer's effort to enforce a generic non-competition agreement.

For instance, *Michigan Lawyers Weekly* in its February 8, 1999 edition, in an article entitled "Doctor Successfully Challenged Non-compete Clause in Contract," reported about a case involving a doctor fighting the University of Michigan. The doctor was board certified colon/rectal surgeon who signed the University's "standard form employment contract" which included a non-compete clause precluding him from any "general surgery contract" which included a non-compete clause precluding him from any "general surgery practice" within an eight mile radius of the hospital for two years subsequent to his employment termination. The doctor took a posi-

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tion with a hospital within an eight-mile radius and filed a declaratory judgment action in Washtenaw County Circuit Court seeking to void the contract arguing that it was ambiguous. The doctor argued that colon/rectal surgery did not fall within the contractual definition of "general surgery practice" and cited numerous professional/medical sources to buttress his position. The court bought the doctor's argument and voided the contract.

6. Is the Non-compete Agreement Assignable?

In the current environment of corporations frequently merging, selling off divisions, restructuring and otherwise transferring people, operations and assets like kids trading baseball or Pokemon cards, many times the non-compete agreements signed by employees are ignored or lost in the shuffle until the employee leaves to join a competitor. The employer then seeks to enforce the non-competition agreement that the employee executed years ago while she was employed by a predecessor entity. Is that old contract assignable to the new/current employer and therefore enforceable?

While there are no reported Michigan decisions specifically answering this question, the case law from other states is very much divided. The majority rule appears to be that covenants not to compete are assignable. One court explained that covenants not to compete are assignable for important public policy reasons: by protecting the interests of sellers and buyers, allowing the assignment of non-compete agreements protects and encourages capital investment. *Reynolds & Reynolds Co. v. Tart,* 995 F Supp 547 (WDNC 1997).

The minority rule that covenants not to compete are not assignable is based upon the view that such agreements are personal service contracts, which cannot be assigned to a third party without all of the parties' consent. *Reynolds & Reynolds Co. v. Hardee,* 932 F Supp 149 (ED VA 1996).

7. What Were The Circumstances of Your Client's Departure From The Former Employer?

Did International mega Corporation fire Joe Six Pack for sexual harassment, poor work performance, chronic absenteeism, or for other reasons which would constitute "good cause?" Was Joe laid-off in connection with a massive cut-back or restructuring? Did Joe voluntarily resign to accept a higher level and better paying position with a direct competitor or to start his own business which happens to be in direct competition with International Mega Corporation?

Joe's answers to these questions are very relevant as to how sympathetic the court will likely be toward International Mega Corporation's request for injunctive relief to enforce the non-competition agreement. Again, in reviewing International Mega Corporation's petition, the court will consider all equitable factors involved, including the circumstances of the former employee's termination. In the *Kelsey-Hayes* case the Court refused to enforce the non-compete agreement by way of an injunction and specifically noted that several months prior to his termination, the former employee had been placed on probation for unsatisfactory performance and told to begin looking for another job. How much of a competitive threat was this entry-level employee who failed to perform up to standards, likely to be as against his former employer?

In contrast, the court in *Superior Consulting Co., Inc. v. Walling,* 851 F Supp 839 (ED Mich. 1994) enforced a six-month limitation non-competition limitation on defendant-employee who resigned from his employment as a health care consultant with plaintiff-employer to accept similar position with a direct competitor. In reciting the facts of the case, the *Superior Consulting* Court specifically noted the circumstances of defendant-employee's termination.

In connection with the termination, has the employer violated its obligations (statutory or contractual) to the former employee thus voiding the limitations on the employee's subsequent right to compete? The employer's alleged wrongdoing or mistreatment of the employee is a legitimate issue in seeking to defeat its effort to enforce a non-compete agreement. The employer must have "clean hands" in seeking an injunction from a court of equity. In his attempt to defeat plaintiff-employer's petition of a restraining order, defendant-employee in *Superior Consulting* argued that the former employer failed and refused to pay him commissions and expenses owed. The court dismissed this argument finding that "it was not sufficient to defeat the motion for preliminary injunction." (p. 849) Significantly, the court noted that the employee had raised this issue "only days before the hearing on the preliminary injunction" and that the court did not have sufficient information to determine whether the employer "was precluded from obtaining equitable relief by virtue of having unclean hands." (p. 849) An employer's wrongdoing relative to the employee against whom it seeks to restrain is a legitimate issue to raise to demonstrate that the employer has unclean hands and is not entitled to injunctive relief.

8. Is Your Client Receiving Compensation During the Non-competition Period?

In considering International Mega Corporation's petition for an injunction to enforce Joe Six Pack's right to compete, the court will examine the relative hardship as between the parties. To what extent will Joe and his family be harmed if the court enforces a one-year limitation on his right to work in his field of expertise and experience? For higher level executives, it is fairly common for the employer to pay significant amounts of severance or other forms of compensation during the period the executive is prohibited from competing. Obviously, if the employer is paying such compensation, the executive will not suffer much (if any) immediate harm.

More frequently, the former employee receives no such compensation during the period he is prohibited from competing and will suffer significant economic harm. This is especially true in the case of middle or lower level employees. Courts are likely to lend a sympathetic ear to the plight of employees like Joe who are left virtually unemployable and without any income except for unemployment benefits. It is critically important to raise the extent of the hardship that Joe and his family will suffer should the court grant the injunctive relief sought by International Mega Corporation.[2] While the court may still grant an injunction in such circumstances, there is a high likelihood that it could significantly scale back the

extent of limitations on Joe's right to compete (i.e. reducing the length of period from a year to six months) based upon the hardship your client will face.

9. Is the Agreement Reasonable?

MCL 445.777 specifically requires that limitations on the employee's right to compete with her former employer be "reasonable as to its duration, geographic area, and the type of employment or line of business" and empowers the court to revise or "limit" the agreement to make it reasonable. Further, that statute notes that the employer is only entitled to protect its "reasonable competitive business interests." Almost always, the reasonableness of the agreement will be central issue in the employer's effort to obtain an injunction.

What is reasonable? The facts of the particular case and the judge's personal views/philosophy are critical to answering this question. Frequently, employers are guilty of overreaching relative to the limitations they seek to impose on the former employee. Such restrictions may be worldwide, for periods of 5 or 10 years, extremely broad regarding what constitutes a competitor/line of business or type of job the employee may take. The more unreasonable (outrageous) the limitations, the higher the likelihood that the court will not just scale back the limitations, but throw out the entire agreement.

"I call your attention to clause 27(A)(3)(iii)(a), the middle of the nineteenth paragraph."

Examples of situations in which the court scaled back competition limitations include the following: The *Superior Consulting* Court modified the non-compete agreement to so as to allow the defendant-employee to work for a competitor as long as the job did not involve providing the same sort of consulting services he had provided the plaintiff (relating to health care). In *Robert Half Intern,* the Court reduced the geographic scope of the limitation from within a 50-mile radius of three of plaintiff-employer's branch office to two of its branches.

10. What Possible Irreparable Harm Can the Former Employer Demonstrate?

International Mega Corporation must establish that it will suffer "irreparable injury" if it fails to enjoin Sally Six Pack from competing against it in violation of her non-compete agreement. So exactly what exactly is the nature of the "irreparable injury" International Mega Corporation is claiming? Is the irreparable injury anything more than potential lost sales to current customers that can be easily determined and for which money damages can be quickly computed? Frequently, the employer's complaint seeking injunctive relief to enforce a non-compete agreement will be vague and ambiguous in describing the alleged irreparable injury. This is neither coincidence nor the result of poor drafting. Frequently employers are hard pressed to demonstrate real irreparable injury and believe that by repeating the phrase "irreparable injury" often enough in the pleadings, the Court will be persuaded such an injury will inevitably occur.

In *Thermatool Corp. v. Borzym,* 227 Mich App 366, 377 (1998) the Court reversed the trial court's issuance of a preliminary injunction where the employer failed to establish irreparable injury: "A breach of the contract, by itself, does not establish that a party will suffer an irreparable injury. In order to establish irreparable injury, the moving party must demonstrate a noncompensable injury which there is *no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty.* The injury must be both certain and great, and it must be actual rather than theoretical. Economic injuries are not irreparable because they can be remedied by damages at law. A relative deterioration of competitive position does not in itself suffice to establish irreparable injury."

Plaintiff in *Thermatool* alleged that defendant violated his non-competition agreement by selling a competitive product to one of its customers. The court found that the damages related to that single incident were "easily calcuable" and concluded: "In cases where the courts have extended a covenant not to compete as a remedy for a breach, the breach has consisted of *continuous and systematic* activity in violations of the agreement." (p. 378)

The *Thermatool* decision provides a powerful weapon in challenging the employer's petition for injunctive relief. As Sally's attorney, you must by way of the discovery process immediately challenge International Mega Corporation's claim of irreparable injury. This can be accomplished by noticing for deposition the corporation's sales manager, chief finance officer, president or other high level executive and asking them to specifically identify what irreparable harm or damages the corporation will incur if Sally is permitted to compete. In addition, requesting that International Mega Corporation produce customer lists, financial statements and other "confidential" information to demonstrate its alleged irreparable injury, will also likely strike a sensitive nerve. One important byproduct of taking this sort of aggressive and intrusive approach in challenging International Mega Corporation's assertion of irreparable harm, is that you may persuade the corporation to negotiate a reasonable resolution of the dispute before it has to publicly disgorge confidential information.

11. Did Your Client Take Any Real "Trade Secrets" or Confidential Information?

If Joe Six Pack left International Mega Corporation carrying away boxes, files or computer discs containing propriety and confidential information, it is far more likely that a court will grant the former employer injunctive relief to enforce a non-compete agreement. Such information could include sensitive pricing information, customer lists, specialized customer requirements, corporate financial data, plans for market expansion. If Joe took this sort of information, he has "unclean" hands. It may be irrelevant what Joe's motivations were in taking the information, i.e., to use in connection with his new job with a competitor, as bargaining chip to be used in connection with possible future litigation or because he thought (perhaps naively) that it was his. If International Mega Corporation demonstrates that Joe took the information and is now working for a competitor in violation of a non-compete agreement, it is unlikely that the court will show much sympathy toward Joe.

At the outset it is critically important to find out what your client took with them when they terminated their employment.

If the client took information, is that information really a trade secret or proprietary? Frequently employers will claim that any piece of paper a former employee took, even sales brochures that are

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widely distributed to the public, constitutes confidential information or a trade secret. Deciding quickly and reasonably whether the information is truly confidential or proprietary is important. Time is of the essence because employer may not even know yet that your client took the information or at least not yet made such claim.

As Joe's attorney, your mission is damage control in dealing with the confidential information in his possession. If International Mega Corporation is not yet aware that Joe took it, all the better. After making an inventory or taking a photograph of the documents, you should facilitate its immediate return to International Mega Corporation. If Joe has not made use of the information in his subsequent employment, chances are that he can quickly neutralize the issue of having taken the information by its prompt return.

"I am returning everything."

If the former employer was aware of your client taking confidential information, in addition to seeking to enjoin your client relative to the non-compete agreement, pursuant to either the Uniform Trade Secrets Act (MCL 445.1901 et seq) and/or the common law (i.e. *Hayes-Albion v. Kuberski* 421 Mich 170 (1984), it will demand the immediate return of the information.

If Joe is to have any chance of success in limiting the damage from having taken confidential information, he must quickly return it. Otherwise, International Mega Corporation's petition to enjoin him pursuant to the non-compete agreement will very likely be granted.

12. What Is the Employer Most Afraid Of?

Sally Six Pack may have almost no legal or factual defenses to International Mega Corporation's petition to enjoin her from breaching a non-compete agreement. Nevertheless, Sally may be able to persuade International Mega Corporation to drop its effort to enforce the non-compete agreement. Sally may have knowledge or information about the company that it does not want to disclose in a public forum. Frequently, employees learn things about a company's operations and personnel that are best left buried. Such information may include instances of employee discrimination or harassment, matters involving the inappropriate behavior of key executives, questionable financial or business practices, issues regarding business entertainment, income tax concerns, etc. This sort of negative leverage can be critically important in persuading International Mega Corporation to drop its effort to enforce a non-compete agreement.

— END NOTES —

[1]See also *Production Finishing Corp. v. Shields,* 158 Mich App 479 (1987). In *Production Finishing,* the Court held that defendant-employee, who was the former president of plaintiff-employer, had stolen a corporate opportunity and breached his fiduciary duties as a director and officer, when he left his employment to establish a competing business. The facts in this case are particularly egregious. Covenants not to compete were unenforceable in Michigan at the time the facts giving rise to this case occurred. Nevertheless, based upon other legal theories (i.e. breach of fiduciary duties, breach of contract), the Court upheld a jury verdict requiring that defendant refund bonus payment and pay other damages.

[2]In *Bryan v. Hall Chemical Co.* 993 F.2d 831, 836 (11 Cir. 1993), the court applied Ohio law in deciding whether to grant plaintiff-employee's action to enjoin enforcement of a non-compete agreement. One of the reasons the court gave in support of its decision to enjoin enforcement of the non-compete agreement was, "Bryan [plaintiff-employee] has over thirty years experience in the chemistry field and is sixty-two years of age. The district court is not clearly erroneous in finding that Bryan 'would be virtually unemployable in the industry in which he has spent most of his life' if this broad provision is enforced." ■

LOOKING AT THE NUMBERS

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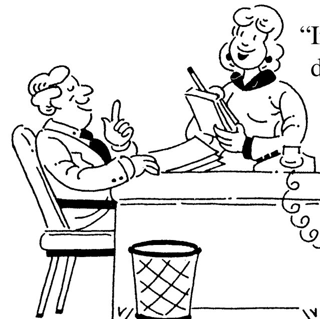
Why do lawyers do the things they do? This is a broad topic, so I will address only one type of common lawyer behavior: writing numbers using *both* numerals and words. Some examples:



"Take a letter to plaintiff's counsel: 'Dear Ms. (em-ess-period) Jones, first (1st) (ef-eye-ar-es-tee), paren, numeral one (1), lower case ess, lower case tee, end paren, I want to say I hope this finds you in good health, period.'"

"In full settlement of all claims, defendant will pay plaintiff the amount of three-hundred twenty-seven thousand, nine hundred and fifteen dollars and twenty-seven cents ($327,915.27), less applicable taxes."

"A grievance must be filed within fifteen (15) working days of awareness of the occurrence that is the subject of the grievance."

"Plaintiff may revoke this agreement by written notice delivered no later than seven (7) calendar days after the signing date."

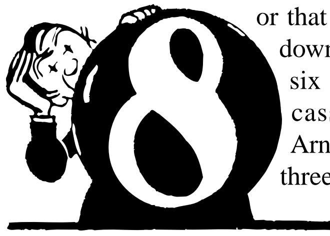
"Plaintiff worked for defendant for sixteen (16) months."

"If you do not respond satisfactorily to this demand within fourteen (14) days, we will be forced to sue you, and you will be relegated to the ninth (9th) level of hell (aitch-ee-double-hockey-sticks), and, if necessary, we will appeal to the Sixth (6th) Circuit and the nine (9) justices of the Supreme Court."

Other professionals don't use this dual numerals-and-words system. For example, the opening paragraph of *Genesis* doesn't end with "And there was evening and there was morning, one (1) day." And even the most avid lawyer-practioners of the dual system have some sense of proportion. You almost never see it applied to court rules or statutes, like "This motion for summary judgment is made pursuant to Fed. R. Civ. P. fifty-six cee (56(c))." Still, you see lawyers apply the dual system every day — in contracts, briefs, letters, and in virtually everything else lawyers write. Just last week I saw two (2) contracts, one (1) release, and three (3) letters using the dual system.

"First."

Why? Do these lawyers think there are those who can read words, but not numerals? Or numerals, but not words? After all, even newspapers — written for sub-eighth (8th) grade reading ability — don't report on fifty-four (54) yard field goals, fourth (4th) round knock-outs or nine (9) game losing streaks; or that the stock I just bought is already down one and one-eighth (1 1/8); or on six (6) sure-fire twenty (20) minute casserole recipes; or that the new Arnold Schwarzenegger movie is rated three and one-half (3½) stars or two (2) thumbs up. I have identified six (6) possible explanations for why many lawyers use the numerals-and-words system.



"Behind the eight (8) ball."

Possible explanation one (1). These lawyers are uncertain about what Strunk and White call matters of form. They know there is a rule out there requiring that some numbers are to be set out in words and some in numerals, but they just don't remember exactly what that rule says. So, they take a belt-and-suspenders approach. You can't go wrong if you use *both* words and numerals. Indeed, this foolproof solution avoids grammatical embarassment and, as a bonus, prominently displays the foresight and prudence of careful lawyers who know how to protect their clients with back-up systems.

Possible explanation two (2). These lawyers are oblivious to the dual system, but their secretaries are not. Their secretaries were trained circa nineteen hundred and fifty-five (c. 1955), or were taught by others trained in that era, and learned that the way you put numbers in a legal document — if you want it to be a *legal* document — is to be sure you type all numbers in both words and numerals.

Possible explanation three (3). These lawyers are not oblivious to the dual system; they're just afraid to tell their legal secretaries not to use it. After all, these secretaries have used the dual system throughout long and successful careers, and any upstart, snot-nosed lawyer who thinks he or she knows better should think again.

Possible explanation four (4). It's tradition. Tradition is good. Indeed, powdered wigs might put a little decorum into circuit court motion day.

Possible explanation five (5). These lawyers are sensitive to potential readers who suffer from Acute Dysnumeria Onset ("AD-ON"), a serious but little known medico-socio-cultural syndrome that I made up. (As Judy Tenuta says, it could happen.) Some lawyers use the dual system because they don't want to take any chances that they might make the lives of AD-ON sufferers more miserable than they already are.

There are two types of Acute Dysnumeria Onset. One is the ability to read words coupled with the inability to read numerals. This is called Numerical Acute Dysnumeria Aphasia, or "NADA." A NADA sufferer is able to determine the settlement amount *only* when it is depicted as "three hundred and twenty-seven thousand, nine-hundred and fifteen dollars and twenty-seven cents." A NADA sufferer cannot, of course, make heads or tails out of "$327,915.27."

The other type of AD-ON is Dysnumeria Other-Than-Numerical ("D'Oh"), also called Homer Simpson Syndrome. This is the ability to read numerals coupled with the inability to read words. A Homer Simpson Syndrome sufferer would fully comprehend "$327,915.27" but would be unable to fathom "three hundred and twenty-seven thousand, nine-hundred and fifteen dollars and twenty-seven cents." Of course, the Homer Simpson Syndrome sufferer would not be able to read the rest of the settlement agreement, unless maybe it was in pictographs.

"Six (6) o'clock already!? #!?&!"

For the sake of diagnostic comprehensiveness, it is important to mention that there are those who are unable to read words *and* numerals. Most are referred to as "pre-schoolers."

Those of you who would like to contribute to research on the causes and cures of AD-ON may send contributions to me at fourteen hundred (1400) North Park Plaza, one seven one one seven (17117) West Nine (9) Mile Road, Southfield, Michigan, four eight zero seven five (48075). For tax purposes, please make out your checks to "cash."

The sixth (6th) and best possible explanation. My own theory, the product of no research whatsoever, is that there is a historical reason behind the dual system.

Before there were word processors, laptops, typewriters, or printing presses, written communication was in handwriting, what they now call "cursive." (This is a pedagogical advancement: when I was in elementary school, teachers chided us for messy handwriting but sent us to the principal if we said something cursive.) Historically lots of people had messy cursive. They handwrote fives that looked like sixes, sixes that looked like eights, ones that looked like sevens, and so on. This was particularly a problem when writing checks on the sides of cows, and engaging in similar commercial conduct that added that element of zaniness to the development of Anglo-American jurisprudence. So, to make sure that cowhide checks and metes and bounds descriptions and conveyances of portions of Blackacre and such didn't feed the litigation explosion plaguing the Queen's Bench before "tort reform," lawyers always wrote numbers twice (2 times) — in numerals *and* words.

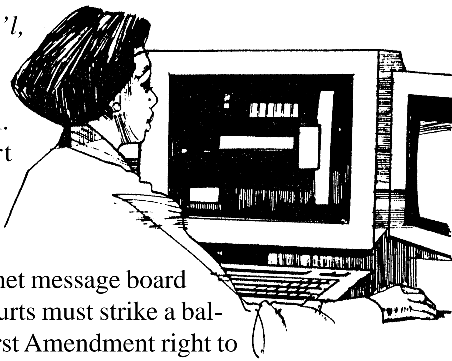
Thus, the numerals-and-words system is the legacy of our progenitors' messy handwriting. In our day and age, however, we have word processors and laptops, rigorous training in cursive, erasers on pencils, and Liquid Paper Correction Fluid. We no longer need to spell out numbers in *both* words and numerals. The dual system is an anachronism. It's supernumerary. So, lawyers, please stop it. Okay (o.k.)? ■

E-MAIL AND THE INTERNET IN THE WORKPLACE

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

CASE LAW

When Is An Employee's Anonymous Speech Not Protected? Two recent decisions from the New Jersey Court of Appeals addressed the issue of whether an employer can procure a court order compelling an Internet provider to identify the name of an anonymous Internet user, believed to be an employee or former employee, making legally actionable statements.



In *Dendrite Int'l, Inc. v. John Doe No. 3,* 2001 WL 770406 (N.J. Super. A. D. Jul. 11,2001), the court concluded that, in deciding whether the identity of an anonymous user of an Internet message board must be disclosed, courts must strike a balance between the "First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants." Dendrite International filed suit against an anonymous Internet user who posted allegedly defamatory statements about the company's financial dealings on a web site called Yahoo! Finance. Because Dendrite was unable to demonstrate that the anonymous Internet user was a Dendrite employee or posted any information that harmed the company, the court affirmed the trial court's refusal to grant Dendrite's motion to compel Yahoo! to disclose the identity of the anonymous Internet user.

Conversely, in *Immunomedics Inc. v. Jean Doe, a/k/a/ "moonshine_fr,"* 2001 WL 770389 (N.J. Super. A. D. Jul. 11, 2001), the anonymous Internet user, known by the computer screen name "moonshine_fr," described herself as a "worried employee" in her post on Yahoo! Finance. "Moonshine" also posted confidential information about Immunomedics. Unlike Dendrite, Immunomedics asserted it had sustained injury and the "Moonshine" should be held liable, in part, under theories of breach of contract and breach of duty of loyalty based on her violation of the company's confidentiality agreement and several provisions of its employee handbook. Accordingly, the court required Yahoo! to disclose the name of defendant "moonshine_fr."

The decisions in *Dendrite Int'l, Inc.* and *Immunomedics Inc.,* when read together, appear to indicate that when balancing the First Amendment right of an individual to speak anonymously and the right of a company to protect its proprietary interest in the pursuit of claims based on actionable conduct by Internet message board users, trial courts are likely to:

1. Require the plaintiff to take steps to notify the anonymous posters that they are the subject of a subpoena or application for an order or disclosure, and withhold action so the fictitiously-named defendants have a reasonable chance to file and serve opposition to the application.

2. Require the plaintiff to identify and set forth the exact statements purportedly made by each anonymous poster that plaintiff alleged constitutes actionable speech.

3. Carefully review the complaint and all information provided to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants.

4. Determine whether plaintiff's action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted by requiring plaintiff to produce sufficient evidence supporting each element of its claim, on a prima facie basis, prior to ordering the disclosure of the identity of the unnamed defendant.

5. Balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

Spying On The Spies. In *Adams v. City of Battle Creek,* Case No. 98-00233 (6th Cir. May 11, 2001), the plaintiff brought an action under the Electronic Communications Privacy Act, ("ECPA"), 18 U.S.C. §§ 2510-2522, alleging that the City of Battle Creek Police Department and a police department employee, through use of a duplicate or "clone" pager, tapped without a warrant his department-provided pager because it erroneously thought he was assisting drug dealers. The issue on appeal was whether the police department may tap a police officer's pager without a warrant or notice to the officer. Under the "ordinary course of business" or "business use" exception of the ECPA, interception of a communication may be undertaken by employers or law enforcement agencies, provided that the interception is done in the "ordinary course of business," and using equipment provided by communications carrier as part of the communications network.

Concluding that the defendants met the latter part of the exception, the Sixty Circuit noted that the City's provider of wire and electronic communication services provided the City with the clone in the ordinary course of the City's business. The court, however, found that the City was unable to demonstrate that its acts were taken in the "ordinary course of business." Although not defined in the statute, the "ordinary course of business" exception generally requires that the use be: (1) for a legitimate business purpose; (2) routine; and (3) with notice. In this case, the defendants did not routinely monitor officers' pagers or give notice to officers that random monitoring of their department-issued pagers was possible. Consequently, the Sixth Circuit reversed the trial court's grant of summary judgment to defendants and remanded the case to the trial court for further proceedings.

HEALTH

- *E-stressed? Turn The Power Off And Go Outside.* Two Ann Arbor, Michigan, social workers, Mary Stevens and Christine White of Walkabout Excursions, have recently diagnosed a new malady that is sapping people's energy and souring their spirits. They call it "E-stress." According to Stevens and White, E-stress is caused by e-mail, cell phones, beeping pagers and constant technological demands of working and living in today's electronic world. The social workers recommended solution is to take people on a retreat, away from machines.

- *Don't blame your keyboard.* In June, researchers at the Mayo Clinic in Rochester, Minnesota, completed a study debunking the notion that typing at a computer keyboard leads to carpal tunnel syndrome, the nerve disorder known to plague office workers everywhere.

PRIVACY

- *Big brother is, indeed, watching.* According to a new survey by the Privacy Foundation, approximately 14 million of the 40 million employees — or nearly one of every three employees — using e-mail or the Internet at work are being monitored by their employer.

- *Will the third time be a charm?* For the third time in three years, a bill has been introduced in the California legislature that would force employers to disclose whether they monitor their workers' e-mail or Internet usage. The bill would merely require a single notification when the employee is hired and allows $1,000 penalties against businesses that fail to inform employees about secret monitoring. Governor Gray Davis vetoed two nearly identical measures and is expected to veto this initiative as well.

- Effective December 21, 2001, the *Australian Federal Privacy Act* will be amended to extend privacy protection to the private sector and will restrict an employer's rights to monitor the electronic activity of its workforce by requiring it to set up formal policies on e-mail and Internet use. Employers will be required to give 14 days' notice before conducting surveillance of employees' e-mails, or to obtain a warrant from the Industrial Relations Commission. Justifiable grounds for surveillance include excessive use of e-mail, distributing offensive material, suspected criminal activities or passing on sensitive information. Employee records — any record created in the context of the employer/employee relationship — are exempt from the Act. Several similar privacy bills are making their way through the United States legislature, including:

    - *Notice of Electronic Monitoring Act* ("NEMA") (H.R. 4908) (*see also* S. 2898). Introduced in the House and Senate on July 20, 2000, NEMA seeks to regulate all electronic monitoring in the workplace. The bills have been in subcommittee since Sept. 2000. Congressional insiders say that the bill to be introduced in the 107th Congress will likely be clarified on several points including, the definitions of electronic monitoring, notice requirements, notification exemptions, and damage provisions.

    - *Electronic Communications Privacy Act of 2000* (H.R. 5018). Introduced on July 27, 2000, this bill seeks to update the wiretap statute to include stored electronic communication. It would also expand reporting requirements and raise the legal standard for use of pen registers. The last major action on this bill was on October 4, 2000, when it was prepared for the floor.

- AltaVista unveiled a new line of software that allows companies to search multiple corporate databases at once, including e-mail accounts and personal computers. Will this product be a tool that increases efficiencies and productivity or will it hurt employee morale and create security headaches? Only time will tell.

NEWS & TRENDS

- *Keep your eyes on the road and your hand upon the wheel.* On June 28, 2001, New York Governor George Pataki signed into law the nation's first statewide legislation completely banning the use of handheld cell phones by drivers. The law takes effect Nov. 1, 2001. Currently two similar bills are making their way through the Michigan legislature:

    - In February 2001, Rep. Bruce Patterson, R-Canton, introduced a bill that would punish drivers with a $25 fine and one point on their driving record if using a cell phone caused them to break traffic laws. The Michigan House Transportation committee has been conducting hearing on Patterson's bill.

    - July 2001, Rep. Ruth Johnson, R-Holly, introduced a bill that would make it illegal to talk on a handheld cell phone while driving. The bill would allow hands-free microphones, however. A violation would result in up to a $100 fine, with no points.

- *First Amendment v. Filters.* In May, the EEOC issued a finding of probable cause that a group of Minneapolis librarians were exposed to a sexually hostile work environment based on pornography viewed on library computers by library patrons. The library, which since 1997 had been giving its patrons unfettered and unlimited access to the Internet pursuant to its First Amendment-inspired policy, may now be forced to aggressively monitor patrons' view habits or install filtering software as a means to ward off potential discrimination suits. Meanwhile, in Massachusetts, lawmakers are at the early stages of debating a proposal that would require all public libraries in the state to use filtering software. South Dakota, on the other hand, has decided not to use filters to prohibit improper Internet use by its employees; rather, it is examining log files and then firing or suspending employees.

- An Eaton Rapids police officer was recently charged with four counts of having child pornography on the department's computer in June. The computer had approximately 200 pornographic photos of children and had Internet images electronically bookmarked.

- In May, tax giant H&R Block sued one of its former tax preparers because he posted a message on how one could cheat on one's taxes on a Yahoo! chat site. Specifically, it is alleged that the posting instructed individuals how to alter their employee wage information in a way that would trick H&R Block consultants. ■

VIEW FROM THE CHAIR

Arthur R. Przybylowicz, ***Chair***
Labor and Employment Law Section

This is my last column as the Chair of the Labor and Employment Law Section. I hope that these columns have been received in the spirit in which they were written — to generate debate and discussion concerning issues of concern to the labor and employment law community. As practicing attorneys, we often become so involved in handling our individual cases that we sometimes do not take the time to consider and analyze long-range trends concerning how decisions today are going to affect the justice system in years to come. Hopefully, these columns have generated some interest in looking at where we are headed.

For my last column, I wanted to discuss the current trend away from the use of one of the cornerstones of the judicial system since the very beginning of American jurisprudence — the jury system. In the past 20 years the Michigan judiciary has steadily moved away from reliance upon the jury system in employment law. In 1980, in *Toussaint v. Blue Cross and Blue Shield of Michigan,* the Michigan Supreme Court left to the discretion of the jury key issues in deciding wrongful discharge cases, including whether there existed a just cause contract and whether just cause existed for the employment termination. Since that time, the Michigan courts have steadily moved farther and farther away from that position and have eroded the right of jurors to decide these important employment law issues. It is unnecessary to set forth the lengthy line of cases that have increasingly reduced the role of the jury in wrongful discharge cases. Today, it is almost impossible to find a wrongful discharge case where the jury is making the ultimate decision.

Even beyond the reduced role of juries in wrongful discharge cases, the Michigan courts have also steadily eroded or eliminated altogether the role of juries in employment law cases in two other important ways.

First has been the trend to impose pre-dispute arbitration on employees as a condition of employment. While the Michigan courts have been somewhat protective of the procedural rights of employees in pre-dispute arbitration, the fact remains that these disputes are no longer resolved by a panel of ordinary citizens, but rather by professional arbitrators. Of course, arbitrators have been used for decades to resolve labor law disputes. Yet, in my view, the use of arbitrators in labor law disputes between union and management is significantly different from pre-dispute arbitration foisted upon employees, because of the continuing relationship between management and labor unions. If labor arbitrators render decisions that are not in keeping with the spirit of the collective bargaining agreement, the parties to the agreement are free to change the language of the collective bargaining agreement or change the jurisdiction of the arbitrator. This opportunity does not exist between management and unrepresented employees subject to pre-dispute arbitration. The end result is that the employee's job and, perhaps, career is being decided not by the system preferred by the drafters of the Constitution, but rather by professional arbitrators.

Second has been the trend of Michigan appellate courts to overturn jury verdicts, particularly in employment discrimination matters. A review of both Michigan Supreme Court and Michigan Court of Appeals decisions in the past few years reflects a continuing pattern in employment law cases for the appellate courts to overrule and reverse jury determinations even in situations where the trial judge has upheld the jury verdict. This is particularly troubling because of the nature of employment discrimination cases. It is the rare employer who admits to having engaged in unlawful discrimination. Thus, proof of unlawful discrimination must include credibility determinations and the use or reasonable inferences from the actions of the employer proved at trial. These are matters for which juries and the trial judge are uniquely qualified and situated, yet appellate judges increasingly seem wiling to decide what is or is not a reasonable inference and whether witnesses were credible based upon a cold record.

The drafters of the Seventh Amendment appreciated that decisions made by common citizens are the most likely to be accepted. This is especially important in employment law, where employees are very much aware of the power differential that in most cases exists with their employer. Decisions made by everyday citizens are more likely to be considered as fair and just than decisions made by professional decision-makers.

In my view, the current trend toward overruling juries and eliminating juries from employment law disputes will necessarily lead to increased dissatisfaction with employment-related decisions and will move us farther away from the concept of equal justice under law.

WRITER'S BLOCK?

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

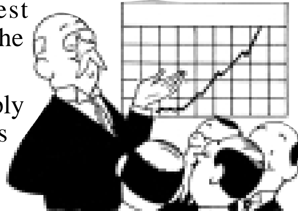
USING EXPERT WITNESSES IN EMPLOYMENT PRACTICE — DO YOU REALLY WANT AN EXPERT?

Francyne B. Stacey
Pear, Sperling, Eggan & Muskovitz, P.C.

A. Preliminary Considerations

From our witness lists, one could surmise that employment lawyers provide full time jobs for many expert witnesses. In practice, though, the decision to actually utilize the services of an expert witness in a given case should not be made lightly. In my view, there are a number of questions to answer before even contacting any potential expert.

1. What is your case really about and what are the most serious areas of contention?
2. Will the expert's testimony make any of the factual issues easier to understand?
3. Will the use of an expert increase the chances of settlement?
4. Is the information that might be admissible through expert testimony more accessible through other means, i.e. lay testimony, public knowledge, etc.?
5. Does the case involve any novel issues, methods of proof, hard to understand topics such as emerging technology, or similar issues that are best explained by an expert in the field?
6. Would you be better off simply consulting with an expert as opposed to actually listing the person on your expert witness list?
7. Ultimately, do you think the expert will really be worth it in the end or is there a better alternative?



"In sum, that is exactly and precisely the only conclusion that a rational person may make."

B. Who Do You Call?

Once you've answered the preliminary questions and, if you still think that an expert witness is absolutely necessary, how do you find an expert that meets your needs (and your budget)?

1. Initially, decide exactly what you want the expert to do and what issues you want her to address. This is extremely important, especially to your clients who are footing the bill for the expert's services.
2. Decide whether you want to employ the expert as a consultant or an expert witness who will actually testify ad deposition or trial. While this might be the same person, you need to ensure that if the expert is going to testify as opposed to simply providing advice and information in the background, she or he is someone who the jury will understand and believe.
3. Despite the fact that experts, whether consultants or witnesses, are expensive, hire the best you can afford for your particular case. On the other hand, don't retain an expert that you are not comfortable with just to save your client a few dollars as it will be a waste of money in the long run.
4. Do your homework. Look on the Internet, get recommendations from other attorneys, and, don't be afraid to look in unlikely places. Just because every attorney you know uses a particular expert does not mean that she or he will be any good in your case.
5. Finally, talk to the expert before you commit to using her or him in any capacity. You have to believe that the expert knows what she is talking about before anybody else will believe her.

C. How To Use Your Expert.

An expert witness must be used very carefully.

1. Remember that whatever written materials you give your expert are discoverable during the course of the litigation. Therefore, don't give your expert materials that are not relevant to her or his expertise.
2. Make sure that the expert knows that any notes she or he makes may also be discoverable materials.
3. Do not ask for a written report unless you are required to produce one or really feel that it will help your case either in settlement negotiations or at trial.
4. Be very clear on what you want the expert to do and what issues you want her or him to address.
5. Keep track of the documents the expert is reviewing and be organized. If you don't know what your expert analyzed to form her or his opinion, you will be hard pressed to convince anyone that the expert's opinion is credible.
6. Prepare, prepare, prepare. If the expert is going to testify, make sure that you spend the time necessary to make it worthwhile. The expert witness must know and understand your theme of the case and how her testimony fits in and must be prepared to defend her opinions and the reasoning behind them. Finally, the expert should be prepared to talk to the jury, use common language, make her testimony interesting and, most importantly, keep it simple. ■

LOOKING FOR *Lawnotes* Contributors!

Lawnotes is looking for contributions of interest to Labor and Employment Law Section members.

Contributions may address legal developments, trends in the law, practice skills or techniques, professional issues, new books and resources, etc. They can be objective or opinionated, serious or light, humble or self-aggrandizing, long or short, original or recycled. They can be articles, outlines, opinions, letters to the editor, cartoons, copyright-free art, or in any other form suitable for publication.

For information, contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., 1400 North Park Plaza, 17117 West Nine Mile Road, Southfield, Michigan 48075 or (248) 559-2110 or israel@martensice.com.

NLRB PRACTICE AND PROCEDURE

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

In my last column I noted that the NLRB did not at that time have a General Counsel or Acting General Counsel as the President had not nominated anyone to replace Leonard Page, whose term ended on April 20, 2001. On Saturday, May 26th, the Senate unanimously confirmed Arthur F. Rosenfeld to be General Counsel of the NLRB. General Counsel Rosenfeld was sworn in on June 4, 2001 replacing John Higgins, the Board's Solicitor, who had been serving as Acting General Counsel since May 16, 2001. General Counsel Rosenfeld, a native of Allentown, Pennsylvania and a graduate of Villanova University School of Law, had been serving as Senior Majority Labor Counsel of the Senate Committee on Health, Education, Labor and Pensions. I am pleased to announce also that General Counsel Rosenfeld has accepted my invitation to be our luncheon speaker at the Bernard Gottfried Memorial Labor Law Symposium to be held on Thursday, October 18, 2001, at Wayne State University Law School. I invite all of you to reserve this date on your calendar to meet and hear General Counsel Rosenfeld speak on recent developments at the NLRB. In addition to General Counsel Rosenfeld, the Symposium will also feature panel presentations on "Withdrawal of Recognition; *Levitz Furniture, Allentown Mack, Chelsea Industries* and related precedent" and the future of "Alternative Remedies under the NLRA." Also scheduled is a presentation by Professor Joseph Slater, University of Toledo College of Law on "Lessons from the Public Sector."

A recent Board decision, *Lee Lumber and Building Material Corp.,* 334 NLRB No. 62, (June 28, 2001) is worthy of note. In *Lee Lumber* the Board, on remand from the D.C. Circuit, established a new standard for calculating what is a "reasonable period of time for bargaining" when an employer refuses to recognize and bargain with an incumbent union. The Board concluded "that when an employer has unlawfully refused to recognize or bargain with an incumbent union, a reasonable time for bargaining before the union's majority status can be challenged will be no less than 6 months, but no more than 1 year. Whether a "reasonable period of time" is only 6 months or some longer period up to 1 year will depend on a multifactor analysis. Under that analysis, we shall consider whether the parties are bargaining for an initial agreement, the complexity of the issues being negotiated and the parties' bargaining procedures, the total amount of time elapsed since the commencement of bargaining and the number of bargaining sessions, the amount of progress made in negotiations and how near the parties are to agreement, and the presence or absence of a bargaining impasse."

Although the time will be past when you receive this newsletter, Region Seven's Local Practice and Procedure Committee plans to meet on September 12, 2001 in Lansing, Michigan in connection with the State Bar meeting. As most of you know this Committee meets regularly throughout the year and I invite any of you who have questions or issues concerning practice or procedure at the regional office level to submit those questions to the undersign or any member of the Committee.

U.S. SUPREME COURT UPDATE

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

Court Addresses Definition of Supervisor Under the NLRA

In *NLRB v. Kentucky River Communitycare, Inc.,* 121 S. Ct. 1861 (2001), the Supreme Court addressed two questions: (1) which party bears the burden of proving an employee's supervisory status in an unfair labor practice proceeding and (2) whether a supervisor's judgment is not "independent judgment" if it is informed by professional or technical training or experience.

In *Kentucky River,* the labor union petitioned the NLRB to represent a single unit of 110 employees. At the representation hearing, the employer objected to the inclusion of 6 nursing supervisors claiming that they were *supervisors* under 29 U.S.C. 152(11), and therefore excluded from the class of *employees* subject to the Act's protection. The Board's Regional Director placed the burden of proving that the employees were supervisors on the employer and found that the employer did not meet its burden. Accordingly, the Regional Director directed an election to determine if the union would represent the unit. The union won the election and was certified as the employees' representative.

The employer then refused to bargain with the union and the Board's General Counsel filed an unfair labor practice complaint under 29 U.S.C. 158(a)(1), (5), which allowed for judicial review of the representation determination. The Board granted summary judgment to the General Counsel and the employer appealed to the Sixth Circuit. The court held that the Board had incorrectly placed the burden of proving that the employees were supervisors on the employer. The court also held that the board had incorrectly held that the nursing supervisors were includable in the bargaining unit. The Board then appealed to the Supreme Court.

The Court first noted that the burden of proving an employee's supervisory status does not appear in the following statutory definition of the term:

> The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. 152(11). However, the Court found that the Board's practice of filling the statutory gap with the consistent rule that the burden is borne by the party claiming that the employee is a supervisor was reasonable and consistent with the Act. Therefore, the Sixth Circuit had erred in allocating the burden to the union.

However, the Court affirmed the Sixth Circuit's holding that the nursing supervisors should not have been included in the bargaining unit. Applying statutory interpretation analysis, the Court rejected the Board's only argument — that employees do not use "independent judgment" when they exercise "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards."

Reviewing Court Must Enforce Arbitrator's Fact-finding

In *Major League Baseball Players Association v. Steve Garvey,* 121 S. Ct. 1724 (2001), petitioner had filed grievances claiming that the Major League Baseball Clubs ("Clubs") had colluded in the market for free-agent services after the 1985, 1986 and 1987 baseball seasons, in violations of the industry's collective-bargaining agreement. Petitioner and Clubs entered in to a settlement agreement establishing a $280 million fund to be distributed to injured players. Petitioner established a framework to evaluate individual players' claims and recommended distribution plans. The framework provided that individual players could seek an arbitrator's review of the distribution plan.

Steve Garvey submitted a $3 million claim for damages, alleging that his contract for the 1988-1989 season was not extended due to collusion. In support of his claim, Garvey presented a letter from the Padres' President and CEO from 1979 to 1987, stating that, before the end of the 1985 season, he had offered to extend Garvey's contract through the 1989 season, but that the Padres had refused to negotiate with Garvey due to collusion. The arbitrator denied Garvey's claim, finding that the letter lacked credibility. The Ninth Circuit reversed the arbitrator's award, holding that he had "dispensed his own brand of industrial justice." *Garvey v. Roberts,* 203 F.3d 580, 589 (9th Cir. 2000).

The Supreme court reversed and held that the arbitrator's award had to be upheld. The Court stated: "When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award." 121 S. Ct. at 1728 (quoting *Paperworkers v. Misco, Inc.,* 484 U.S. 29, 39 (1987).

Front Pay Not Subject to Title VII Damage Caps

Under 1991 amendments to the Civil Rights Act of 1964, aggrieved plaintiffs are entitled to compensatory damages, subject to certain monetary caps. 42 U.S.C. 1981a(a)(1), (3). In *Pollard v. E.I. du Pont de Nemours and Co.,* 121 S. Ct. 1946 (2001), the Sixth Circuit had held that front pay was an element of compensatory damages and was therefore subject to the statutory cap. The Supreme Court, recognizing there was room for more than one interpretation, concluded that front pay was not an element of compensatory damages and thus not subject to the cap. ■

Mark your calendar for the 27th 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 on April 16 and 17, 2002 at the MSU Management Education Center in Troy. Details about the program and LELS Member discounts will be forthcoming from ICLE.

Lawyer and notary public James M. Moore responds to Stuart M. Israel's article "Declarations, Si! Affidavits, No!" Vol. 11, No. 2 *Lawnotes* 7 (Summer 2001):

I read with interest and amusement your discussion of notaries public and their future. I have been a notary public for many years and was anticipating that income from that office might aid my retirement (albeit many years hence) since by then, by most accounts, Social Security will provide so little for us baby boomers. Needless to say, as with my investment in internet stocks, I am reassessing my plans.

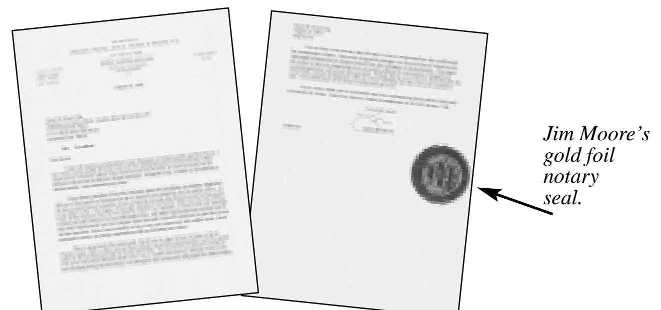
I have been a member of this elite fraternity since my late father, an attorney, suggested that one of the benefits of attaining the age of majority was eligibility for this public office. At the time I could think of a number of more important rewards, but filial devotion bid me accede to my father's offer. One legacy of that early initiation was that my father was not only willing to pay all the required costs, he even paid for a seal. I am, therefore, a notary *with seal,* although it is the only place where I use my full middle name. My father apparently believed that such a high office deserved the use of a complete name and that is how he signed me up and how he had the seal inscribed. Since I am too thrifty to buy a new seal without my full middle name, I have continued to renew my notary commission with my full name ever since.

Alas, I cannot recite the notary oath. But if you are eager to hear it, hang out at the Wayne County Clerk's office (second floor) where it is publicly administered to all who qualify (after the fee has been paid and the receipt delivered). You do receive an attractive certificate ("To all whom these Presents shall come," etc.), suitable for framing, although I have so far resisted posting the document, even though it does contain the autograph of Candice Miller.

I do not know your secretary and thus am at a loss to understand how she could permit her commission to lapse. I am aware of no public outrage over the activities of notaries public that might influence her to distance herself from her colleagues in the profession. Then again, she works for lawyers, suggesting she is not unduly affected by expressions of disapproval concerning persons with whom she associates. Perhaps she has an aversion to disclosing the day of her birth; a recent development is the use of one's birthday (not the year) as an expiration date. Yet another piece of our lives is revealed for all to see.

In any event, thank you for your article and your continued service as editor of the justly acclaimed *Lawnotes.* I must now repair to further contemplation of 28 USC Section 1746.

Israel replies: Awed by the majesty of Jim Moore's gold foil seal, Lydia Jefferson renewed her notary commission, Section 1746 notwithstanding. Thanks, Jim. ■



Jim Moore's gold foil notary seal.

SIXTH CIRCUIT HOLDS THAT ARBITRATORS MUST GENERALLY DECIDE ISSUES OF TIMELINESS, AND ADDRESSES OTHER LABOR ISSUES

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

The second quarter of 2001 was a slow one for the Sixth Circuit in terms of publishing cases dealing with labor and employment issues. From May of 2001 through July of 2001, the Sixth Circuit published approximately 9 cases dealing with a variety of labor and employment issues. The full text of Sixth Circuit decisions are available on the Internet at: "http://pacer.ca6.uscourts.gov/opinions/main.php."

ARBITRATION - Timeliness Is Generally For The Arbitrator To Decide

In *Armco Employees Independent Federation v. A.K. Steel Corp.*, 252 F.3d 854 (6th Cir. 2001), the Sixth Circuit clarified and limited its 1988 holding in *General Drivers, Local 89 v. Moog Louisville Warehouse*, 852 F.2d 871 (6th Cir. 1988), with regard to the issue of whether a court or an arbitrator decides challenges to arbitrability based on an allegation that the grievance is untimely.

In *Moog*, the Sixth Circuit held that a challenge to the arbitrability of the grievance in that case, on the basis of timeliness, must be decided by the Court. *Moog* involved a unique situation because the parties' collective bargaining agreement actually stated that an untimely grievance was not arbitrable. Although *Moog* could have easily been distinguished on its facts, in *Raceway Park, Inc. v. Local 47, Service Employees Int'l Union*, 167 F.3d 953 (6th Cir. 1999), a panel of the Sixth Circuit expressed concern that *Moog* required that all challenges to arbitrabilty based on the issue of timeliness must be decided by a Court and that this constituted a grave departure from the Supreme Court's ruling in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 84 S.Ct. 909 (1964) and the rule in every other circuit that timeliness is a procedural issue that must be decided by an arbitrator.

In *Armco*, the Sixth Circuit clarified its rulings in *Moog* and *Raceway Park* as applying only when an agreement specifically indicates that the parties may not submit untimely grievances to arbitration. In *Armco,* however, because the agreement did not specfically state that an untimely grievance "shall not be arbitrable", the issues of whether the grievance was timely, and whether it was precluded from arbitration because it was untimely, were issues for the arbitrator to decide.

ARBITRATION - Vacating Arbitration Awards

In *DBM Technologies, Inc. v. Local 227, United Food & Commercial Workers,* Docket No. 00-55449 (July 20, 2001), the Court once again reaffirmed that an arbitration award will not be set aside unless an award 1) conflicts with the express terms of the collective bargaining agreement, 2) imposes additional requirements that are not expressly provided in the agreement, 3) is without rational support from the text of the agreement, or 4) is based on general fairness and equity instead of the precise terms of the agreement. In such cases, the award would fail to draw its essence from the collective bargaining agreement and thus would be set aside. However, if the arbitrator was even arguably applying the construing the award, the award may not be set aside. In light of this strict standard, the Sixth Circuit upheld the district court's refusal to set aside the arbitrator's award even though the arbitrator's interpretation might lead to a conflict between two provisions of the contract.

TITLE VII RETALIATION - Adverse Employment Action

In *Strouss v. Michigan Dept. of Corrections*, Docket No. 99-2501 (May 4, 2001), the court held that a lateral transfer may constitute an adverse employment action, which is one of the elements of a retaliation claim. An employee's rejection of a lateral transfer is actionable as a constructive discharge if the transfer would have been objectively intolerable to a reasonable person. In *Strouss*, the Plaintiff, a prison guard, claimed that the transfer would have endangered her life because she would have had to guard certain prisoners who had threatened her life. Thus, the court concluded that a genuine issue of material fact existed as to whether the lateral transfer was an adverse employment action and whether the rejection of the transfer constituted a constructive discharge. However, the Plaintiff failed to establish the "causal connection" element of her retaliation claim and, thus, her retaliation claim was held to have been properly dismissed by the district court.

RACE DISCRIMINATION - Prima Facie Case

In *Wade v. Knoxville Utilities Bd.,* Docket No. 00-5210 (July 30, 2001), the Sixth Circuit upheld a district court's grant of summary judgment to the defendant on plaintiff's claims of racial discrimination and retaliation. The court held that the plaintiff had not met the elements of a prima facie case of race discrimination because he was not able to return to work when he was discharged. Plaintiff had been on 20 months of disability leave prior to his discharge. The district court's denial of plaintiff's motion to amend to allege a claim of disability discrimination was also upheld on appeal because he waited 18 months before filing the motion, offered no justification for the delay, and because the delay significantly prejudiced defendant because the deadline for filing dispositve motions had already passed.

RULE 60(B) - Summary Judgment Will Not Be Set Aside

In *Jinks v. Allied Signal,Inc.*, Docket No. 00-5160 (May 14, 2001), the Sixth Circuit upheld the district court's refusal to set aside its grant of summary judgment in favor of the defendant on plaintiff's Age Discrimination in Employment Act claims. After the district court ruled in favor of defendant, plaintiff filed a motion seeking relief from the order under rule 60(b) of the Federal Rules of Civil Procedure. Plaintiff argued that "newly discovered evidence" and/or "mistakes" required the court to vacate its previous order. The alleged newly discovered evidence consisted of a new interpretation of statistical evidence by plaintiff and a new affidavit allegedly supporting plaintiff's claim. The alleged mistakes consisted of plaintiff's allegation that the district court improperly failed to consider evidence that plaintiff did not refer to in its response to the motion to summary judgment or was miscited by plaintiff. Both the district court and the court of appeals rejected plaintiff's arguments and refused to set aside the order. ■

EASTERN DISTRICT UPDATE

Jeffrey A. Steele
Brady, Hathaway, Brady & Bretz

No Class Certification Where Some Members May Have a Statute of Limitations Problem.

Garrish v. UAW, 149 F.Supp.2d 326 (E.D. Mich. 2001). Purportedly on behalf of 6,000 UAW members, several union members working at a GM facility in Pontiac sued their employer and the local and international union to which they belonged. The union members claimed that the defendants violated the LMRA by fraudulently prolonging a strike to obtain benefits that only "high-level" members of the local union would enjoy. The members further claimed that the employer made illegal payments to end the strike, payments that were divided among several high-level members of the local union. Judge Gadola conditionally denied the plaintiffs' motion for class certification, without prejudice, because the plaintiffs failed to address (and, hence, satisfy) the adequacy of class representation inquiry. In addition, Judge Gadola found that common questions of law and fact may not predominate over all plaintiffs regarding the issue whether their claims fell within the statute of limitations. The statute of limitations begins to run when each individual knew or had reason to know of the alleged impropriety. Because this inquiry is "particular to each individual Plaintiff, . . . it is conceivable that a few Plaintiffs may meet this burden while many do not." Because the plaintiffs could not establish without further discovery that each plaintiff filed suit within the statute of limitations, Judge Gadola denied the motion for class certification but permitted the plaintiffs to revisit the issue after discovery closed.

Jury Trial and Monetary Damages Available For Claim Under Title II of the ADA.

Dorsey v. City of Detroit, (2001 WL 909176 (E.D. Mich. 2001)). The plaintiff sued several public and private golf courses under the ADA and the Michigan Persons With Disabilities Civil Rights Act. Relying on *Johnson v. City of Saline,* 151 F.3d 564, 572-573 (6th Cir. 1998), Judge Duggan rejected the defendant's contention that Title II of the ADA and the PWDCRA do not provide for jury trials or the receipt of monetary damages for claims against public courses. The Court thus held that the plaintiff could pursue claims of physical and emotional damage against the public courses in front of a jury. Reasoning that Title III of the ADA provides only for injunctive relief, Judge Duggan agreed with the defendant's claim that the plaintiff was not entitled to monetary damages or a jury trial in his case against the private golf clubs.

Comparables Who Were Not On Probation Were Not Similarly-Situated.

Akers v. Family Independence Agency, 2001 WL 739495 (E.D. Mich. 2001). Judge Steeh first dismissed the plaintiff's race and national origin discrimination claims because they were not specifically mentioned in her EEOC charge. Judge Steeh then dismissed the plaintiff's sex and age discrimination claims on the basis that the plaintiff had no evidentiary support for her claim that similarly-situated individuals outside her protected classes were treated differently. Judge Steeh reasoned that "[a]lthough plaintiff refers to co-workers . . . as employees that were treated differently for unsatisfactory performance, plaintiff has not produced evidence tending to show that these employees were subject to the higher probationary standards of a 'conditional service rating' position — such as the one occupied by plaintiff . . ."

Firing a White Co-Worker For The Same Conduct on the Same Day Precludes Race Claim.

Agee v. Northwest Airlines, Inc., __ F.Supp.2d __ (E.D. Mich. 2001). The plaintiff, an African-American male, was terminated for falsifying sick leave, lying and failing to cooperate with his employer's investigation into his misconduct. Judge Gadola dismissed the plaintiff's race discrimination claim because the plaintiff's Caucasian co-worker and roommate was fired on the same day for the same reason. Judge Gadola reasoned that "where an employer discharges individuals, both black and white, for the same conduct . . . a plaintiff cannot establish a prima facie case of discrimination." Judge Gadola continued by noting that, even if the plaintiff had established a prima facie case of either race or disability discrimination, his lengthy denial of the employer's legitimate, non-discriminatory reason was insufficient to establish pretext. The plaintiff was instead obligated to come forward with "specific facts" that the employer's explanation was untrue.

No Duty to Tell Employees About a Potential Sale.

Sneyd v. Int'l. Paper Co., LW 42086 (E.D. Mich. 2001). The plaintiffs sued for silent fraud, claiming that the employer should have told them of a contemplated sale of the subsidiary corporation before hiring them. Judge Gadola granted the employer's motion for summary judgment. Judge Gadola reasoned that the employer has no legal duty to inform potential employees that it is contemplating selling, or that it has decided to sell, a subsidiary corporation. ■

ICLE PUBLICATIONS BY AND OF INTEREST TO LELS MEMBERS

Martha B. Goodloe, Richard J. Seryak and Daniel D. Kopka, *Employment Law in Michigan*

Employment Law in Michigan provides an overview of Michigan and federal authority on common issues that arise in the life cycle of the employment relationship. Topics include interviewing and hiring, employment agreements, compensation and fringe benefits, discrimination and harassment, employee privacy, workers' compensation, workplace violence, OSHA requirements, union activities, termination, unemployment insurance, and ERISA. Each chapter includes a summary of the law, practice tips, and relevant forms and checklists.

Arthur R. Przybylowicz, David B. Calzone and Daniel D. Kopka, *Employment Litigation in Michigan*

Employment Litigation in Michigan is a comprehensive guide to litigating employment issues in Michigan, from case intake and evaluation through trial. It includes chapters on age, race, sex, and disability discrimination, workplace harassment, wrongful discharge, ERISA and the Family and Medical Leave Act. The book offers litigation and negotiation strategies for both employees and employers, and includes forms, pleadings and checklists on disk and in the book.

For information, contact the Institute of Continuing Legal Education, toll-free: (877) 229-4350.

WHAT'S NEW IN THE WESTERN DISTRICT

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

Statements About Aging And High Salaries Did Not Provide Basis For Age Discrimination Claim When Focus Of Conversation Was On High Salaries.

John Hill v. Pharmacia & Upjohn Company, Case No. 4:00-CV-67 (April 30, 2000). Gordon J. Quist, District Court Judge, granted defendant PUC's motion for summary judgment under Fed R Civ P 56 as to plaintiff's breach of employment contract claim, and state discrimination claims under the Elliott-Larsen Civil Rights Act. Plaintiff's state claims were based on direct and circumstantial evidence theories. Plaintiff's employment contract claim was brought under the "legitimate expectations" theory based on PUC's manual.

Despite a lengthy and detailed graduated performance improvement and discipline section in PUC's manual, the court dismissed plaintiff's breach of employment contract claim, stating that the language in the PUC policy contained no reference to "just cause" for disciplinary action. *Id* at 12. The court noted that under *Dolan v. Continental Airlines,* 563 NW2d 23 (1997) and the cases it cites, "there must be something more than a disciplinary policy or procedure to convert an at-will relationship into a just cause relationship." The court chose to disregard two previous cases against PUC finding in favor of the plaintiffs, namely, *Johnson v. Pharmacia & Upjohn Company,* No. B99-0680-NZ (Mich Cir Ct 2000), and *Perry v The Upjohn Company,* No. E90-3493-NZ (Mich Cir Ct 1992), stating it was a federal court sitting in diversity and is "not bound to follow those decisions."

The court also dismissed plaintiff's age discrimination claim. Plaintiff was fired after sending a direct e-mail to various customers regarding PUC's treatment of him regarding a down-sizing of plaintiff's territory, and characterized PUC's proposed transfer of the plaintiff as negative and unfair. Plaintiff's supervisors had told him not to contact any customers directly regarding his proposed transfer. Just prior to his termination, plaintiff had been offered three separate transfers as a part of PUC's changing sales territories because of a lag in sales.

Plaintiff argues that he was discriminated against with respect to the proposed transfers and, ultimately, his discharge. With respect to the transfer, the court stated that plaintiff had three alternative positions available to him. Further, plaintiff's old territory was assumed by two other individuals, both *older* than plaintiff. With respect to the plaintiff's forbidden e-mail, the court stated he failed to show "that another similarly situated employee outside the protected class was not discharged for insubordination after engaging in the same or similar conduct." *Id* at 20. Accordingly, under the circumstantial evidence *(McDonnell Douglas* shifting burden) standard, the court granted summary judgment in favor of PUC. Lastly, the court dismissed plaintiff's "direct" evidence age discrimination claim, despite his supervisor making several statements regarding the aging sales force in plaintiff's section and the high salaries each of the men apparently earned. With respect to this proffered evidence the court stated that plaintiff's "alleged statements do not present any basis for a claim of age discrimination because the focus was on high salaries, not age." *Id* at 19 (citing *Hazen Paper Co. v. Biggins,* 507 US 604 (1993)).

Reduction In Work Force And Plaintiff's Poor Attendance Were Non-Discriminatory Reasons For Her Discharge.

Sheila Gardenour v. Power Quest Boats, Inc., Case No. 1:00-CV-667 (May 1, 2001). Robert Holmes Bell, District Court Judge, granted the defendant employer's motion for summary judgment under Fed R Civ P 56(c) as to plaintiff Gardenour's claim of unlawful retaliation based on the Family Medical Leave Act, 29 USC 2601. Plaintiff was employed with defendant for only 16 months. Defendant fired plaintiff as a result of a reduction in force due to lagging sales. Plaintiff was chosen to be discharged out of several potential candidates because plaintiff had a horrible attendance record. In short, in only sixteen months of employment, the plaintiff had 46 excused absences (provided as a matter of grace by her employer), 13 unexcused absences and 18 tardies without excuse. Based on overwhelming legitimate, non-discriminatory reasons for her discharge, including a legitimate reduction in force as well as providing plaintiff with numerous excused absences before she was even qualified under the FMLA, the court granted the defendant's summary judgment motion.

Plaintiff Failed To Support Race Discrimination Claim Because He Could Not Prove He Was Similarly Situated.

Kim v. Maxey Training School, et. al., Case No. 1:99-CV-917 (June 12, 2002). Defendant Maxey Boys Training School discharged plaintiff, a youth specialist of Korean descent, after plaintiff's supervisor witnessed him using his feet to restrain a youth. Prior to that incident plaintiff also received a written reprimand for falling asleep at work. Plaintiff claimed discrimination based on national origin and race in violation of Title VII of the Civil Rights Act of 1964. Richard Alan Enslen, District Court Judge, granted defendant's motion for summary judgment with respect to plaintiff's claims.

Plaintiff alleges his director, an African-American, ignored plaintiff and was friendlier to African-American employees. Plaintiff claims his dismissal represented unlawful disparate treatment compared to the discipline received by three African-American employees. To prove a prima facie case for disparate treatment, plaintiff must show defendant treated a protected class member adversely compared to a non-class member who engaged in identical conduct. *Mitchell v. Toledo Hosp.,* 964 F.2d 577, 582 (6th Cir. 1992). The court must first determine whether the class member is similarly situated to the non-class member. "To be similarly situated, the individuals with whom the plaintiff seeks to compare his treatment must have dealt with the same supervisor and have been subject to the same conduct without differentiating or mitigating circumstances." *See Cox v. Elect Data Sys Corp.,* 751 F Supp 680, 691 (ED Mich 1990). Plaintiff was not similarly situated to one employee because her incident did not involve intentional physical contact and did not occur in the process of restraining a youth. Unlike plaintiff, the other two employees had achieved classified civil service status, entitling them to progressive discipline. Plaintiff was serving a probationary period that allowed the Family Independence Agency to evaluate how employees perform their duties in order to ascertain their fitness for future service. Since

plaintiff could not prove he was similarly situated to the employees who received disparate treatment, the court dismissed his Title VII claim.

County Employee's Speech Did Not Rise To The Level Of Public Concern Necessary For First Amendment Retaliation Claim.

Slinkman v. Deetz, et. al., Case No. 5:00-CV-27 (June 5, 2001). Plaintiff alleged an unlawful failure to hire claim. The action was filed in the Allegan County Circuit Court and removed to federal court. During an interview with Allegan County Community Mental Health ("ACCMH"), plaintiff Slinkman was told that his ability to work closely and cooperatively with Allegan County ("Allegan") was an integral part of his position. At the time of the interview, plaintiff was an employee of Allegan. Plaintiff denied having any problems with Allegan during the interview. Plaintiff, however, complained to the Allegan Board of Commissioners about Allegan's failure to fulfill contractual obligations concerning wage increases. In his resignation letter to Allegan, plaintiff mentioned that this concern, among others, precipitated his resignation.

Allegan's human resource director, defendant Deetz, contacted ACCMH and reported plaintiff's complaint. After questioning plaintiff about these allegations and finding his reasoning disturbing and reflecting poor judgment, ACCMH withdrew the job offer. Plaintiff sued, alleging: (1) tortious interference with contract against defendant Deetz; (2) retaliatory discharge in violation of public policy against defendants Higgs, Deetz and Allegan; and (3) retaliatory discharge and interference with employment in violation of the First Amendment against defendants Allegan and ACCMH.

Judge Hillman followed the Supreme Court's three-pronged test, known as the Pickering Test, in deciding the First Amendment claim for retaliatory discharge. Under the test, the plaintiff must prove (1) the speech was a matter of public concern; (2) the plaintiff's interest in making the statement outweighs the employer's interest in promoting operational efficiency; and (3) the speech at issue was a substantial or motivating factor for the adverse employment action. *See Perry v. McGinnis, 209 F3d 597* (6th Cir 2000). The court found that plaintiff's complaint concerned a wage dispute involving two people and did not rise to the level of "public concern." The court also found the insulting tone of plaintiff's letter addressing his personal concern over a dispute suggested the context should not be considered protected speech. Thus, plaintiff did not satisfy the first element of the test. Plaintiff also failed to meet the second prong of the Pickering Test. Courts weighing a plaintiff's interest in making the statement against the employer's interest in promoting workplace harmony consider "whether the speech impairs discipline by superiors, has a detrimental impact on close working relationships, undermines a legitimate goal or mission of the employer, impedes the performance of the speaker's duties or impairs the harmony among co-workers." *Id* at 607. Here, plaintiff's speech was of limited public interest and highly confrontational. Additionally, plaintiff's position at ACCMH put him in charge of sensitive information and questions of loyalty threatened ACCMH's independence from the county. Since plaintiff failed the Pickering Test, the court granted defendant's motions for summary judgment, dismissed the First Amendment retaliation claim, and remanded the remaining state law claims. ■

MICHIGAN SUPREME COURT UPDATE

Kimberly A. Clarke
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Equal Protection Claims in the Employment Discrimination Context

The Supreme Court issued companion cases recognizing potential equal protection claims against state actors in employment discrimination suits despite the safe harbor provisions of the Civil Rights Act and limiting potential remedies for those claims to declaratory and injunctive relief.

In *Sharp v. city of Lansing,* (No. 116171, July 17, 2001), the Court ruled that the safe harbor provision of the Michigan Civil Rights Act ("CRA") "does not abrogate rights generally guaranteed under the Equal Protection Clause of the Michigan Constitution." Plaintiff brought a reverse discrimination suit against the City of Lansing "for its use of an affirmative action plan in hiring decisions," alleging violations of both the CRA and the Equal Protection Clause. The trial court ruled that both plaintiff's CRA and Equal Protection Clause claims were barred by the "safe harbor" provision of the CRA. The Supreme Court agreed that the safe harbor provision protects employers "who act in accordance with properly approved affirmative action plans" from liability under the CRA and affirmed dismissal of plaintiff's CRA claim. However, the Supreme Court ruled that the safe harbor provision does not protect employers' claimed violation of equal protection rights guaranteed under the Michigan Constitution and that "injunctive and declaratory relief are available to restrain any acts found to violate the state Equal Protection Clause."

In *Lewis v. State of Michigan,* (No. 114241, July 17, 2001), the Supreme Court rejected a claim for money damages or other compensatory relief against the state for past violations of the Equal Protection Clause of the Michigan Constitution. Plaintiff brought a reverse discrimination suit against the Michigan State Police, alleging race and sex discrimination in violation of the Equal Protection Clause. The trial court determined that the state police violated plaintiff's right to equal protection of the law and awarded damages of over $300,000. The Court of Appeals peremptorily reversed the trial court pursuant to *Cremonte v. Michigan State Police,* 232 Mich App 240 (1999), and rejected the "imposition of a judicially inferred damage remedy for violation of Const 1963, art 1, sec 2." The Supreme Court affirmed, ruling that a judicially inferred damage remedy would confer upon the Supreme Court the "implementation power of Const 1963, art 1, sec 2" and improperly usurp legislative authority. Justice Taylor wrote the majority opinion. Justice Kelly concurred in part and dissented in part.

***McDonnell Douglas* Burden-Shifting Framework Clarified**

The Court ruled in *Hazle v. Ford Motor Co.,* (No. 116162, July 3, 2001), that "a plaintiff is not required to provide evidence that he is at least as qualified as the successful candidate in order to establish a prima facie case under [*McDonnell Douglas Corp. v. Green,* 411 US 792; 93 S. Ct 1817; 36 L Ed 2d 668 (1973)]." Rather, in order to establish a prima facie case of unlawful discrimination under the burden-shifting framework established in *McDonnell Douglas,* a plaintiff must "present admissible evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination." Plaintiff established a prima facie case of discrimination, and the burden shifted to defendants

(Continued on page 18)

MICHIGAN SUPREME COURT UPDATE

(Continued from page 17)

to rebut the presumption of discrimination. Defendants presented sufficient evidence of legitimate, nondiscriminatory reasons for its hiring decisions to defend against the rebuttable presumption of discrimination and restore the burden to plaintiff. The plaintiff ultimately "failed to create a genuine issue of material fact concerning whether defendants relied on any discriminatory animus in making their employment decision." The Supreme Court reinstated the trial court's order granting defendants summary disposition.

Disability Discrimination Claims Based on Employer's Perception of Disability Limited

In *Michalski v. Bar-Levav,* 463 Mich 723 (2001), the court held that the 1990 amendments to the Handicappers' Civil Rights Act ("HCRA") changed the "perception" of discrimination standard to require proof that the employer regarded plaintiff "as presently having a characteristic that currently creates a substantial limitation on a major life activity." The Court ruled that the Legislature's choice of "present tense language in defining the term handicap" used in the 1990 amendment requires a plaintiff to demonstrate that the employer "regarded her as having a characteristic that substantially limited major life activity at the time she was his employee." Since the employee in this case, at most, "presented evidence that she informed defendant that she had been tentatively diagnosed with multiple sclerosis and that he believed that this might substantially limit her major life activities in the future," summary disposition was properly granted against the employee. Justice Weaver wrote the majority opinion. Justice Kelly dissented and Justice Cavanagh concurred with Justice Kelly's dissent. 463 Mich at 761.

Employers May Switch Between Benefit Reduction Provisions of The Worker's Compensation Disability Act

In *Stozicki v. Allied Paper Co., Inc.,* 464 Mich 257 (2001), the Court overturned *Saraski v. Dexter Davision Kosher Meat & Poultry,* 206 Mich App 347 (1994), holding that an employer may revoke an initial decision to use a particular benefit reduction provision under the Worker's Compensation Disability Act ("WCDA"). In *Saraski,* the Court of Appeals held that "once an employer makes an initial election between § 354 ["coordination of benefits"] and § 357 ["age 65 reduction"], § 357(2) prohibits the employer from serially switching the selection." The Supreme Court disagreed with this interpretation of § 357(2) reasoning that, "[t]he plain meaning of that statute is that an employer may not simultaneously take advantage of coordination under § 354 and the age reduction under § 357." Since there is no language making "an employer's initial decision to use a particular benefit reduction provision irrevocable," such a limitation "cannot be read into the WDCA." Therefore, an employer may switch between the "age 65 reduction" nd the "coordination of benefits" provision of the WCDA. Justice Kelly issued a concurring opinion. 464 Mich at 264.

Court Denied Certiorari And Validated Contractual 180-day Limitations For Civil Rights Claims

The Court denied certiorari effectively validating the Court of Appeals decision in *Timko v. Oakwood Custom Coating, Inc.,* 244 Mich App 234 (2001). The Court of Appeals decision in *Timko* upheld a 180-day period of limitation within an employment agreement because it did not "constitute an inherently unreasonable amount of time and . . . plaintiff failed to otherwise demonstrate that the shortened period unfairly deprived him of the opportunity to file" his civil rights claims. ■

MICHIGAN COURT OF APPEALS UPDATE

John W. Smith
Dykema Gossett PLLC

The Court of Appeals Complicates the law of Sexual Harassment in Work-Place Romances: *Corley v. Detroit Board of Education,* (Neff, P.J.), docket No. 218528, May 15, 2001.

Only a month after holding that harassment based upon romantic jealousy was not actionable under Elliott-Larsen in *Barrett v. Kirtland Community College,* a panel of the Court of Appeals has now held that workplace romances *can* give rise to a discrimination or harassment claim. In *Corley v. Detroit Board of Education,* the plaintiff was employed by defendant Detroit Board of Education as a full-time counselor at Cass Technical High School and, following a divorce in 1991, she took an additional part-time position in the adult education program at the Golightly Vocational Center.

An intimate, romantic relationship developed between Corley and her supervisor at Golightly which lasted nearly four years, but ended in 1995, when the supervisor became involved with another Golightly administrator, whom he married in the spring of 1996. Because of Corley's part intimate relationship, problems arose at Golightly between the three individuals. following the 1995-96 school year, the supervisor informed Corley that her counseling job at Golightly would not be continued.

Following the termination of her adult education position, plaintiff filed a lawsuit alleging discrimination in violation of Elliott-Larsen, breach of contract, and intentional infliction of emotional distress. In her discrimination claim, Corley alleged that she was subjected to a hostile work environment, sexual harassment, disparate treatment, and the unlawful termination of her employment because of her gender and her prior relationship with her supervisor. The trial court granted summary disposition in favor of the defendants with regard to the discrimination claim.

In reviewing, and eventually reversing, the summary disposition, the Court of Appeals first inquired as to whether the complained-of conduct constituted quid pro quo sexual harassment. The Court held that the threshold issue for a claim of quid pro quo sexual harassment is that submission to or rejection of the proscribed conduct was "a factor in decisions affecting [the plaintiff's] employment . . ." Corley argued that the defendants' adverse actions against her constituted sexual harassment because they were rooted in the reactions of her supervisor and co-worker to the past consensual intimate relationship. In her complaint, Corley alleged that after their breakup, her supervisor confronted her with thinly veiled threats warning her that she would lose her job unless she promised to do nothing to adversely affect his subsequent relationship. Among the alleged adverse job actions, Corley also alleged that her supervisor's new wife was responsible for assigning her to a particular desk, which was within the new wife's authority, while no other employees were assigned seats.

In *Barrett v. Kirtland community College,* 245 Mich App 306 (2001), the Court had recently held that Elliott-Larsen does not "prohibit conduct based on romantic jealousy," and therefore no claim of sex discrimination could be made where the male plain-

tiff alleged that his male supervisor subjected him to adverse employment actions because they were both pursuing a romance with the same female employee. However, the Court distinguished *Barrett* in that the defendants' conduct in *Barrett* did not emanate from a prior sexual/romantic relationship between the plaintiff and his supervisor and there was no claim or evidence that the plaintiff was required to submit to sexual harassment as a condition of employment.

The Court held that being targeted for persistent and hostile communications based upon Corley's continued presence in the workplace, as a former paramour, may reasonably be considered allegations of conduct or communication "of a sexual nature," in that they "emanated from the romantic/sexual relationship." Similarly, the Court held that Corley's allegation that she suffered adverse employment actions and was discharged for reasons stemming from her status as a former girlfriend may reasonably be considered an allegation that plaintiff's employment was terminated because of her "submission" to her supervisor's prior romantic/sexual advances.

The Court reversed the summary disposition holding that:

> The provisions of the CRA covering sexual harassment in the workplace should be read to broadly protect an employee against adverse employment action taken by an employer acting in furtherance of personal animosity toward the employee as the result of the employer's sexual advances. Under the circumstances of this case, we conclude that plaintiff has presented a genuine issue of fact concerning whether she was subjected to quid pro quo sexual harassment.

The Court continued to hold that "viewing the evidence in a light most favorable to plaintiff, as a female, former girlfriend of her supervisor, plaintiff was the object of unwelcome sexual conduct or communication in the form of remarks and offensive actions," and that the hostile environment claim should also have survived summary disposition. The court did, however, affirm the summary disposition of Corley's intentional sex discrimination and disparate treatment clams for lack of evidence (i.e. there was no similarly-situated male employee or showing that the defendant was predisposed to discriminate against the entire class).

Elliott-Larsen Distinguished From Title VII In The Pregnancy Discrimination Context: *Cunningham v. Dearborn Board of Education,* Docket No. 216170 (Griffin, P.J.), July 6, 2001.

Although the Michigan Courts frequently defer to analogous interpretations of federal discrimination statutes, the Court of Appeals recently departed from federal precedent in the area of pregnancy discrimination. Since 1991, Denise Cunningham had worked for defendant as a Custodian C, a position which required extensive lifting. In 1995, Cunningham became pregnant with her second child. Because of her pregnancy, on March 22, 1995, Cunningham's personal physician submitted a list of restrictions (no lifting of more than fifteen to twenty pounds, no ladder climbing, and no use of an industrial buffer), each of which were essential duties of her custodial position. Shortly after Cunningham presented defendant with her written work restrictions, defendant's supervisor of human resources wrote a letter to plaintiff which stated:

> Dear Ms. Cunningham:
>
> As I told you on Monday, March 27, 1995, you cannot currently perform your Custodial C duties due to the restrictions your doctor has placed you under because of your pregnancy.
>
> Since you have exhausted all your sick, personal business, and vacation banks, you must apply for leave under the Family and Medical Leave Act. Please complete the appropriate forms as soon as possible and return them to the Department of Human Resources.

Thereafter, defendant placed plaintiff on extended health leave that was later converted to family medical leave. After the birth of her child, plaintiff returned to work as a Custodian C on November 30, 1995.

Pursuant to an agreement between defendant and Cunningham's union, defendant had a "favored work" program under which an employee who was either eligible for or receiving worker's compensation benefits would be permitted to work within the parameters of the medical restriction placed on the employee. It is uncontested that because plaintiff was not eligible for worker's compensation for her pregnancy, she was not offered favored work.

Cunningham filed a complaint in circuit court, alleging that defendant's decision to suspend her employment because of her medical restrictions constituted sex discrimination in violation of Elliott-Larsen. Cunningham maintained she was treated differently than alleged similarly-situated individuals because defendant permits favored work for job-related disabilities, while defendant does *not* afford favored work for non-job-related disabilities such as pregnancy. The trial court granted summary disposition holding that Cunningham was unable to establish a prima facie case of sex discrimination based on her pregnancy because she could present no evidence that she was treated differently than any other employees with non-work-related conditions.

On appeal, Cunningham relied on federal authorities to argue that illegal sex discrimination occurs based on pregnancy if a defendant/employer does not treat pregnancy as a job-related disability eligible for favored work. The Court of Appeals rejected the federal precedent.

The Court held that the Michigan and federal statutes treated pregnancy discrimination differently. Michigan's statute, for example, was a straightforward redefinition of the term sex discrimination, which was clarified to include pregnancy and pregnancy-related conditions. By contrast, the 1978 Congressional amendment to Title VII of the Civil Rights Act was more than a clarification. The Court pointed out that unlike the 1978 amendment to the Michigan Civil Rights Act, the federal amendment not only stated that sex discrimination included discrimination based on pregnancy and pregnancy-related conditions, but further provided *"women affected by pregnancy . . . shall be treated the same for all employment-related purposes, . . . as other persons not so affected but similar in their ability or inability to work."*

The Court of Appeals found Elliott-Larsen distinguishable from Title VII which not only outlawed discrimination on the basis of pregnancy, but also *"provided additional protection to those women affected by pregnancy."* The Sixth Circuit relied on the sec-

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MICHIGAN COURT OF APPEALS UPDATE

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ond clause of the Pregnancy Discrimination Act, which "mandates that pregnant employees shall be treated the same for all employment-related purposes as non-pregnant employees similarly situated *with respect to their ability to work." Id.* (Emphasis added). The Michigan Court of Appeals also recognized that in *Sumner v. Wayne Co.,* 94 F Supp 2d 822, 826 (ED Mich, 2000), Judge Cohn of the Eastern District held:

> Contrary to defendant's arguments, the distinction that Seely's [another employee] temporary disability was as a result of an injury sustained on the job, while Sumner's [plaintiff] was as a result of her pregnancy (presumably sustained while she was off-duty), is not material. The proper focus under the comparison prong is whether the employees are similar in their ability or inability to work, regardless of the source of the injury or illness.

The Court of Appeals noted that there was conflicting precedent in other circuits.

Unpersuaded by the federal cases, the Court of Appeals never settled the split among the federal cases and simply decided that no such protections existed under Michigan law: "Michigan's 1978 amendment is narrower in scope than the federal PDA. Thus, as previously noted, the above conflicting interpretations of the dissimilar federal statute are inapposite and not dispositive of the case at hand."

In defending its departure from Title VII, the Court stated that while it is frequently guided in its interpretation of the Michigan Civil Rights Act by federal precedent, it has always been careful to make it clear that it is not compelled to do so: "Instead, our primary obligation when interpreting Michigan law is always "to ascertain and give effect to the intent of the Legislature, . . . 'as gathered from the act itself.'" The Summary Disposition in favor of the defendant was affirmed. ■

"LET'S STEP OUTSIDE!"

Overheard at a deposition: "Wait, don't answer that! I object! This line of inquiry is totally irrelevant. You've been wasting my time all day! I instruct my client not to answer. Rule 30 (d)(1)!? Rule, schmule! Let's step outside, and I'll show you some rules. Now, do you have some relevant questions or what? We're leaving at 3:00 p.m. I don't care what your notice said, I'm leaving. I've got a tee-off - - - - er, an appointment. So get moving if you have any good questions, which I doubt. I've been in practice for 25 years and I've never met anyone as incompetent as you. And another thing . . ."

Sound familiar? Consider ICLE's half-day seminar, "Dealing With Hardball Litigators," scheduled for Thursday, December 13, 2001 in Troy, from 9:00 a.m.-12:30 p.m. For information contact ICLE toll-free at (877) 229-4350.

MERC UPDATE

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

Since the previous issue of *Lawnotes*, the Michigan Employment Relations Commission has issued 11 decisions and orders in a variety of cases. A brief summary of each of those cases follows. Of those 11 cases, six were unfair labor practice hearings, four were representation hearings and/or unit clarification hearings, and one was a duty of fair representation hearing. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations' website at www.cis.state.mi.us/ber.

Unfair Labor Practices.

Clairmount Laundry, Inc.
Case No. C00 G-138 (June 29, 2001).

On January 11, 2001, the Administrative Law Judge (ALJ) issued a decision and recommended order finding that Respondent, Clairmount Laundry, Inc., violated Section 16(6) of the Labor Relations and Mediation Act by refusing to recognize Charging Party, Chicago and Central States Joint Board, UNITE, AFL-CIO (Union), as the exclusive representative of its employees, and by refusing to meet and negotiate in good faith with the Union regarding a new contract. The ALJ found that Respondent unlawfully altered existing wages and benefits of its employees after the contract had expired but prior to reaching impasse.

On exception, the Union argued that the relief ordered by the ALJ failed to adequately remedy the unfair labor practices committed by the Employer. Specifically, the Union asserted that the remedial order should require the Employer to make both the insurance and pension funds whole for any losses that may have resulted from the Employer's termination of the insurance and pension funds contributions. Further, Union requested a broader cease and desist directive than provided by the ALJ.

The Commission agreed with the Union that the appropriate remedy required the Employer to restore the status quo and make the employees whole for losses suffered as a result of its unilateral action. Further, the order shall direct the Employer to cease and desist from offering health insurance plans without bargaining. As to the request for a broader cease and desist order, the Commission found the ALJ's directive to be adequate and required no further changes.

International Association of Theatrical and Stage Employees, Local 274, AFL-CIO
Case No. CU00 D-14 (June 22, 2001) (No Exceptions)

The Lansing Entertainment and Public Facilities Authority (Employer) filed an unfair labor practice charge against the International Association of Theatrical and Stage Employees (Union). The charge alleged that the Union violated its duty to bargain in good faith when, after reaching a tentative settlement of a contract covering the Technical Services Unit, it permitted members of the Union at large to vote on ratification of the agreement. It was the Union's usual practice after reaching a TA to obtain informal approval of the contract by members in the unit. If the unit members approve the agreement, a formal ratification vote was taken of the general membership. In this case, the Union notified the Employer that the membership had ratified the TA, excluding an article covering a new position. In the Employer's view, by allowing the Union membership at large to vote on the TA, the Union expanded the Technical Services Unit to encompass the entire membership.

The ALJ found that the Union had not failed to bargain in good faith. PERA does not require a bargaining agent to obtain employee ratification of a contract negotiated on behalf of the bargaining unit. Further, nothing in PERA prevents the Union from considering the interests of its membership as a whole. Therefore, the Union did not violate Section 10(3)(c) of PERA.

City of Detroit
Case Nos. C00 K-198, CU00 K-44 (June 12, 2001)
(No Exceptions)

Timothy Lee Lamar, an individual, filed an unfair labor practice charge against his former employer, the City of Detroit, and his bargaining agent, Amalgamated Transit Union Local 26. Lamar claimed that he was unjustly terminated while on an approved medical leave without notice. Both the Union and the Employer filed a motion to dismiss the charges.

The ALJ noted that PERA does not cover discharges which might be deemed "unfair" but rather prohibits a termination that is in fact motivated by the employee's exercise of rights protected by PERA. Lamar did not allege that his termination constituted retaliation for engaging in protected activity. Further, the charge filed against the Employer and the Union were untimely. Therefore, the charges were dismissed in their entirety.

City of Kalamazoo
Case No. C00 D-70 (June 1, 2001) (No Exceptions)

The Kalamazoo Police Officers Association filed an unfair labor practice charge against the City of Kalamazoo, alleging that it conditioned the length of disciplinary suspensions upon whether or not employees exercised their right to file grievances under the collective bargaining agreement. During settlement negotiations regarding potential discipline of members of the Union, the Employer indicated that discipline would be more severe if the parties were unable to settle with regard to an appropriate amount of suspension time. Pursuant to the settlement, the employees were required to sign a Memorandum of Understanding stating that the suspensions were non-precedent setting and non-grievable.

The ALJ found no credible evidence that the Employer threatened to double the discipline imposed if the bargaining unit members filed grievances. Rather, the ALJ concluded that the parties engaged in settlement discussions and exchanged various proposals in an attempt to agree on an appropriate level of discipline. In support of this finding, the ALJ noted that the Commission has held that statements made by parties during settlement discussions are inadmissible and have no probative value in establishing whether or not a violation of law has occurred. The ALJ opined that the use of settlement discussions to form the basis of an unfair labor practice charge would have a chilling effect on parties' efforts to settle future disputes.

Royal Oak Township
Case No. C99 G-125 (May 9, 2001) (No Exceptions)

The American Federation of State, County, and Municipal Employees, Council 25 filed an unfair labor practice charge against Royal Oak Township, alleging that it violated PERA by unilaterally reducing the wages and benefits of its firefighters and changing their status from full-time to part-time employees. The Union also claimed that the Employer failed and refused to bargain in good faith by entering into a settlement agreement that it did not intend to implement and by discriminating against employees for the purpose of discouraging labor organization.

In 1998, the Employer petitioned the Oakland County Circuit Court for a declaratory judgment to allow it to contract with the Oakland County Sheriff's Department to provide Township police services. As a result, the Union filed an unfair labor practice charge. In settlement of the ULP, the Township met with its public safety officers and encouraged them to transfer to the Oakland County Sheriff's Department. Employees who elected to remain employed by Royal Oak Township were told they could transfer to the fire department as firefighters and their pay and benefits would remain the same. Eight employees chose to remain employed by the Township. In July of 1999, the Employer notified its firefighters that their wages and benefits would be reduced and that their hours of work would also be reduced from full-time to part-time. The Union filed the current ULP, maintaining that the Employer unilaterally reduced the employees' pay and work hours and discontinued their medical insurance in violation of PERA.

Employer argued that the management rights clause granted it the right to determine whether the newly-created fire department would be staffed with part-time or full-time firefighters. Thus, the Employer maintained that the Union waived its right to bargain about this issue. The ALJ held that the contract language giving the Employer the right to determine the number and type of its personnel "cannot remotely be interpreted as clearly and unmistakably authorizing Respondent to unilaterally reduced employees' pay and work hours or to discontinue their medical insurance."

The Employer also contended that it had the inherent management right to change employment conditions that are not expressly restricted or granted in a collective bargaining agreement. The ALJ noted, however, that the Commission has distinguished between an employer's decision to lay off employees as one within the area of management control from the decision to cut back scheduled shifts or hours as a means of averting layoffs. As to the latter, no inherent management right exists.

Employer next contended that the Union failed to make a demand to bargain. The ALJ noted that no specific format was required to constitute a bargaining request and that the Employer knew that the Union, in a letter to the Employer, was requesting bargaining.

Finally, the Employer argued that no collective bargaining agreement was in effect between the parties. However, as the ALJ noted, the record established that the Employer continued to recognize the Union as the employee's bargaining agent and continued to acknowledge the existence of a contract. Therefore, the Employer violated PERA by unilaterally changing the hours of work and wages and benefits without bargaining, by refusing to bargain in good faith, and by repudiating its agreement regarding the public safety officers.

Tuscola County Medical Care Facility
Case Nos. CU00 E-21 and C00 F-110 (April 25, 2001)
(No Exceptions)

The Employer, a public nursing home facility, filed an unfair labor practice charge against the American Federation of State, County and Municipal Employees, Michigan Council 25, alleging that it violated its duty to bargain by failing to execute a collective bargaining agreement reached by the parties. The Union alleged that the agreement prepared by the Employer did not accurately reflect the agreement made at the bargaining table. The Union filed an unfair labor practice charge based on the Employer's refusal to return to the table to resolve the differences.

The ALJ found that the Union made a unilateral mistake, and thus must accept the contract offered by the Employer as ratified by both sides. If the mistake had been mutual, there would be no meeting of the minds and the Union's argument that the parties should return to the bargaining table would be correct. However,

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MERC UPDATE

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since the ALJ found that the mistake was unilateral on the part of the Union, the Employer satisfied its bargaining obligations owed to the Union.

Election Petitions

St. Clair County Intermediate School District
Case No. R00 K-145

Service Employees International Union filed a petition for a self-determination election. Union represented a bargaining unit of teacher aides employed by the St. Clair County Intermediate School District. The Union also represented a separate bargaining unit of program assistants employed by the same employer. The Union sought a self-determination election to merge the teacher aide and program assistant units. The Employer argued that the existing collective bargaining agreement covering the teacher aide unit should bar the petition.

The Commission reiterated that the contract bar rule did not apply to self-determination elections. The contract bar rule only applies where there is a question of representation. In this case, the majority status of the Union in each of the two units was not disputed. Further, it was not disputed that the two units share a community of interest. Therefore, a self-determination election was directed.

City of Grand Rapids
Case Nos. R00 J-121 and R00 J-129 (July 5, 2001)

Teamsters Local 406 filed a petition to represent a bargaining unit of civilian emergency communications supervisors (ECS). The Association of Public Administrators filed a petition seeking to accrete the position of communications manager to its supervisory bargaining unit. The Employer maintained that neither position was covered by Act 312. However, the Employer asserted that if one position is found to be Act 312 eligible, then both positions should be covered by the Act.

The Commission held that the ECSs regularly answer emergency calls and dispatch emergency personnel. Therefore, the position was covered by Act 312. The communications manager, however, did not answer overflow emergency calls. Therefore, this position was not covered by Act 312. The Commission concluded that the unit of ECSs constituted an appropriate residual unit and the communications manager can appropriately be included in the supervisory unit represented by the Association of Public Administrators. Accordingly, an election was ordered.

Wayne County
Case No. R00 H-102 (July 3, 2001)

Petitioner Union sought to represent a unit of employees which are eligible for compulsory arbitration under Act 312. Petitioner contended that severance was appropriate because the existing unit consists, in part, of employees who are not Act 312 eligible.

The incumbent Union contended that Act 312 status alone was not a sufficient basis to sever a group of employees from a longstanding, existing bargaining unit.

The Commission has held that where a unit is per se inappropriate or where an extreme divergence in community of interest is established, the existing bargaining unit may be broken up. Although Act 312 eligibility is an important and often controlling factor in determining community of interest, this policy does not require the division of a previously established and agreed-upon unit composed of both Act 312 eligible and noneligible employees. As such a unit is not per se inappropriate, petitioner did not present evidence sufficient to break up this established bargaining unit. Petition for representation was dismissed.

Unit Clarification

Jackson Community College
Case No. UC99 H-35 (July 6, 2001)

The Petitioner, the Jackson Community College Faculty Association, filed a petition seeking to add to its bargaining unit five positions represented by the Jackson Educational Support Personnel Association (ESPA). As to three of the positions, the Union argued that the job duties of the positions had substantially changed and thus unit clarification was appropriate. Two of the positions were newly created positions.

The petition for unit clarification resulted when the Employer, Jackson Community College, decided to eliminate faculty counselors in the Petitioner's bargaining unit. The Union asserted that the duties of the faculty counselors were transferred to the five positions at issue. The Employer argued that unit clarification was not appropriate because the current collective bargaining agreement between the parties barred this petition, Petitioner was attempting to disturb the parties' agreement regarding unit placement, that the duties have not significantly changed after the faculty counselor positions were eliminated, and that the five positions lack a community of interest with the Petitioner's bargaining unit.

The Commission first found that the existing contract did not bar this unit clarification petition.

Next, the Commission found that the three positions in dispute have not substantially changed in order to justify Petitioner's unit clarification petition. Although the positions at issue have additional responsibilities as a result of the elimination of the faculty counselors, the Commission found that the job duties have not significantly changed from prior to the faculty counselors' elimination.

As to the two new positions, the Commission found substantial similarities between the work performed by the two new positions and the other advisor positions in the ESPA unit. As the Employer had made a reasonable, good faith decision to place the new positions in a unit which arguably shares a community of interest, the Commission deferred to the Employer's decision. Therefore, Petitioner's request for unit clarification was denied.

Duty of Fair Representation

Eaton Rapids Education Association and Michigan Education Association
Case No. CU00 D-15 (May 10, 2001)

Charging Party, Michael Garcia, filed exceptions to the decision and recommended order of the ALJ granting summary disposition to the Union. Garcia was a probationary teacher with Eaton Rapids Public Schools. After receiving several negative performance evaluations, Garcia was notified that his employment would not be renewed. A series of grievances was filed by the Union on Garcia's behalf. Garcia filed this current charge alleging that the Union breached its duty of fair representation with respect to the manner in which it processed his grievances.

Garcia filed a number of exceptions regarding the ALJ's dismissal of the charges. The Commission noted that a Union satisfies the duty of fair representation as long as its decisions are within the range of reasonableness. Garcia cited to numerous examples of alleged unfair conduct by the Union. The Commission found each of these examples to be without merit and upheld the ALJ's decision to grant summary disposition. ■

A POWER VACUUM AT THE TOP?

George M. Mesrey and Jack Van Hoorelbeke
Clark Hill PLC

The number of NLRB members continues to dwindle as the term of Peter J. Hurtgen came to an end on August 27, 2001. Member John C. Truesdale announced his October departure. Member Dennis P. Walsh will also leave office in October if he is not reappointed. These departures will leave only Member Wilma B. Liebman, whose term does not expire until December 16, 2002. The following is an outline of significant cases decided by the NLRB during the last two months.

1. DECERTIFICATION

Overnite Transportation Co. 333 NLRB No. 166. The Board affirmed the dismissal of petitions filed by unit employees seeking elections to decertify Teamsters Local 120 and 406 because the Employer's nationwide campaign of unfair labor practices tainted the decertification petitions filed for those locations.

2. UNION COERCION

Healthcare Employees Local 399, SEIU (City of Hope National Medical Center) 333 NLRB No. 170. The Board held that the union violated Section 8(b)(1)(A) of the Act by threatening the Employer's employees that it would bargain with the Employer to have work contracted out or "outsourced."

3. ELECTION OBSERVERS

Butera Finer Foods 334 NLRB No. 11. The Board ruled that a non-employee business agent of an incumbent union acting as an observer in a decertification election was objectionable conduct warranting setting aside the election.

4. SALTING

Norman King Electric 334 NLRB No. 12. The Board held the employer had unlawfully refused to consider for employment and refused to hire four job applicants because of their union and concerted activities. The Respondent also violated the Act by maintaining a "no applications accepted" policy for the purpose of discouraging union activities.

5. UNION ACCESS

Wolgast Corporation 334 NLRB No. 31. The Board held that the employer violated the Act by interfering with a Carpenters Local 706 official's access to the jobsite pursuant to the access provision in the Union's collective-bargaining agreement.

6. EMPLOYER DISCRIMINATION

M&M Electric, Inc. 334 NLRB No. 45. The Board dismissed the complaint allegations that the employer violated the Act by refusing to call back six electricians who were selected for layoff and by instituting a new application procedure because of the Union's organizing efforts, concluding that the six employees laid off were the least productive. It was also significant that of the group, only three were union members.

7. PLANT CLOSING

Gallup, Inc. 334 NLRB No. 52. The Board held that the employer violated the Act by temporarily closing its Austin, Texas facility, because of the Union's organizing effort. The Board also found that the posting of a memorandum, informing employees that the facility was going to be temporarily closed, was an independent violation of the Act.

8. AFFILIATION OF UNIONS

Avanté at Boca Raton, Inc. and Avanté Terrace at Boca Raton, Inc., Joint Employers 334 NLRB No. 56. The Board found that the employer violated the Act by refusing to bargain with the certified Union following the affiliation between its parent organization, 1115 District Council, and the Service Employees International (SEIU) because there was substantial continuity of representation following the affiliation with the SEIU.

9. JURISDICTIONAL DISPUTE

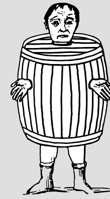
Teamsters Local 179 (USF Holland, Inc.) 334 NLRB No. 53. Jurisdictional dispute between employees of USF Holland, Inc. represented by Teamsters Local 179 and Machinists Local 701 regarding fueling and transporting vehicles between employer's terminal and garage. The Board ordered the bargaining unit work to the Teamsters.

10. BAD FAITH BARGAINING

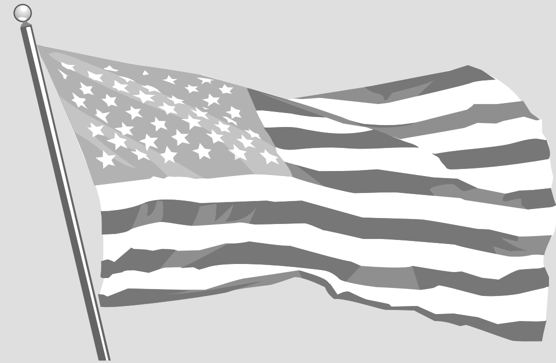
Lee Lumber and Building Material Corp. 334 NLRB No. 62. The Board reaffirmed that when an employer has unlawfully refused to recognize or bargain with an incumbent union, any employee disaffection arising during the course of the unlawful conduct will be presumed to be caused by that conduct.

11. WITHDRAWAL OF RECOGNITION

Heritage Container, Inc. 334 NLRB No. 65. The Board held that the employer violated the Act by withdrawing recognition from Teamsters Local 578 because the employer could not rely on the antiunion petition it received to withdraw recognition. The Board stated that the unfair labor practices contributed to employer's disaffection from the Union. ■



THE JOY OF LABOR LAW



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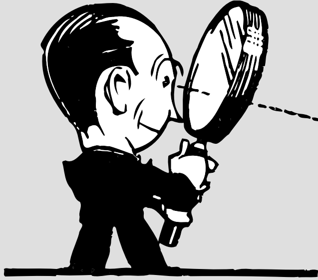
SEPTEMBER 11, 2001

John G. Adam

INSIDE *LAWNOTES*



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- Fran Stacey contemplates the use of expert witnesses in employment cases.
- Stuart Israel gives six (6) possible explanations for many lawyers' curious practice of writing numbers in both numerals and words.
- Jim Moore ruminates on his second profession, notary public.
- Adam Forman focuses on developments at the interface of cyberspace and the workplace
- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, websites to visit, the Joy of Labor Law, and more.
- Authors John G. Adam, John T. Below, Kimberly A. Clarke, Gary S. Fealk, Adam S. Forman, Stuart M. Israel, Danielle N. Mammel, George M. Mesrey, James M. Moore, Andrew M. Mudryk, Arthur R. Przybylowicz, William C. Schaub, Jr., Michael M. Shoudy, John W. Smith, Francyne B. Stacey, Jeffrey A. Steele, Daniel D. Swanson, Jack VanHoorelbeke, and more.

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