

LABOR AND EMPLOYMENT LAWNOTES



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FRAUD AND MISREPRESENTATION: ALTERNATIVE LEGAL THEORIES FOR TERMINATED EMPLOYEES

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Employees who feel they have been terminated unjustly look to a variety of sources as substantive grounds for a wrongful termination suit. The most common sources are civil rights legislation or other legislation protecting workers and contract or quasi-contract claims alleging a just-cause standard for termination. See, for example, *Koester v. City of Novi*, 458 Mich 1 (1998); *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich 579 (1980). While these claims have been and continue to be powerful tools for wronged employees, appellate courts are holding plaintiffs to higher factual and legal standards and scenarios that would once suffice to defeat a dispositive motion are frequently no longer sufficient. See *Chambers v. Trettco, Inc.*, 463 Mich 297 (2000), for a recent example. The landscape for these cases seems to be in an increasing state of flux.

Since the mid 1990's some terminated employees have turned to pleading fraud or misrepresentation in the hiring process — so called “truth-in-hiring” claims. These cases stand apart and distinct from just-cause claims. This theory allows terminated employees to recover damages even if they have not been discriminated against and were not just-cause employees. It is a powerful claim indeed. As terminated employees turn to this claim, a new body of case law, in Michigan and elsewhere, is developing in fraud and misrepresentation in the employment context. For a comprehensive and national survey see, “Fraudulent, Negligent, and Innocent Misrepresentation in the Employment Context,” 20 *Campbell L. Rev.* 1 (Winter 1997).

The traditional elements of a fraud or misrepresentation claim are well established and have been specifically adopted in the employment context. In *Clement-Rowe v. Michigan Health Care Corp.*, 212 Mich. App. 503 (1995) the Court of Appeals endorsed six elements of such a claim: (1) that defendant made a material representation; (2) that it was false; (3) that when defendant made the statement defendant knew the statement was false, or made it recklessly, without any knowledge of its truth as a positive assertion; (4) that defendant made the representation with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it, and (6) that plaintiff suffered injury. *Clement-Rowe*, 212 Mich. App. at 507, citing *Brownell v Garber*, 199 Mich. App. 519, 533; 503 NW2d 81 (1993).

Clement-Rowe provides an instructive context in which to examine this cause of action. In *Clement-Rowe* plaintiff accepted a position as a nurse with the defendant health care provider. She sold her home in Saginaw and moved to the Detroit area. A month after she was hired, plaintiff (along with more than one hundred other employees) was terminated as a result of defendant's severe financial crisis. Plaintiff, who had signed an unequivocal “at-will” statement, filed suit alleging both a *Toussaint* claim and a fraud/misrepresentation claim. The Court of Appeals upheld the trial court's dismissal of the *Toussaint* claim, holding that plaintiff had presented insufficient evidence that the at-will statement had been modified. However, in a split decision (in which Judge White dissented and would have affirmed the trial court's dismissal of the misrepresentation claim as well as the *Toussaint* claim) the Court of Appeals reversed the lower court's dismissal of the fraud/misrepresentation claim.

In *Clement-Rowe*, the defendant's personnel director told plaintiff in a pre-hire discussion that the funds for her position had already been allocated. The Court held that this statement was sufficient to constitute a material representation. As subsequent events proved, this statement was not true. The Court reasoned that such a statement was made either to assuage plaintiff's fear that the position may not be a long-term position or as an unsolicited statement to persuade plaintiff to accept the position. In either case, the statement regarding the financial security of plaintiff's position constituted a “material representation” that was in fact false at the time it was made. The court went on to reason that when the personnel director made the statement he must have either known it was false or made the statement without investigation into its truthfulness. Plaintiff submitted an affidavit indicating that she relied on the statement in accepting the position.

Clement-Rowe also addressed plaintiff's claim of “silent fraud.” This type of fraud exists where there is a duty on the part of a defendant to reveal information and the defendant fails to do so. See, for example, *Fasshi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C.*, 107 Mich. App. 509 (1981). Plaintiff in *Clement-Rowe* argued that, because defendant had represented that plaintiff's position was financially secure, defendant also had a duty to divulge that it was experiencing financial difficulties and that, in failing to do so, it intended for plaintiff to rely on the omission in accepting employment. Defendant argued that, at the time of plaintiff's hire, it was not experiencing financial hardship and that those events occurred only after plaintiff's hire. The Court held that this dispute gave rise to a genuine issue of material fact that precluded summary disposition. The court stated, 212 Mich. App. at 508-509:

Today's employment market is both tenuous and difficult. Nearly all employment is at-will. The economic well being and financial stability of a potential employer is an important factor in accepting a job offer. Consequently, an employer who succeeds in asserting its economic

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STATEMENT OF EDITORIAL POLICY

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

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health to attract qualified employees knowing the assertions are untrue may not later hide behind an at-will employment contract. Neither may it be permitted to avoid liability after omitting to disclose, when asked, known economic instability which later leads to economically based layoffs.

Clement-Rowe represents a specifically endorsed cause of action that provides plaintiffs a way to avoid the harsh consequences of an at-will employment situation. Since *Clement-Rowe*, there has not been an explosion of reported Michigan cases alleging fraud or misrepresentation by plaintiff-employees. However, there has been one case that has, in its own right, generated several opinions. The Michigan Supreme Court decision in *Hord v. ERIM*, 463 Mich 399 (2000), is the most recent and definitive statement in this area. The two earlier Court of Appeals opinions deserve some review to set the context in which *Hord* was decided.

In *Hord v. ERIM*, 228 Mich. App. 638, (1998) (*Hord I*), plaintiff interviewed for a position with defendant in late 1992. During the interview process representatives of defendant gave plaintiff a copy of their operating summary for 1991. There was no discussion regarding the operating summary, but there was conversation regarding how long it would take plaintiff to fully develop his position. The operating summary showed that the defendant had increasing revenues and was in solid financial condition. However, following the generation of the 1991 operating summary, defendant experienced a significant decline in revenue and employee cut backs. Defendant received information from its auditors throughout 1992 that its financial picture was not so rosy.

Plaintiff was hired in January 1993 and was laid off in January 1994. Plaintiff sued alleging that presenting him with the stale 1991 operating summary constituted misrepresentation and fraud. Plaintiff testified that he relied on the sound economic condition of the company, as depicted in the 1991 report, in accepting the offer of employment. Plaintiff also alleged that defendant engaged in silent fraud, that once defendant undertook to represent its financial condition it had an obligation to do so accurately, and that by providing him out-dated financial information when current information was available defendant had concealed a material matter. The case was submitted on both a misrepresentation/fraud theory and a silent fraud theory. The jury returned a verdict in favor of plaintiff, although it did not specify on which theory it relied.

In an opinion written by Judge Wahls and joined by Judge Gribbs, *Hord I* reiterated the six essential elements of a fraud claim, specifically citing, among other cases, *Clement-Rowe*. On appeal, defendant argued that the operating summary contained no false information and was clearly labeled as the summary for the year ending September 30, 1991, and that therefore there was no factual misrepresentation. The court rejected this argument 228 Mich. App. at 643-643:

Defendant's contention that it made no affirmative misrepresentations ignores the fact that the jury could have found that defendant's presentation of its 1991 operating summary to plaintiff in September 1992 was a misrep-

resentation. Defendant repeatedly argues that the 1991 operating summary was clearly labeled "For the Fiscal Year Ending September 30, 1991," and, therefore, that it could not have constituted a misrepresentation regarding defendant's financial position in 1992, and that plaintiff could not have been misled by it. The flaw in this argument is exposed by simply asking: Why did defendant give plaintiff a copy of its 1991 operating summary? Clearly, the act of giving plaintiff the operating summary constituted an endorsement of its contents and a representation that the summary was somehow a reflection of defendant's current financial strength. This was obviously a material representation, and the act of giving the operating summary to plaintiff during a job interview allowed the jury to infer that defendant intended that plaintiff act on it. In addition, there was evidence that, at the time defendant gave plaintiff the 1991 operating summary, it had more current financial information that suggested that it was in a much weaker financial position than it was in September 1991. From this evidence, the jury could have concluded that the representation regarding defendant's financial strength was false and that defendant knew that it was false when made. Finally, plaintiff testified that he relied on this representation in making his decision to accept defendant's offer of employment, and there was evidence that plaintiff suffered injury. Consequently, we find no error in the trial court's decision to deny defendant's motions for a directed verdict and for JNOV regarding plaintiff's fraudulent misrepresentation claim.

The court went on to hold that the fact that plaintiff was an at-will employee did not prevent his claim for future wage loss. The court acknowledged *Sepanske v. Bendix Corp.*, 147 Mich. App. 819 (1985), which held that where an at-will plaintiff's only claim sounds in breach of contract, only nominal damages are available, because the plaintiff has no reasonable expectation of continued employment. However, a fraud claim sounds in tort and *Hord I* declined to extend the *Sepanske* logic to non-contract situations, as to rule otherwise would insulate employers who commit fraud from any significant damages which result from their fraud.

Judge Hoekstra dissented in *Hord I*. He would have ruled that defendant had no affirmative duty to plaintiff to divulge financial difficulties. Judge Hoekstra pointed out that plaintiff never asked questions about the financial condition of the company during the lengthy negotiation process and that the mere act of providing the 1991 operating summary did not give rise to any duty to disclose. Judge Hoekstra agreed with defendant that the information it did provide was accurate and that defendant could not have committed fraud or misrepresentation if the information in the operating summary was true.

Defendant sought leave to appeal to the Michigan Supreme Court. In lieu of granting leave, the Supreme Court remanded the case to the court of appeals for consideration in light of *M & D, Inc. v. McConkey*, 231 Mich. App. 22, (1998). *M & D* is an opinion from an MCR 7.215(H) special panel on which both Judge Gribbs and Judge Wahls served. Like *Hord*, *McConkey* had a long life span in the appellate courts and produced multiple opinions. *McConkey* involved a dispute over commercial property plaintiff had purchased on an "as-is" basis and then leased to a tenant, a co-plaintiff in the case. The heart of the special panel

McConkey opinion is that, ". . . the touchstone of liability for . . . 'silent fraud' is that *some* form of representation has been made and that it was or proved to be false." 231 Mich. App. at 30 (emphasis in original). That is, mere knowledge by a defendant of some material fact does not create a duty to reveal that fact in the absence of some circumstance giving rise to that duty, such as some representation to the contrary. The *M & D* panel also held that a misrepresentation does not need to be articulated with words, but can exist where a false impression is created.

On remand (*Hord II*), Judge Gribbs, joined by Judge Murphy (who was also on the *M & D* special panel), held the outcome in *Hord* was not altered by the *M & D* decision and that plaintiff submitted sufficient evidence to establish silent fraud. Judge Gribbs noted that even in the original *M & D* opinion (before remand) Judge Young had stated that where "subsequently acquired information" renders a previously accurate representation inaccurate, a duty to disclose that information exists. 231 Mich. App. 29 (1997). *Hord II* reiterated that the jury could have reasonably inferred that defendant presented plaintiff with the 1991 summary with the intent that plaintiff rely on it and that defendant should have presented the subsequently acquired information regarding the deterioration of its financial health to plaintiff for his consideration. That not only constituted simple fraud (a misrepresentation of facts known at the time the operating summary was provided), but also silent fraud, in that defendant had a duty to disclose subsequently acquired information which ". . . clearly rendered untrue any implications from the 1991 figures." 237 Mich. App. at 97.

Again, Judge Hoekstra dissented in *Hord II* and essentially argued that if plaintiff had taken the 1991 operating summary as standing for anything other than the condition of the organization in 1991, he did so at his own peril, and defendant should not be liable for plaintiff drawing his own inferences. Had plaintiff made some additional inquiry regarding the 1992 condition of the organization, Judge Hoekstra offered, the outcome might be different. But in the absence of other inquiry or discussion, Judge Hoekstra believed that plaintiff sealed his own fate by relying on the 1991 operating summary.

Defendant in *Hord* again sought leave to appeal. On October 10, 2000, in lieu of granting leave the Supreme Court reversed the court of appeals in *Hord II* by way of a *per curiam* opinion from which Justices Kelly and Cavanagh dissented. *Hord III* essentially adopted the reasoning of Judge Hoekstra's dissent in *Hord I* and *Hord II*. The Supreme Court quoted Judge Hoekstra liberally and agreed that, because no statements in the 1991 operating summary were false, there was no fraud or misrepresentation. Turning to silent fraud, the Supreme Court held that, ". . . mere nondisclosure is insufficient. There must be circumstances that establish . . . a duty . . . to . . . disclose." 463 Mich. at 412. The Supreme Court found that no such duty existed in *Hord*. The Court found that no partial or incomplete disclosure had been made which would give rise to the duty, and plaintiff had made no inquiry regarding the information, which would also give rise to the duty.

Justice Kelly, joined by Justice Cavanagh, dissented. Her dissent was twofold. First, she thought the Court usurped the function of the jury and that sufficient evidence had been presented from the jury could rule in favor of plaintiff. Second, Justice

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Kelly cited specific testimony regarding the context in which the operating summary was presented. The excerpts established that defendant had given the operating summary to plaintiff to “show what had been the record of the company” including the financial record. 463 Mich. 416. The excerpts also established that the individual who interviewed plaintiff before his hire had been advised orally prior to meeting with plaintiff that 1992 would not be as good as 1991 and had been receiving such reports monthly. Justice Kelly also pointed out the dramatic nature of the decline in financial health. 463 Mich. 417. She accused the majority of “gloss[ing] over the context” surrounding the delivery of the report to plaintiff. The context, as she saw it, was defendant’s attempt to lure plaintiff into accepting employment. According to Justice Kelly, defendant “deliberately painted a misleading picture of the present viability of ERIM, hoping to obscure the truth . . .” (463 Mich. at 419), a situation that the *M & D* special panel seemed to specifically endorse as one giving rise to a duty to disclose. Justice Kelly argued that silent fraud had been established because defendant had an obligation to correct the misimpression it had created and, through its silence, failed to do so.

At least one federal court in Michigan has acknowledged and followed the *Clements-Rowe/Hord I & Hord II* line of reasoning. In *Willis et al v. Sony et al*, Case No. 96-CV74535-DT (U.S.D.C., E.D. Mich.) (a pre *Hort III* case), Judge Denise Page Hood relied on those cases to deny a motion for summary judgment where plaintiffs alleged that defendants misrepresented the depth of their commitment to a new business venture in an effort to lure plaintiffs into accepting employment. When that commitment evaporated shortly after plaintiffs’ hire (as “at-will” employees) and plaintiffs were laid off, they sued alleging that had they known of the tenuous nature of the corporate support for the venture, they would not have accepted employment with defendants. Judge Page Hood’s opinion denying defendants’ motions is not reported. Plaintiffs claims were tried on the fraud theories.

As courts continue to redefine and reshape the contours of employment law, the fraud/misrepresentation claim appears to be one that has a solid footing in traditional tort law with a longstanding case history of required elements. As terminated employees look to avoid the hardships associated with a wrongful termination case (see *Sepanske, supra*) and the heightened standards in civil rights claims, they may look to what induced them into accepting employment in the first place as an additional basis for liability. The prevailing employment conditions will certainly be a factor on the degree to which an employer needs to “sell itself” to secure qualified employees. These cases may lead to more sophisticated applicants who will make some inquiry into the financial health of a company before accepting employment, thus triggering the required disclosure that Judge Hoekstra and the Michigan Supreme Court have apparently endorsed. The adequacy of both the inquiry and the corresponding disclosure should prove to be fertile ground for future litigation. Counsel on both sides of the bar would do well to counsel their clients accordingly. ■

FIVE COMMON MISCONCEPTIONS REGARDING THE FAIR LABOR STANDARDS ACT

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In 1937 President Roosevelt stated that the Fair Labor Standards Act (“FLSA”) would “help those who toil in factory and on farm to obtain a fair day’s pay for a fair day’s work.”¹ While it may have achieved this purpose when Congress passed it in 1938, its regulatory scheme is counter-intuitive for the modern employer. This article will explore five of the common misconceptions employers possess regarding the FLSA.

I. OVERVIEW OF FLSA

The FLSA is the primary federal law controlling the payment of wages. It requires employers to pay employees overtime compensation for all hours worked over forty in a workweek. In most cases, this overtime compensation equates to one and one-half times the employee’s regular rate of pay. Not all employees are covered by the FLSA, however. Executive, administrative, and professional employees are exempt from the FLSA. In order to be classified as an executive, administrative or professional exempt employee, however, the employee must satisfy a salary basis test and a duties test. Most of the misconceptions regarding the FLSA stem from misunderstandings regarding these tests.

A. The Salary Basis Test

The Department of Labor (“DOL”) has promulgated a short and long test for evaluating whether an employee meets the salary basis test. The long test is extremely outdated and hardly ever used. Under the short test the employee must earn a salary of \$250.00 a week to be considered exempt.

B. The Duties Test

The executive, administrative and professional exemptions have different duties tests.

1. The Executive Exemption

To qualify as an executive, exempt from the overtime provisions of the FLSA, an employee must: (1) regularly direct the work of at least two or more other employees, and (2) have as his or her primary duty the management of the enterprise, or of a recognized department or subdivision of the enterprise.

2. Administrative Exemption

To qualify as an administrative employee, exempt from the overtime provisions of the FLSA, an employee must: (1) have as his or her primary duty the performance of office or non-manual work directly related to management policies or general business operations of his or her employer or his or her employer’s customers; and (2) exercise discretion and independent judgment with regard to these duties.

3. Professional Exemptions

To qualify as a professional employee, exempt from the overtime provisions of the FLSA, an employee must primarily perform “work requiring knowledge of an advanced type . . . acquired by

a prolonged course of specialized intellectual instruction and study," or work that is "original and creative in character in a recognized field of artistic endeavor."²

II. FIVE COMMON MISCONCEPTIONS

A. Misconception # 1: Highly Compensated Employees are Exempt

This misconception is best illustrated by example. Jane Doe is an accountant at a local hospital. She earns a salary of \$50,000 per year. Her duties generally include: preparing financial statements and supporting schedules, analyzing financial statements and accounts, preparing tax returns, preparing journal entries, maintaining the general ledger, preparing audit reports or schedules for auditors and conducting inventories. She is one of four accountants working for the hospital in this capacity, and therefore holds a job of relative importance to her employer.

Despite the fact that Jane earns almost twice as much as the median income in the United States, due to the duties test for administrative and professional employees she could be considered non-exempt. Specifically, Jane could argue that due to technology, all she does, in effect, is tabulate data. She could supplement this argument by stating that whenever judgment and discretion are required in her job, she defers to her supervisor. Basically, Jane could denigrate her duties to such a point that a court would find her entitled to time and one half for all hours worked in excess of 40.

Thus, an assumption by Jane's employer — that as Jane is paid on a salary basis and is relatively highly compensated, she is exempt — would be wrong. Essentially, Jane would be considered in the same category as "those who toil in factory and on farm." Although this may seem absurd to most employers, it is a reality that more and more employers in today's world are forced to face. Indeed, with technological advances, more and more employees are exercising less discretion and judgment and deferring to computers. Despite the fact that these employees may earn large salaries and as Jane did, hold jobs that are important to their employers, they could be considered non-exempt. This illustrates that the outdated exemptions of the 1930s are simply counter-intuitive.

B. Misconception #2: Paying an Employee on a Salary Basis Satisfies the Salary Basis Rule

The second misconception is the idea that simply paying an employee on a salary basis satisfies the salary basis rule. While this seems logical, it is not true. There are a number of minor technicalities regarding employer deductions from employee's pay that may ultimately determine whether the employee is paid on a salary basis. In particular, an employer may not:

1. Make deductions from an exempt employee's salary for absences occasioned by the employer or business requirements;
2. Make deductions from an exempt employee's salary for absences due to personal reasons, other than sickness, of a less than a full day;
3. Make deductions from an exempt employee's salary for absences of a day or longer for reasons of illness or disability unless they are made pursuant to a bona fide sick leave plan;

4. Make deductions from an exempt employee's salary for absences caused by jury duty, attendance as a witness, or temporary military leave (the employee's salary may be offset by the amount of fees received by the employee for these purposes);
5. Make deductions from an exempt employee's salary for work rule violations unless the infractions are for violations of safety rules of "major significance," such as smoking in an explosive factory.

Notably, the regulations provide that the employer that inadvertently makes one of these deductions will not lose the exemption if the employer reimburses the employee and promises future compliance. However, this "window of correction" does not apply if the employer has a policy or rule in effect that could subject an employee to any of these deductions.

So, going back to Jane Doe, if her employer had a policy permitting deductions from her salary for partial workday absences, she could lose her exemption even if she otherwise clearly fit within an exemption and even if the policy was never used and no deductions were actually made. In addition, the employer would have to pay overtime to all employees in classifications subject to the policy. Indeed, in one case an employer had to pay almost one million dollars in retroactive overtime due to such a policy.³

In 1997, the Supreme Court held that the mere possibility of an impermissible deduction is not enough to destroy adherence to the salary basis requirement. The Court stated there must be a "reasonable likelihood" that the deduction will be made.⁴ What exactly constitutes a "reasonable likelihood," however, has yet to be determined.

C. Misconception #3: An Employee who Spends Less than Fifty Percent of His or Her Time Doing Exempt Work is Non-Exempt

As employers know, the FLSA regulations state that for an employee to be considered exempt, his or her primary duties must consist of the duties required by his or her particular exemption. For example, an exempt administrative employee's primary duties must be the performance of office or nonmanual work directly related to the business operations of the employer. In satisfying this test most employers equate the word "primary" with fifty percent or more.

However, an employee can spend less than fifty percent of his or her time doing exempt work and still be considered exempt. The regulations outline a number of alternative factors that can be evaluated to determine if an employee is exempt even if that employee spends less than fifty percent of his or her time doing exempt work. These factors include: (1) the amount of time spent performing exempt duties; (2) the relative importance of the exempt duties as compared with other types of duties; (3) the frequency with which the employee exercises discretionary powers; (4) the employee's relative freedom from supervision; and (5) the relationship between the employee's salary and the wages paid other employees for non-exempt work.⁵ This is one misconception that works in the employer's benefit.

D. Misconception #4: The Administrative Exemption is the "Catch-All" Exemption

Most employers believe that employees who perform office duties, other than basic clerical duties, are exempt. However, this perception ignores the fact that the office duties performed by the

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exempt administrative employee must directly relate to the general business operations of the employer or its customers. Whether office duties relate to the general business operations of the employer or its customers is an issue that has been litigated over and over again.

A good example is the Fifth Circuit's decision in *Dalheim v KDFW-TV*. In *Dalheim*, producers, directors and editors assembled the news portion of the newscast for KDFW-TV. They determined the content of the newscast, how much time to allocate to each story, and the sequence of stories and commercial breaks. Despite the fact that these employees received relatively high salaries and clearly had jobs of great importance to KDFM, the district court found that these employees were not administrative employees exempt from the overtime provisions of the FLSA. The Fifth Circuit agreed, stating that these employees were non-exempt because their primary duty was the *production* rather than the *administration* of business operations.⁶

The reasoning in *Dalheim* again illustrates the outdated nature of the FLSA. While this analysis may have been appropriate in the 1930s to protect those who "toil in [the] factory," it clearly does a disservice to most of today's employers. Indeed, in the 1930s the employees who worked in the factory were the employees who actually *produced* the goods. In addition, these were the employees in need of protection from long overtime hours. However, in today's world, the employees who actually *produce* goods under the *Dalheim* analysis may be white-collar employees who clearly were not contemplated as needing protection in the 1930s. Thus, it is risky for employers to classify individuals whose jobs are clearly white-collar as administrative employees exempt from the provisions of the FLSA. This "catch-all" classification can lead to lengthy and expensive litigation.

E. Misconception #5: An Administrative Employee Whose Job Requires Great Skill and Knowledge is Exempt

To be considered exempt, an administrative employee must exercise judgment and discretion. These words – judgment and discretion – have generated the most difficulties in determining whether an employee is exempt or non-exempt. "In general, the exercise of discretion and independent judgment involves the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered."⁷ Notably, "[t]he fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment."⁸ Furthermore, judgment and independent discretion must be exercised with respect to matters of consequence.⁹

The most difficulty in determining whether an employee exercises judgment and discretion stems from the difference between evaluating possible courses of conduct and using skill in the performance of one's job. For example, Jane Doe uses her skills as an accountant to prepare and analyze financial statements, tax returns, variance analyses and audit reports. Despite this skill, however, Jane will be considered non-exempt if she can illustrate that she does not compare and evaluate possible courses of conduct. To make this argument, Jane can state that she does not make inde-

pendent choices with respect to matters of significance, but rather defers to her supervisor to make these calls. If a judge or jury accepts this argument, Jane will be considered non-exempt despite the fact that her job requires great skill and knowledge.

CONCLUSION

The five misconceptions discussed illustrate that despite the fact that the FLSA has been around for a long time, it is not fully understood by employers. This is for good reason, however. Most of the requirements and regulations are simply outdated. Sadly, there are many more misconceptions, beyond these five, which support this contention. Until Congress enacts a comprehensive revision of the Act, however, these misconceptions will persist and employers will again and again risk litigation with the classification of each and every white-collar employee as exempt or non-exempt.

— END NOTES —

⁶81 Cong. Rec. 4983 (daily ed. May 24, 1937), S. Rep. No. 75-884, 75th Cong., 2d Sess., at (1937) (message of President Franklin Delano Roosevelt regarding S. 2475).

⁷See 29 U.S.C. § 541.3.

⁸See *Malcolm Pirmie, Inc v Martin*, 949 F2d 611 (2d Cir 1991), cert denied, 113 S Ct 298 (1992).

⁹See *Auer v Robbins*, 519 US 452 (1997).

¹⁰See 29 CFR § 541.103.

¹¹See *Dalheim v KDFW-TV*, 918 F2d 1220 (5th Cir 1990).

¹²See 29 CFR § 541.207(a).

¹³See 29 CFR § 541.207(e).

¹⁴See 29 CFR § 541.207(d)(1). ■

NLRB NEWS

News: business groups endorse Arthur Rosenfeld for NLRB general counsel in a letter to the White House. (*Wall Street Journal*, 2/13/01). Follow up: The White House nominates Rosenfeld to be the next General Counsel. (*Wall Street Journal*, 5/29/01). Looks like letters make a difference.

Rosenfeld was the Republican counsel on the Senate Committee on Health, Education, Labor and Pension, chaired by Vermont's Senator Jeffords. Rosenfeld was confirmed as NLRB General Counsel in late May.

Speaking of NLRB changes, Board member and recently deposed chairman John Truesdale, true to his pledge to resign to let a new president appoint a member, submitted his resignation to the president on May 24 to "be effective upon confirmation, or recess appointment pending confirmation, of my successor, or on October 1, 2001, whichever occurs sooner." On May 17, Member Peter Hurtgen was named chairman to succeed Truesdale. A president's designation of a Board Member as Chairman is not subject to Senate confirmation.

Business suffered a split decision in the NLRB supervisory issue case at the Supreme Court, arising out of the Sixth Circuit. *NLRB v. Kentucky River Community Care, Inc.*, Case No. 99-1815 (May 29, 2001). The Court, in an opinion by Justice Scalia, held that the Board correctly placed the burden of proving supervisory exemption on the party asserting it. But in a 5/4 *Bush v. Gore* alignment, the majority ruled that Board misinterpreted the "independent judgment" test for determining supervisory status and refused to certify the union's election victory. In short, another election victory snatched away by the Court, 5/4.

John G. Adam

DECLARATIONS, SI! AFFIDAVITS, NO!

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

Lydia Jefferson, my legal secretary, is no longer a notary public. After years of service as a notary, she let her "commission" lapse. I haven't asked why. I'm afraid to hear the answer. It may be passive aggression. It may be the hard years of affiants asking her to notarize their signatures without showing their driver's licenses or passports, expecting her to confirm their identities on faith. It may be she forgot to renew her commission.

Anyway, I've had to adjust to professional life with a legal secretary who is not a notary public. It hasn't been all that difficult.

When I really need a notary to sign and seal, I ask another secretary in the office, one of those who keep their commissions current. It has been interesting. You never know when you'll get a notary commissioned in Wayne County who is "acting" in Oakland County. I don't think "acting" has some metaphysical meaning — denoting, for example, the spiritual difference between "acting" like a notary and actually "being" a notary.



"Should I declare, certify, verify, or state?"

This "acting" thing may have some legal significance, however. There are statutes somewhere that say what notaries are empowered to do, and probably say when it's okay for a notary commissioned in one county to "act" in another. I know that notaries have to take some kind of oath before they can exercise notary powers and it probably covers "acting." I don't know what the notary oath says. It may be a secret oath. You

never see it framed and hung on the wall, the way you see the Lawyer's Oath hanging next to bar admission certificates. I don't know whether there is a notary oath-taking ceremony involving candles or cutting a thumb or things like that. These are more questions I've never asked.

It has been easy to get by in federal court without a legal secretary who is a notary. Notaries are the buggy whip manufacturers of the federal system. Notaries have been rendered obsolete by Congress. If you're interested in the future of the notary industry, look at 28 U.S.C. § 1746 (1976). Under Section 1746, pretty much whatever a notarized affidavit can do, an unsworn declaration can do just as well.

Whenever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), . . .

Stick with it; the statute is about to get to the point.

. . . such matter may, *with like force and effect*, be supported, evidenced, established, or proved by the *unsworn declaration, certificate, verification or statement, in writing* of such person which is subscribed by him, as true under the penalty of perjury, and dated, in substantially the following form . . . (emphasis added).

The statute goes on to provide two forms for complying with the "subscribed by" requirement. One form is for use "within the United States," the other is for use "without the United States." The "within" form reads: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct." That's it. The witness acknowledges the perjury penalty and forgets about notaries.

And this unsworn testimony can be used just like an affidavit ("with like force or effect") to support, evidence, establish or prove "a matter."

Think about this: not only are notaries rendered unnecessary, but "subscribers" (i.e., witnesses) have a whole array of choices that can be tailored to their moods and preferences. They can support summary judgment motions with declarations or certificates

or verifications or statements, all without swearing or affirming, just by signing on to that perjury penalty thing.



Since Lydia retired as an active notary, I've pretty much stuck to declarations, but I may soon go for statements, if that's okay with the witnesses. Or, I may mix and match, filing a declaration with the brief and a supplemental certificate with the reply brief. Or I may have one witness declare and another state and another certify or verify. Using Section 1746, applying Rule 56(e) can be fun. ■

WRITER'S BLOCK?



You know you've been feeling a need to write a feature article for *Lawnnotes*. 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 supply 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 *Lawnnotes* 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.

THEODORE SACHS, MICHIGAN LABOR LAWYER (1928-2001)

With the passing of Theodore Sachs, a Michigan labor lawyer, in March, one is reminded of the opening scene of *Chariots of Fire* where the remaining members of Britain's 1920's Olympic gold medal winning track team gathered in memory of their team members who had passed and the glory that they brought to Britain. Theodore Sachs brought the gold medal to the Employment and Labor Bar of Michigan many times in his lifetime. He made us all proud to be labor lawyers, as he was a shining role model.

A successful lawyer is a lawyer who, in the pursuit of justice, makes a difference in that he or she made this world a better place in which to live. This is a perfect definition of Theodore Sachs. He brought justice to labor management relations and to our political system.

Upon being graduated from the University of Michigan Law School first in his class and editor in chief of the Michigan Law Review, Theodore Sachs made the representation of the labor movement his career choice.

Look at the record he made — many individual employees — in the courts — before arbitrators — and before state and federal agencies — received passionate, scholarly, vigorous representation producing extraordinary results. And he did change the law.

In 1959, less than half of the people of Michigan had 24 Senators representing them in the State Senate while the remainder had only 12. One Senator represented 50,000 people, another 656,000 people. As a result, this misapportionment of the State Senate, at the request of August Scholle, then President of the Michigan AFL-CIO, Theodore Sachs, then age 31, conceived the idea of a *writ of mandamus* before the Supreme Court of Michigan to force reapportionment based upon the Fourteenth Amendment. The Supreme court, by a 5-3 vote, turned down the request, though there was vigorous dissent by Justices Thomas M. Kavanaugh and Talbot Smith. Theodore Sachs took the matter to the U.S. Supreme Court.

At about the same time, the Court was considering *Baker v. Carr*; the Supreme Court remanded *Scholle v. Hare*, as the Michigan case was known, to the Michigan Supreme Court to rule consistent with *Baker v. Carr*; one person, one vote. And, indeed, based on Theodore Sachs' efforts, the Court did, with Justice Thomas M. Kavanaugh leading the way.

Two years later, the Supreme Court decided in *Reynolds v. Sims* that there was a constitutional basis for reapportionment, refused to grant the stay in the Michigan case, and remanded it back to the Michigan Court where the Court again declared the recently enacted provisions of the Michigan Constitution contrary to the Fourteenth Amendment. As a result, the State Senate was apportioned with people meaning more than trees.

This all happened in 1964. To labor, this meant that by 1965 the Legislature had passed the Michigan Public Employment Relations Act, bringing dignity to the working men and women of the public sector. By 1969, the Michigan Legislature as reconstituted passed Public Act 312 of 1969 providing for compulsory arbitration. As a result, our fire fighters and police have received a working wage among the highest in the country. Theodore Sachs drafted Act 312.

Later, Theodore Sachs successfully argued before the United States Supreme Court *Abood v. The Detroit Federation of Teachers*, establishing the principle that those who did not want to join the union, but were willing to accept the benefits of a union contract, had the responsibility to pay their share in obtaining and administering a contract. But that is not all that happened in *Abood*. There is a footnote to the case. Theodore Sachs filed a concise and erudite brief. His opponent filed a brief of over 200 pages that really said nothing. During oral argument, Chief Justice Warren Berger leaned over to one of his colleagues and could be heard saying, "Is this the case where we decided that we would change the court rules to limit the number of pages in a brief?" Theodore Sachs' brief was an example of brevity, and the Court did change the rules.

More recently, Theodore Sachs successfully argued for a change in workers' compensation law in *General Motors v. Romein*, in a remarkable result.

Theodore Sachs remembered his profession. He served as Chairman of the Labor Law Section and numerous committees of the State Bar. By one count, he had given over 100 professional lectures across the country, from coast to coast — at the University of Michigan, Harvard, Boston University, Temple University, University of Illinois, University of Arkansas, Catholic University in Washington, in San Diego, and at Tokyo Law School in Tokyo, Japan. He has written numerous articles in bar journals and law reviews. For a number of years, he wrote the annual survey of Michigan labor law for the Wayne Law Review. We went to those articles to keep up.

Those who practiced with or against Theodore Sachs have only fond memories of the experience. His example required the very best response. He was on time in court. His arguments were creative. His briefs were concise, erudite and frustrating because, frequently, he cited cases that had only been decided the day before. But no matter how vigorously Theodore Sachs argued in court, before an arbitrator, or before an agency, he was always cordial and congenial with his colleagues at the Bar, both before and after the arguments.

Theodore Sachs believed in integrity. One did not have to write confirming letters to Theodore Sachs. His word was his bond. Theodore Sachs demanded the best of himself and he inspired those who practiced with him or against him to do their best. Is there any wonder that the Labor and Employment Section in 1997 awarded Theodore Sachs its first Distinguished Service Award?

On a personal side, Theodore Sachs' long marriage to Joan made a perfect love story. And at his funeral, the eulogy from his son, Jeffrey Sachs, was extraordinary — full of love, telling a story of a father who cared about his children, Jeffrey and Andrea, and his grandchildren. Despite a busy practice, he always had time for them and to inspire them to do their best.

Theodore Sachs made a difference. He won the gold medal many times — not for himself, but for his clients, his brethren at the Bar, for justice, and for his family.

Back to *Chariots of Fire*. The five fire fighters at the Southfield Fire Station near the funeral home from which Ted's funeral originated were the teammates reminiscing. As the hearse went by, these fire fighters in full uniform stood at attention, as if on the Olympian podium, saying goodbye to a lawyer who made a difference in their life.

Goodbye, Ted. Your example will continue to inspire generation after generation of Michigan lawyers whenever the discussion is about great lawyers and human beings.

George T. Roumell, Jr.

APPELLATE REVIEW OF MERC DECISIONS JANUARY 2000 – MAY 2001

Roy L. Roulhac,
Administrative Law Judge
Michigan Employment Relations Commission

Duty to Provide Information — Internal Affairs Files — Freedom of Information and Employee Right to Know Acts

Kent County Deputy Sheriffs Ass'n v. Kent County Sheriff and Kent County, 463 Mich. App. 353 (September 19, 2000). In an earlier proceeding between the same parties, 1991 MERC Lab Op 374, the Commission held that the employer's internal investigative reports fell within a confidential information exception that did not have to be disclosed to the union because their release would destroy or diminish the employer's ability to conduct internal affairs investigations. The instant dispute involves the union's attempt to obtain internal affairs files and witness statements to use in arbitrating grievances filed on behalf of two guards who were disciplined in 1995 and 1996. Rather than filing an unfair labor practice charge under PERA to compel the employer to release its internal investigation reports, the union filed a lawsuit in circuit court under the Freedom of Information (FOI) and the Employee Right to Know (ERK) Acts. The trial court's grant of the union's summary judgment motion regarding its FOIA claim was overturned by the Court of Appeals, 238 Mich. App. 310 (1999).

The Supreme Court affirmed, but disagreed with the Court of Appeals' finding that the circuit court lacked jurisdiction because a public sector labor union's FOI request created an unfair labor practice issue that falls with MERC's exclusive jurisdiction and PERS's dominance in the labor relations field precluded the union's FOI action. The Supreme Court observed that "it would be anomalous indeed if the effect of the PERA were that a union could not obtain public information that was available to all other citizens." The Court, however, agreed that internal investigation records of a law enforcement agency can be exempted from disclosure under the FOIA, MCL 15.243(1); MSA 4.1801(13)(1), and that the employer sufficiently established that public interest favored non-disclosure. The confidentiality of the internal investigation reports was justified on the following grounds: (1) internal investigations are inherently difficult because employees are reluctant to give statements about the actions of fellow employees; (2) if their statements would be a matter of public knowledge they might refuse to give any statements at all or be less than totally forthcoming and candid; (3) disclosure could be detrimental to some employees; and (4) public disclosure of records relating to internal investigations into possible employee misconduct would destroy or severely diminish the sheriff departments' ability to effectively conduct such investigations.

Duty to Bargain — Subjects of Bargaining

Grand Rapids Community College Faculty Ass'n v. Grand Rapids Community College, 239 Mich. App. 686 (February 11, 2000). In dismissing an unfair labor practice charge alleging a violation of Section (10)(1)(e) of PERA, both the Administrative Law

Judge and MERC found that Grand Rapids Community College's decision to implement a cap on bargaining unit faculty members' total teaching hours involved overtime, a permissive, rather than mandatory subject of bargaining. Overload teaching refers to hours voluntarily assumed by a faculty member during a given semester in addition to his or her normal teaching load. Under a bargained-for allocation system tied to seniority and full-time status, faculty members were allowed to assume an unlimited number of available overload hours. This allocation resulted in some members assuming in excess of thirty total teaching hours in a semester. In 1995, the employer capped total teaching hours to thirty hours per semester, and for the fall 1995 and spring 1996 semesters, the employer imposed a twenty-nine hour cap. The administrative law judge and MERC found no error in the employer's action. On exceptions, while conceding that the total aggregate number of overload hours to be offered each semester was an issue of economic control within the employer's purview, and thus a permissive subject of bargaining, the union argued that the decision to impose individual restrictions on total teaching hours, affecting the assignment of overload hours, related not to the availability of total overtime, but instead to the *process of distribution* of overtime.

The Court, while finding support in the record for MERC's conclusion that overload hours are in the nature for purposes of the PERA, observed that the application of a general rule that any and all issues related to overtime, except overtime pay rates, are permissive subjects of bargaining, failed to account for the complexity of the precise question presented. After considering the unique circumstances presented by the use of "overtime" in a collegiate teaching setting, the Court agreed with the union and concluded that because the employer's decision directly impacted application of a bargained-for allocation process by which total available overload hours were distributed, the employer's imposition of a cap on the number of total teaching hours bargaining unit faculty members can accept presented a mandatory subject of bargaining. The Court reversed and remanded the case to MERC to consider additional defenses raised by the employer to the unfair labor practice charge which were not reached since the issue of bargaining status had been found to be dispositive. The Commission's decision is reported at 1998 MERC Lab Op 543.

Administrative Procedures — Res Judicata

Oyo E. Ekpe v. Detroit Board of Education and Teamsters Local 214, Docket No. 209651, March 7, 2000, (unpublished). After Ekpe was discharged from his position as a mechanic, the union filed a grievance that proceeded to arbitration. Ekpe's discharge was upheld. Ekpe then filed a charge with MERC claiming that the union breached its duty of fair representation in handling his grievance. After a hearing, but before a decision was rendered, Ekpe wrote a letter to the administrative law judge stating that he was "dropping the case without prejudice." MERC's director notified the parties that the withdrawal request had been approved and the matter was closed. In another letter responding to the union's request for clarification, the director stated that "both parties had a full opportunity to secure a decision from the commission, which

(Continued on page 10)

APPELLATE REVIEW OF MERC DECISIONS JANUARY 2000 – MAY 2001

(Continued from page 9)

opportunity was waived by the withdrawal. Accordingly, although the withdrawal letter used the term ‘without prejudice’ the Commission would consider the matter closed.”

Ekpe then brought an action in circuit court against the union and the employer. The trial court granted the union’s request for summary judgment for Ekpe’s failure to serve process. It also dismissed the case against the employer on the ground that the withdrawal of the duty of fair representation charge against the union was “with prejudice” and, therefore, Ekpe would not be able to make the requisite showing of a breach of the union’s duty of fair representation in his case against the employer for breach of the collective bargaining agreement. The Court of Appeals upheld summary judgment for the union for Ekpe’s failure to serve process, but reversed the trial court’s dismissal of the case against the employer. First, it observed that although Ekpe would be required to prove that the union’s representation of him was unfair in his case against the employer, the union was not a necessary party to that case. The Court found that *res judicata* — a prior decision on the merits between the same parties or their privies — should not apply to bar the civil court action because Ekpe’s MERC action was not against the employer, and the parties, therefore, were not the same. The Court of Appeals disagreed with the trial court’s conclusion that MERC Rule 54(2), which provides for the withdrawal of charges before a final order is issued and upon approval by the administrative law judge, subject to review by the Commission, did not apply. The trial court had reasoned that Ekpe’s claim of unfair representation against the union was not a claim or an unfair labor practice.

Moreover, the Court found that the letter from MERC’s director stating that the dismissal was “final” and that there would be no determination by the MERC of the validity of Ekpe’s claim of unfair representation was not “adjudicatory in nature” because it was not an order nor was it signed by a MERC administrative law judge. The Court also rejected the employer’s alternative argument that dismissal was warranted because the employee’s discharge was upheld after binding arbitration which was *res judicata* to the present action. The Court, however, found that the arbitrator’s decision for the employer would not be grounds to grant summary disposition because an exception to the rule of binding arbitration is created if the contractual process has been seriously flawed by the union’s breach of its duty to fairly represent its members. The case against the employer was remanded to the circuit court for further proceeding.

Rules of Evidence — Burden of Proof

Grand Rapids Fire Fighters, Local 366, IAFF v. City of Grand Rapids Fire Department, Docket No. 126389, September 1, 2000 (unpublished). MERC affirmed the administrative law judge’s dismissal of a March 1997 unfair labor practice charge that alleged a violation of Section 10(1)(c) for the employer’s failure to promote bargaining unit member Frank Verburg to captain. The

administrative law judge relied, in part, on *County of Tuscola*, 1990 MERC Lab Op 815, where the Commission found no anti-union motivation in a denial of promotion when the parties alleged to have engaged in discrimination were members of the same union as the party allegedly discriminated against. According to the union, by relying on *Tuscola*, the administrative law judge raised the standard for proving anti-union animus as evidenced by her statement that it would be “extremely difficult if not impossible” to do. The union also claimed that because the administrative law judge considered the fact that supervisory and non-supervisory personnel are members of the same bargaining unit, an unfair, enhanced burden has been placed on non-supervisory employees attempting to show discrimination based on anti-union animus. Generally, supervisory public employees are not included in the same bargaining unit as non-supervisory personnel. However, under PERA, MCL 423.213; MSA 17.455(13), fire department supervisory and non-supervisors are placed in the same bargaining unit.

Contrary to the union’s assertions, the Court found nothing in the law, beyond the general considerations set forth in the Michigan Administrative Procedures Act (APA), MCL 24.275; MS 3.560(175), that made a distinction as to the weight to be given any piece of evidence, or limit the evidence that may be considered, even in a hearing concerning firefighters. Thus, the Court concluded that MERC properly considered the supervisors’ union membership in assessing the union’s claim of discrimination based on anti-union animus since “reasonably prudent men” would “commonly rel[y] upon” this type of evidence in determining this question. The Court also rejected the union’s assertion that MERC’s decision was not supported by competent, material and substantial evidence on the record. Noting that Verburg was an aggressive and tenacious union president who had participated in several union related activities that involved strong disagreements between Verburg and several supervisors, including the fire chief, who took part in the promotional process, the Court found nothing, except pure speculation, that connected disagreements that occurred with the motivation behind the promotional decision. The Commission’s decision and order is reported at 1998 MERC Lab Op 703.

Discriminatory Discharge — Failure to State a Claim — Failure to Raise Issues Before MERC

Knubbe v. Detroit Board of Education and Detroit Federation of Teachers, Docket No. 215333, February 16, 2001 (unpublished). The Court upheld MERC’s dismissal of unfair labor practice charges filed by Knubbe, a tenured teacher, that contended the employer improperly terminated her employment and the union breached its duty of fair representation by refusing to pursue a grievance on her behalf. The Court found that although the charges alleged that the charging party was dismissed out of retaliation, her factual allegations did not establish a nexus between her exercise of rights protected by PERA and the unfair labor practices. Moreover, the Court observed Charging party failed to take advantage of an opportunity to amend her charges to further explain her conclusory allegations. Therefore, the Court agreed with MERC’s finding that Knubbe failed to state a claim upon which relief could be granted under PERA. The Court also concluded that none of the other arguments regarding the conduct of the hearing referee, the MERC panel and clerk, attorneys, and parties were raised or con-

sidered below and were considered to be waived for appellate review. Charging Party also failed to cite to the record to factually support her allegations and failed to cite any authorities to support her position.

Duty to Bargain — Alter Ego/Joint Employer Status — Unlawful Threats

St. Clair County ISD and Academy for Plastics Manufacturing Technology v. St. Clair County Education Association, 2001 Mich. App. LEXIS 81, May 2, 2001, (published). The Court affirmed MERC's finding that the school district violated the PERA by interfering with a school nurse's rights to join the union and to seek union assistance for a salary increase. The Court concluded that although the supervisor did not expressly state that the district would discharge the employee if she joined the union, the supervisor's meaning was clear in conveying to the employee the message that either she could stop her effort to join the bargaining unit and to increase her salary, or she could lose her job. The Court briefly commented on the rocky development of labor unions from their beginning "as a criminal conspiracy" to a familiar cultural institution and observed that "[W]hile this case may not present the most egregious form of coercion, it nevertheless demonstrates how vigilant the law must be."

The Court also affirmed the Commission finding that the Academy was not the alter ego of the school district or a joint employer and neither the school district nor the Academy was required to bargain with the union on behalf of bargaining unit member who was unilaterally removed from the unit and hired by the Academy. Under the Revised School Code and the contract between the school district and the academy, the academy had the ultimate authority to hire, fire, discipline its employees, and determine their wages, benefits, and work schedules. Although the school district had extensive oversight responsibilities, the court agreed with Commission that it did not exercise independent control over the Academy's employees on a daily basis and to such a pervasive extent that it could reasonably be considered their employer.

The Court also rejected the union's argument that the school district and the Academy should be considered joint employers because PERA is the primary vehicle for defining employees' rights to organize and the public school academies legislation in the Revised School Code conflicts with PERA. According to the Court, the union did not point to any explicit provision in the RSC that allegedly conflicted with PERA and failed to recognize that even with the supervisory role the school district retained, it gave up a significant amount of control and authority by transferring its metal machine program.

Finally, the Court found that the commission did not abuse its discretion by denying the union's request to reopen the record to introduce evidence that the ISD moved its electromechanic/hydraulics program to the Academy in August 1998. The Court observed that although the union was unable to present the evidence at the original hearing because the event had not occurred, reopening the record is discretionary. The evidence would not be enough to prove that the ISD and the Academy were joint employers, and, in turn, have any effect on the administrative proceeding. ■

MICHIGAN SUPREME COURT UPDATE

Kurt Graham

Varnum, Riddering, Schmidt & Howlett, LLP

Sales Representatives' Commission Act Applies Prospectively Only

In *Lynch & Co. v. Flex Technologies, Inc.*, 624 NW2d 180 (2001), the Supreme Court, per Justice Young, held that the Sales Representatives' Commissions Act (SRCA), MCL 600.2961, applies prospectively only. In doing so, the Court reemphasized the strong presumption against retroactive application of statutes absent a clear and contrary expression by the legislature. In this case, the Court found no clear legislative intent that the SRCA should be applied retroactively because: (1) the SRCA includes no express language regarding retroactivity; and (2) the express statutory language only provides for liability when a principal "fails to comply with [subsection 5]." See MCL 600.2961(5). Since the SRCA did not exist when plaintiff's claim arose, the Court stated it was impossible for defendants to comply with the act's requirements.

The Court's decision reversed in part the Court of Appeals' decision and overruled *Flynn v. Flint Coatings, Inc.*, 230 Mich. App. 633 (1998), in which the Court of Appeals held that the SRCA applied retroactively.

Michigan Persons With Disabilities Civil Rights Act Does Not Protect "Future" Disabilities

In *Michalski v. Bar-Levav*, 2001 WL 438991 (2001), a secretary diagnosed with multiple sclerosis brought suit against her employer alleging that he regarded her as disabled in violation of subsection (iii) of the Michigan Persons With Disabilities Civil Rights Act, MCL 37.1103(d)(i)(A)(iii). The Supreme Court, per Justice Weaver, stated that when a plaintiff proceeds under a theory of discrimination based on having an "actual" determinable physical or mental characteristic, or under a theory of having been "regarded as" having a determinable physical or mental characteristic, it will evaluate the physical or mental characteristic at issue either: (1) as it actually existed at the time of the plaintiff's employment or (2) as it was perceived at the time of the plaintiff's employment. In this case, plaintiff failed to produce any evidence relating to whether defendant regarded her as having a physical or mental characteristic that substantially limited a major life activity at the time she was employed. Instead, plaintiff's evidence "at most" showed that her employer believed her multiple sclerosis might substantially limit her major life activities in the future. As a result, the Supreme Court granted summary disposition for the employer and remanded the case back to the Court of Appeals for further consideration of plaintiff's theory of actual handicap. ■



VIEW FROM THE CHAIR

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

Laws to protect persons with disabilities from employment discrimination were heralded with blaring trumpets when passed by Congress and the Michigan Legislature. Now those same laws, through judicial interpretation, have become nearly impotent in protecting the disabled. What has happened to the American with Disabilities Act (ADA) and the Michigan Persons with Disabilities Civil Rights Act (MPDCRA) is an important lesson in how judicial interpretations of a statute, which individually may be arguable, collectively contravene legislative intent.

When the ADA was first passed, disability groups throughout the country hailed it as a means of eliminating discrimination against the disabled based either upon disabilities which did not affect the individual's ability to perform the job or upon unrealistic fears or concerns of the employer in allowing a person with a disability to perform a particular job. While there was considerably less publicity when the Michigan Legislature passed the predecessor to the MPDCRA, the Handicappers' Civil Rights Act, it, too, was looked upon as a way of insuring that employers made decisions based upon the abilities of individuals and not based upon preconceived notions of what a person with a disability is able to do.

The Michigan Handicappers' Civil Rights Act was first effectively negated as a viable protection for the disabled when the Michigan Supreme Court decided in *Carr v. General Motors Corp.*, 425 Mich 313 (1986) that the employer's duty to accommodate only arose when an employee's handicap was unrelated to the ability to perform the job. Thus, the Supreme Court's interpretation led to the paradox that the only time an employer needed to accommodate a disability was when an accommodations was not necessary. Basically, the *Carr* decision changed the Handicappers' Civil Rights Act to a barrier-free law, where the employer's duty to accommodate only arose when there was some physical barrier to the employee arriving at the workplace. The Michigan Legislature corrected this interpretation of the Handicappers' Civil Rights Act by amending it to make it parallel in many respects to the ADA.

With the advent of the newly-enacted ADA and the newly-revived Handicappers' Civil Rights Act, the courts began whittling away at the protections of these acts through judicial interpretation. First, the definition of a disability was narrowly interpreted. Both federal and state courts found that the requirement of a substantial impairment of a major life activity with respect to working meant more than impairing the ability of the individual to perform the job he or she was currently doing, but instead only protected conditions which prevented the individual from performing a wide range of jobs. The employer's duty to accommodate never arises when the condition does not constitute a disability. Thus, even though an employee could no

longer perform his or her job because of a disability, but could perform the job with a reasonable accommodation, the employee was not protected by the ADA or the MPDCRA unless the condition impacted a wide range of jobs. Similarly, federal and state courts narrowly construed substantial limitations so that many persons with disabilities were caught in the paradox that either their disabilities were not severe enough to constitute a disability under the ADA or MPDCRA or the conditions were severe enough to meet the definition of disability, but the severity of those conditions kept the person from being "otherwise qualified" and, thus, not protected by the law.

Both the federal courts and later, Michigan courts determined that temporary disabilities were not protected by the respective laws. Thus, employees who suffered disabilities of a temporary nature could be terminated based upon that temporary disability despite the disability civil rights laws.

More recently, both the United States Supreme Court and Michigan Supreme Court have decided that the disability civil rights laws require that the determination of a disability must be based upon the condition in its corrected or medicated state. Thus, if a person is taking medication that controls his or her condition, the person does not have a disability under the law and may be terminated based upon that condition. Consequently, these disability civil rights laws, hailed as such great protections for the disabled, have been reduced to providing even less protection than predecessor laws such as Section 504 of the federal Rehabilitation Act. Under Section 504, I successfully represented a railroad worker who was discharged by his employer based upon a history of having a seizure disorder, even though he had been seizure free for eight years. Now that case would never survive summary judgment in federal court or summary disposition in state court because the seizure disorder was completely corrected by his medication.

The Michigan Supreme Court has now gone one step further in reducing the protections of the MPDCRA. In *Michalski v. Bar-Levav*, Docket No. 114107; May 1, 2001, the court interpreted the MPDCRA as allowing an employer to engage in a course of harassment against the employee because the employer believed the employee was in the first stages of multiple sclerosis. The majority of the Court held that under the definition of a perceived disability, there must be evidence that the employer perceived the condition at the time of employment as substantially impairing one or more major life activities. The Court distinguished an earlier decision under the Michigan Handicappers' Civil Rights Act that prohibited an employer from discharging an employee who the employer erroneously believed was HIV-positive as based upon statutory language that was changed in the MPDCRA. Presumably, a Michigan employer may now lawfully decide to terminate an employee who the employer believes may develop AIDS in the future.

The results of these decisions are that many employees who most people would have thought be protected by the federal and state disability civil rights laws are not protected. In my view, it is time for Congress and the Michigan Legislature to amend those statutes to overturn these narrow judicial interpretations and to provide real protection for persons with disabilities.

E-MAIL AND THE INTERNET IN THE WORKPLACE

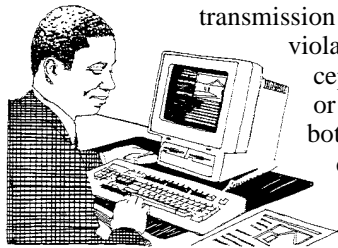
Adam S. Forman

Miller, Canfield, Paddock & Stone, P.L.C.

CASE LAW

A Fox In Sheep's Clothing? In *Konop v. Hawaiian Airlines, Inc.*, 2001 WL 13232 (9th Cir. Jan. 8, 2001), an airline pilot sued his employer under the Wiretap Act and the Stored Communications Act after a company vice president used other employees' name to log onto his private web site. The site contained bulletins critical of the airline that were not supposed to be seen by upper management. Addressing this issue of first impression, the Ninth Circuit held that the vice president's unauthorized viewing of the pilot's secure website, using false pretenses, constituted an unlawful "interception" of an electronic communications facility in violation of the Wiretap Act. The court also concluded that such conduct was unlawful "access" of an electronic communications facility in violation of the Stored Communications Act.

But On the Other Hand . . . In *Fraser v. Nationwide Mutual Ins. Co.*, Case No. 98-CV-6726 (E.D. Pa., Mar. 27, 2001), the court held that an employer's decision to dig through an employee's e-mails in computer storage did not violate any federal or state wiretap laws — not even the Stored Communications Act — as all of the laws are triggered only when the interception occurs "in the course of transmission." According to the court, "The strong expectation of privacy with respect to communication in the course of transmission significantly diminishes once transmission is complete." Wiretap laws are



violated only when an e-mail is intercepted from "intermediate storage" or "back-up protection storage" — both of which automatically occur during the course of transmission — or if the e-mail is viewed before the intended recipient has a chance to open it. Thus,

key for the court in *Fraser* was that the intended recipient employee had previously received the e-mail that the employer retrieved from its file server. Notably, the court stated that while such retrieval "is not legally actionable under the ECPA," it "may in fact be ethically 'questionable.'" In situations where there has been prior disclosure of such legally proper electronic monitoring activities, however, it is difficult to discern any ethical issues.

TRENDS

- *Do you have the feeling you're being watched?* According to the American management Association's "2001 AMA Survey, Workplace Monitoring & Surveillance," more than three-quarters of employers engage in electronic monitoring of employees' work-related communications and activities. This percentage has increased from 35.3% in 1997 to 77.7% this year.
- An April 4, 2001, the United States labor Department filed a lawsuit against Uni Prise Systems, Inc., a now-defunct software company, and its majority shareholders for failing to forward thousands of dollars of employee contributions to the firm's retirement fund in violation of the Employee Retirement Income Security Act. The lawsuit, *Chao v. Mowry*, Case No. 01-CV-00378,

C.D. Cal., serves as a reminder to companies in the fast paced, rapidly changing computer industry that they too must be mindful of the obligations under ERISA.

- *Careful what you post, you never know who is watching.* Consider the following:
 - Value Line, a money manager and fund research company, recently initiated a lawsuit against a former employee and ten "john Does" over allegedly defamatory postings against the company's CEO.
 - MeltroniX, a California-based semiconductor company, filed suit against several web-surfers, including a former MeltroniX employee and individuals who it believe have ties with a privately held rival company, claiming that they posted defamatory statements about the company in its Internet chat room.
 - A federal worker was recently terminated from his job for posting a map of the caribou calving areas in the National Wildlife Refuge, an area the Bush administration hopes to open for oil exploration.
- A recent child pornography case in New York has set a precedent making Internet service providers responsible for illegal content on their servers. The company, BuffNET, failed to take action after it was notified that one of its newsgroups was distributing child pornography. While BuffNET was found responsible for the conduct of its customers, as opposed to its employees, this case, nevertheless, serves as another reminder to employers to police their company Internet system.
- The regulatory arm of the National Association of Securities Dealers has made it clear to brokers that rules governing how they communicate with customers about stocks when they use the phone or a letter also apply on the Internet. The seven-page "Notice to Members" — directed at broker/dealers who exchange securities traded on the NASDAQ and AMEX — conformed that the applicability online of its "suitability rule," a requirement that members ensure that any recommendation to sell or purchase securities, is in keeping with an investor's own financial resources and objectives.
- In Australia, the NSW Labor Council is looking to back a test case against employee e-mail monitoring in an effort to curtail workplace surveillance. Perhaps this is not surprising in light of a recent Australian law making forwarding an e-mail to friends, family or colleagues without permission from the sender illegal and punishable by up to five years' jail or fines of \$60,000.
- In California, a Superior Court judge ordered a Bay Area consulting firm to drop restrictive clauses from its employment contract, including one that demanded a \$25,000 fee from employees who left to join the firm's clients. The case offers a window onto the work environment for temporary high-technology workers on H-1B visas.
- The CEO of a health care software development company in Kansas City, Miss., recently sent an e-mail berating employees for not caring about the company. The e-mail, originally intended only for 400 company managers, was leaked and posted on Yahoo for viewing by the general public, including the company's 3,100 employees, analysts and investors. Included in the message were threats of layoffs and hiring freezes and a shutdown of the employee gym. Hoping to "start a fire" the CEO never would have guessed that his e-mail would have caused a chain reaction that saw the company's stock plummet 22% in just three days. ■

U.S. SUPREME COURT UPDATE

Andrew M. Mudryk

The Law Offices of Andrew M. Mudryk

The U.S. Supreme Court has been prolific this term in issuing opinions related to labor and employment law. The topics that the court has addressed include the ADA, the FAA, and other important acronyms.

Court Prohibits ADA Suits Against States

The court recently added the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 et seq., to the list of civil rights statutes to which States are immune from suit under the Eleventh Amendment. Relying on the test it enunciated in *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). (Eleventh Amendment bars Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621 et seq., suits against state employers), a five-member majority ruled that Congress did not act within its constitutional authority by subjecting the States to suit in federal court for money damages under the ADA. *Board of Trustees of the University of Alabama v. Garrett*, No. 99-1240 (Feb 21, 2001). For further discussion of *Kimel*, see this column in the Spring 2000 issue of *Lawnotes*.

Under *Kimel*, "Congress may only abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and "act[s] pursuant to a valid grant of constitutional authority." *Garrett*, Slip. Op. at 3 (quoting *Kimel*, 528 U.S. at 73). There was no dispute that Congress unequivocally intended to abrogate the States' Eleventh Amendment immunity, so the sole question before the court was whether Congress acted under a valid grant of constitutional authority.

The court first noted that Article I, the Commerce Clause, is not a valid basis for Congress to abrogate the States' Eleventh Amendment immunity, but section 5, the enforcement provision of the Fourteenth Amendment, is. However, section 5 legislation reaching beyond the scope of section 1's guarantees (due process, equal protection) must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 4 (quoting *Kimel* at 520).

In applying that test, the court began by noting that in *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the court set forth a rational-basis test for determining whether States must make special accommodations for the disabled. The court then "examined whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled." *Id.* at 5. Looking at the legislative record of the ADA, the court concluded that Congress failed to do so.

In his concurrence, Justice Kennedy discussed the nature of prejudice. Although it is not necessary to an understanding of the court's opinion, the following quote might warrant repeating in a brief or closing argument:

Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves. Quite apart from any historical documentation, knowledge of our own human instincts teaches that persons who find it difficult to perform routine functions by reason of some mental or physical impairment might at first seem unsettling to us, unless we are guided by the better angels of our nature. There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will.

Id. at 10.

Federal Arbitration Act Applies to Most Workers

Under the Federal Arbitration Act (FAA), 9 U.S.C. 1, the following are excluded from coverage: "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Contrary to most of the other Courts of Appeals, the Ninth Circuit had held that all contracts of employment were beyond the FAA's reach. The Supreme Court disagreed and held that the exemption only applies to contracts of employment of transportation workers. *Circuit City Stores, Inc. v. Saint Clair Adams*, No. 99-1379 (March 21, 2001).

State does not Violate Due Process Clause by Withholding Contractor Payments.

Under the California Labor Code, the state may order withholding of payments due a contractor on a public works project if a subcontractor does not comply with code requirements. The contractor may then withhold sums from the subcontractor. In *Lujan v. G & G Fire Sprinklers, Inc.*, No. 00-152 (April 17, 2001), the state had ordered withholding of funds due the plaintiff subcontractor for allegedly violating the labor code. The plaintiff sued under 42 U.S.C. 1983, claiming the withholding without a hearing constituted a deprivation of property without due process in violation of the Fourteenth Amendment.

The Supreme Court disagreed and held that the code provisions did not violate due process principles. Although the plaintiff had a property interest in its claim for payment, its interest was not a present entitlement, such as the right to exercise ownership dominion over property. Therefore, the plaintiff's right to file a breach of contract suit under state law satisfied due process requirements.

Back Wages are Subject to FICA and FUTA Taxes in the Year in which the Wages are Paid

In *United States v. Cleveland Indians Baseball Company*, No. 00-203 (April 17, 2001), the Supreme Court held that back wages are subject to Federal Insurance Contributions Act (FICA) and Federal Unemployment Tax Act (FUTA) taxes by reference to the year in which the wages are actually paid. Although both parties set forth valid arguments, the court deferred to the IRS's longstanding interpretation of its own regulations.

Worker does not have Retaliation Claim for Complaining about Offensive Comments

In a *per curiam* opinion, the Supreme Court held that a worker did not have a claim for retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e — 3(a) because no reasonable person could have believed that the incident she complained about violated Title VII. *Clark County School District v. Breeden*, No. 00-866 (April 23, 2001). In *Breeden*, the plaintiff's male supervisor met with her and another male employee to review psychological evaluation reports of job applicants. One report stated that one of the applicants had commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon." *Breeden*, Slip. Op. at 1. The supervisor read the comment and said, "I don't know what that means." The other employee said, "Well, I'll tell you later," and both men laughed. *Id.* The plaintiff complained about the incident and claimed the defendant retaliated against her for doing so.

The court held that the plaintiff failed to state a claim for retaliation because no reasonable person could have concluded that the conduct constituted sexual harassment under Title VII. The court reiterated its previous holdings that "[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Id.* at 2 (quoting *Faragher v. Boca Raton*, 524 U.S. 775, 778 (1998)). ■

THE TEN BIGGEST MISTAKES MY UNION OPPONENT MAKES IN NEGOTIATIONS

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As suggested by the use of "Opponent" in the title, labor negotiations are often perceived to be adversarial with the respective sides antagonists. By implication, then, there should be a winner and a loser. However, although this perception is sometimes accurate, the bargaining process can be an effective mechanism for joint problem solving. In this context, the "mistakes" that your "opponent" makes do not necessarily result in a "win" for your client, but rather may thwart the effort to resolve issues without strikes or other forms of strife and unrest.

I. Essentials For Effective Negotiations

- A. Decide what you want.
- B. Develop a negotiating strategy to achieve your objectives.
- C. Be an understanding listener.
- D. Learn what the other party needs and why.
- E. Attack the problem, not the people.
- F. Treat the other side as a collaborator, not your enemy.
- G. Educate, not intimidate.
- H. Be patient.
- I. Be flexible and creative.
- J. Consider the consequences of no agreement.

II. Mistakes Of Union Negotiators

- A. Failing To Request Relevant Information Within The Employer's Possession Essential For Effective Preparation. See *NLRB v. Truitt Manufacturing Co.*, 351 US 149 (1956); *NLRB v. F. W. Woolworth Co.*, 352 US 938 (1956), *rev'g* 235 F2d 319 (CA 9, 1956); *E. I. Dupont De Nemours v. NLRB*, 744 F2d 536 (CA 6, 1984).
- B. Failing To Utilize Experts Or Otherwise Seek Technical Assistance Regarding Complex Issues Such As Health Care And Pensions.
- C. Assuming That The Wishes Of The Employee Negotiation Team Members Are Reflective Of The Will Of The Whole Bargaining Unit.
- D. Failing To Guide And Educate The Employee Negotiating Team Members During The Bargaining Process.
- E. Making Specific Promises About The Results To Be Achieved In Negotiations.
- F. Inflexibly Insisting On The Employer's Acceptance Of A "Standard Union Agreement" Or Other Proposals Allegedly Chiseled In Granite.
- G. Failing To Listen And Learn What The Employer Needs In The Negotiations.
- H. Threatening, Insulting and Engaging In Other Offensive Behavior Intended To Intimidate.
- I. When An Employer Pleads Inability To Pay, Failing To Request And Diligently Pursue Examination Of The Company Financial Records. See *NLRB v. Truitt Manufacturing Co.*, 351 US 149 (1956); *NLRB v. Western Wirebound Box Co.*, 356 F2d 88 (CA 9, 1966), *enforcing* 145 NLRB 1539 (1964). *Cf. United Paperworkers International Union v. NLRB*, 981 F2d 861, 865-866 (CA 6, 1992).

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THE TEN BIGGEST MISTAKES MY MANAGEMENT OPPONENT MAKES IN NEGOTIATIONS

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An attorney's role in a labor negotiation can take many forms. In some cases, an attorney may be called upon to be the chief spokesperson for a bargaining team. In other circumstances, he or she may be one of many members of a bargaining team. At other times, an attorney will not participate directly but will be involved from the sidelines. An attorney's contributions may include developing strategies and tactics, drafting (and redrafting) demands and proposals, and evaluating and commenting on issues. In the dynamics of a labor negotiation, an attorney may engage in all these activities and more before the negotiations are concluded.

1. **Don't Prepare.** Preparation is often the critical element in labor negotiations (and most other endeavors). The "mistakes" that follow are, in many ways, examples of a lack of adequate preparation.
2. **Don't Listen.** When a Union representative speaks, there's usually a point being made. Maybe the Union rep is venting, but even then the message may be the extent of the membership's interest and, therefore, the importance of the issue.
3. **Underestimate the Union.** This can take a variety of forms, including underestimating the Union's preparation, its skill and its resolve — of both the Union's bargaining team and the rank and file.
4. **Agree on Ground Rules and then Ignore Them.** It is often helpful to set out some ground rules — not to be confused with imposing conditions which can be illegal. See, *e.g.*, *Coastal Chemical Co.*, 304 NLRB 556 (1991). Once established, failing to follow mutually-agreed ground rules is treacherous.
5. **Come to the Table with No Real Authority.** In some circumstances this may be an unfair labor practice. See *e.g.*, *Fitzgerald Mills Corp.*, 133 NLRB 877 (1961), *enforced* 313 F.2d 260 (2nd Cir., 1963) *cert. den.* 375 US 834 (1963); *Napoleon School District* 1982 MERC Lab Op 1567. But the practical effect is to engage in negotiations that are a waste of time.
6. **Come to the Table with No Flexibility.** Also an unfair labor practice under some circumstances: "surface bargaining." See *e.g.*, *Joy Silk Mills, Inc., v. NLRB*, 185 F.2d (D.C. Cir., 1950) *cert. den.* 341 US 914 (1951). But even if the lack of flexibility is somehow legal, the Union will respond in kind and the talks will go nowhere.
7. **Engage in Posturing.** Employer representatives have been known to strut their stuff in order to remind the Union who's really in charge.
8. **Disclose the Schisms in Your Bargaining Team.** Union bargaining teams are, of course, always models of solidarity prepared to exploit the parochial concerns of individual Employer representatives who may have divergent interests.
9. **Misrepresent Information.** Nothing sours a negotiation faster than the discovery that the Employer has misrepresented or lied about something. The credibility of the Employer's bargaining team can be irretrievably lost and the evidence of bad faith useful in the subsequent unfair labor practice charge. *Waymouth Farms*, 324 NLRB 848 (1997) *enforced in part* 172 F.3d 598 (8th Cir., 1998).

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NLRB PRACTICE AND PROCEDURE

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Regional Director, Region Seven
National Labor Relations Board

As most of you know Leonard Page, former Associate General Counsel for the International Union, UAW, had been serving as Acting General Counsel of the National Labor Relations Board. On April 20, 2001, his term as Acting General Counsel ended. I know all of us wish Leonard the best and I have it on good authority that he will be returning to Michigan to finally finish that log home in upper Michigan he always talked about. As of the drafting of this column (May 11, 2001) no one has been nominated to serve as General Counsel nor has anyone been appointed to serve as Acting General Counsel. One effect of not having a General Counsel or Acting General Counsel is that no unfair labor practice complaints can issue.

The Board has issued a number of significant cases in recent months and I wish to call your attention to several specific cases that merit close attention. In *Levitz Furniture Company*, 333 NLRB No. 105 (March 29, 2001), the Board held that an employer may “unilaterally withdraw recognition from an incumbent union only where the union has actually lost the support of a majority of the bargaining unit employees. . . .” This holding overrules *Cellenase Corp.*, 95 NLRB 664, (1951), in which the Board held *inter alia* that an employer could withdraw recognition on the basis of “a good faith doubt based on objective considerations of the union’s continued majority status.” The Board in *Levitz* also lowered the standard necessary for an employer that wishes to file a petition (RM) for election, holding that employers may obtain elections by demonstrating “good faith reasonable uncertainty (rather than disbelief) as to the union’s continuing majority status.” In this regard the Board decided that “good faith reasonable uncertainty” includes, in addition to “firsthand statements by employees concerning personal opposition to an incumbent union” such things as an employee statement regarding other employees’ anti-union sentiments and employee statements expressing dissatisfaction with the union’s performance as collective bargaining representative. Obviously each case will have to be decided on a case-by-case basis and the Board will not apply “the new withdrawal of recognition standard in pending cases.”

In *GPS Terminal Services*, 333 NLRB No. 121 (April 16, 2001), the administrative law judge (ALJ) decided *sua sponte* to amend the unfair labor practice complaint to reflect his view of the “credible evidence.” The General Counsel excepted to the ALJ’s ruling arguing that “the complaint was issued and prosecuted by the General Counsel and could only be amended by, or with the consent of, the General Counsel.” The Board agreed with the General Counsel, noting that Section 3(d) of the Act gives the General Counsel “final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaint. . . .” Here, as the amendment made by the ALJ “was neither sought nor consented to by the General Counsel,” the ALJ “exceeded his authority. . . .”

Finally, in *Allegheny Ludlum*, 333 NLRB No. 109 [March 30, 2001] the Board on remand from the D.C. Circuit Court of Appeals, revised its standards governing employee participation in an employer’s pre-election campaign video. Without attempting in

this short summary to capture the specific facts of this case or all of the nuances involved, the Board held that an employer may lawfully solicit employees to appear in a campaign video if each of the following requirements is satisfied:

1. The solicitation is in the form of a general announcement which discloses that the purpose of the filming is to use the employee’s picture in a campaign video and includes assurances that participation is voluntary, that nonparticipation will not result in reprisals, and that participation will not result in rewards or benefits.
2. Employees are not pressured into making the decision in the presence of a supervisor.
3. There is no other coercive conduct connected with the employer’s announcement such as threats of reprisals or grants or promises of benefits to employees who participate in the video.
4. The employer has not created a coercive atmosphere by engaging in serious or pervasive unfair labor practices or other comparable coercive conduct.
5. The employer does not exceed the legitimate purpose of soliciting consent by seeking information concerning union matters or otherwise interfering with the statutory rights of employees.

Slip op. at 9-10. The foregoing principles apply “to all pending cases in whatever stage.”

I invite you to submit any questions or issues you want discussed to me or any member of Region Seven’s Local Practice and Procedure Committee. ■

THE TEN BIGGEST MISTAKES MY UNION OPPONENT MAKES IN NEGOTIATIONS

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- J. Declaring Complete And Absolute Opposition To The Employer’s Proposals So As To Confirm A Bargaining Impasse And Facilitate The Employer’s Unilateral Implementation Of Its Last Offer. See *Taft Broadcasting Co.*, 163 NLRB 475 (1967), *aff’d sub nom., Television & Radio Artists v NLRB*, 395 F2d 622 (CA DC, 1968); *CJC Holdings, Inc.*, 320 NLRB 1041 (1996). Conversely, Engaging In Bad Faith Bargaining To Avoid Impasse — Again Facilitating Unilateral Implementation. See *New Brunswick General Sheet Metal Works*, 326 NLRB No. 77 (1998); *United Papermakers International Union (Jefferson Smurfit Corp.)*, 311 NLRB 41 (1993); *Double S. Mining, Inc.*, 309 NLRB 1058 (1992); *Louisiana Dock Co.*, 293 NLRB 233, 235-236 (1989); *Young & Hay Transportation Co.*, 214 NLRB 252 (1974). ■

THE TEN BIGGEST MISTAKES MY MANAGEMENT OPPONENT MAKES IN NEGOTIATIONS

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10. Refuse Third Party Intervention or Sidebar Discussions. Sometimes a third party, such as a mediator, or discussions away from the main table, can be helpful in breaking a log-jam or moving an issue toward resolution. Rejecting such efforts may doom negotiations to failure. ■

SIXTH CIRCUIT MUDDIES RETALIATION STANDARD AND VACATES ARBITRATION AWARD

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From February of 2001 through April of 2001, the Sixth Circuit published about 23 cases dealing with a wide 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>".

RETALIATION — Causal Link Element. In October of 2000, the Sixth Circuit Court of Appeals clarified the general rule in this circuit that temporal proximity between the alleged adverse employment action and the filing of an EEOC charge alone is not sufficient to establish a causal link between the alleged failure to promote and the filing of the charge, which is a required element of a *prima facie* case of retaliation. *Nguyen v. City of Cleveland*, 229 F.3d 559 (6th Cir. 2000). The *Nguyen* panel, however, also stated in dicta that there could possibly exist circumstances where evidence of temporal proximity alone would be sufficient to establish a causal link. On March 30, 2001, in *Gribcheck v. Ruynon*, Docket No. 00-3279, a panel of the court held generally that: "A plaintiff may demonstrate the causal connection by the proximity of the adverse employment action to the protected activity." The court then held that merely because the plaintiff had shown that his civil rights litigation was ongoing at the time of his suspension, he had established the required causal link. *Gribcheck* did not indicate how the case differed from *Nguyen* so as to make it proper to establish the causal link by temporal proximity alone. In light of *Gribcheck* and *Nguyen*, the role that temporal proximity plays in establishing a *prima facie* case of retaliation is unclear and is ripe for *en banc* review.

ARBITRATION — Award Vacated. It is well-established that in order to vacate an arbitration award, the party seeking to vacate the award must satisfy one of the narrowest standards of judicial review. In *Appalachian Regional Healthcare, Inc. v. United Steelworkers, Local 14398*, Docket No. 99-6590 (March 29, 2001), the court noted that an arbitration award may be vacated if (1) the award conflicts with the terms of the agreement, (2) the award imposes additional requirements that are not expressly provided for in the agreement, (3) the award is without rational support or cannot be rationally derived from the agreement, and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement. In *Appalachian Regional Healthcare, Inc.*, Sixth Circuit upheld a district court order vacating an arbitration award where the arbitrator, though ostensibly construing the contract, imposed a limitation regarding management's authority to assign overtime that was not contained in the collective bargaining agreement.

ERISA — Respondeat Superior. In *Hamilton v. Carell*, 243 F.3d 992 (Sixth Cir. 2001), with regard to ERISA breach of fiduciary duty claims, the Sixth Circuit held that in order to find respondeat superior liability, "the agent must have breached his or her fiduciary duties while acting within the course and scope of employment." The Court rejected the Fifth Circuit approach of requiring active and knowing participation in the breach of fiduciary duty by the principal.

NLRA — Handbilling. In *Sandusky Mall Co. v. N.L.R.B.*, 242 F.3d 682 (6th Cir. 2001), the Sixth Circuit denied enforcement to a Board order requiring a shopping mall to permit non-employee union organizers to trespass on the mall's property to distribute handbills urging mall customers not to patronize non-union employers. In so holding, the Sixth Circuit reaffirmed its holding in *Cleveland Real Estate Partners v. N.L.R.B.*, 95 F.3d 457 (6th Cir. 1996), ruling that it is not discrimination against union activity to enforce a general no solicitation rule unless the union meets the burden of showing that it has no other reasonable means of communicating its organizational message to employees. Contrary to the Board's decision, the Sixth Circuit held that *Holly Farms v. N.L.R.B.*, 517 U.S. 392 (1996) did not overrule *Cleveland Real Estate Partners*.

NLRA — Retaliation. In *BE&K Construction Co. v. N.L.R.B.*, Docket Nos. 99-6469; 0-0512 (April 9, 2001), the Sixth Circuit, following *Bill Johnson's Restaurants v. N.L.R.B.*, 461 U.S. 731 (1983), held that an employer violated the NLRA by initiating a lawsuit against a union that (1) lacks a reasonable basis in law, and (2) where it was filed to retaliate against employees for engaging in protected activity. The Sixth Circuit ruled that the first element of the *Bill's Johnson's* test is met if the employer fails to succeed on the merits. If the employer fails to succeed, the motive of the employer is then examined for retaliatory motive.

ADA — Qualified Individual With Disability. In *E.E.O.C. v. J.H. Routh Packing Co.*, Docket No. 99-4482 (April 19, 2001), the Court reinstated the EEOC's claim of ADA violations. The complaint alleged that an employee who was not hired was a qualified individual with a disability because he suffered from epilepsy, but it also alleged that he controlled his condition with medication. The Sixth Circuit held that the EEOC did not fail to state a claim upon which relief can be granted simply because it alleged that the applicant's condition was controlled by medication. The allegation that he was a qualified individual with a disability was sufficient to meet the requirements of "notice pleading" and thus stated a claim under the ADA.

FREE SPEECH — Harassment of Students. In *Bonnell v. Lorenzo*, 241 F.3d 800 (6th Cir. 2001), the Sixth Circuit reversed a district court's issuance of a preliminary injunction reinstating a college english professor. The professor was discharged after he repeatedly used obscene and vulgar language in class that was unconnected to the subject matter of the discussion. For example, a female student complained that the professor recounted explicit details concerning his own sexual experiences. The college discharged the professor in response to the sexual harassment complaints by female students. In the lawsuit, the professor claimed that the college violated his First Amendment right to free speech. The court reversed the district court's issuance of an injunction reinstating the professor holding that he had not shown a substantial likelihood of success on the merits of his claims. The court found that although the professor's speech was a matter of public concern implicating First Amendment rights, the college's interest in enforcing its sexual harassment policy outweighs plaintiff's claimed free speech interests.

NLRA — Elections. In *N.L.R.B. v. Seawin, Inc.*, Docket No. 99-6624 (April 26, 2001), the Sixth Circuit denied enforcement of an NLRB decision finding that the employer failed to bargain with a certified union. The company challenged the votes of eleven laid off workers claiming that they had no reasonable expectancy of recall. The Board overruled the company's challenges. The Sixth Circuit found that the NLRB ignored record evidence regarding changes in the nature and scope of the company's business in finding that the employees had a reasonable expectancy of recall. The court also held that equivocal statements by the employer such as "hopefully" employees would be recalled, without more, do not establish a reasonable expectancy of recall. ■

MICHIGAN COURT OF APPEALS UPDATE

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Employers Vicariously Liable for Default Judgments Against Employees: *Rogers v. J.B. Hunt Transport, Inc.*, 244 Mich. App. 600 (Doctoroff, P.J.), April 5, 2001.

In 1996, J.B. Hunt Transport Company employed Wesley Crenshaw as a truck driver. One afternoon in June of that year, Crenshaw parked his tractor-trailer on the shoulder of the expressway. Shortly before it would have passed the truck, Ja'Von Rogers' car left the paved portion of the highway, traveled on the shoulder for approximately seventy-five feet, and collided with the right rear section of the truck's trailer. According to the state police trooper who investigated the accident, the tractor-trailer was completely off the main traveled portion of the highway and the rear taillights were on. It was disputed whether Crenshaw activated his flashers; however, Crenshaw admitted that he did not set out his emergency reflective triangles before the crash. Mr. Rogers died instantly as a result of injuries from the collision. The police were unable to determine why his vehicle left the roadway.

Mr. Roger's representative filed a complaint on July 23, 1996, alleging that Crenshaw's negligence was the proximate cause of the decedent's death and that J.B. Hunt was vicariously liable for Crenshaw's negligence. J.B. Hunt admitted that Crenshaw was acting within the scope of his employment at the time of the accident, but denied that Crenshaw was negligent or that Crenshaw's alleged negligence was the proximate cause of the decedent's death. Crenshaw was a co-defendant with J.B. Hunt, but the company's attorney requested to withdraw from the representation of Crenshaw due to an inability to contact him. Crenshaw was eventually defaulted for failing to cooperate with discovery. Based upon this default, the trial court granted partial summary judgment against J.B. Hunt holding that they could not contest that Crenshaw was negligent, that negligence was a proximate cause, or that it was vicariously liable for Crenshaw's negligence.

The Court of Appeals affirmed this ruling holding that "the entry of a default operates as an admission by the defaulting party of all the plaintiff's well-pleaded allegations." *Id.* at 535. The court continued that in order to prove that an employer is vicariously liable, the plaintiff need only show that the actions of the employee were within the scope of his employment, which J.B. Hunt had already admitted. The court further ruled that the discovery sanctions are an appropriate remedy for the plaintiff's thwarted discovery requests. As a result, J.B. Hunt was foreclosed from litigating the issues surrounding liability.

The Court of Appeals rejected the policy arguments advanced by J.B. Hunt. The company had argued that it should not be sanctioned for its former employee's conduct as it was unfair and unwarranted because J.B. Hunt had no control over Crenshaw's actions. The Court of Appeals held that vicarious liability is not invoked by some theoretical "control" of the employee, but by the employer's ability to absorb the financial consequences. This doctrine is applicable particularly where, as here, the company was profiting from Crenshaw's actions at the time of the accident.

Harassment based upon Romantic Jealousy Not Actionable Under Elliott-Larsen: *Barrett v. Kirtland Community College*, Docket No. 217040 (Zahra, J.), April 10, 2001.

Brent Barrett was hired by Kirtland Community College (KCC) in February 1992 as part-time cultural events coordinator. In September 1992, Barrett signed a one-year contract to serve as KCC's full-time coordinator of cultural events/activities. In September 1993, Barrett signed another one-year contract to remain in that position. That second contract was to expire on September 17, 1994.

Cary Vajda, KCC's dean of student services, and Barrett's supervisor, asked KCC employee Allison Goshorn on a date. Vajda did not know Goshorn was romantically involved with Barrett at the time he asked her out. Barrett claimed that the quality of his working relationship with Vajda declined once Vajda discovered the nature of Goshorn's relationship with Barrett. As a result, Barrett filed three complaints with the Michigan Department of Civil Rights (MDCR), the earliest on March 11, 1994.

Barrett claimed that he suffered psychological and physical problems as a result of continual adverse treatment by Vajda. Those problems prompted Barrett to take a personal leave from his job in May 1994 and a later unpaid leave. During the time Barrett was on leave, his position was reconfigured by KCC administrators. Barrett applied for the new position, but was not hired. On September 13, 1994 (four days before the expiration of his employment contract), Barrett returned from his leave and was discharged after a short meeting. A letter written to Barrett on the date of his discharge stated that his "[c]ontinued insubordination" and his "[a]bandonment of position" were the reasons for his discharge.

In October 1995, Barrett filed suit, alleging breach of employment contract, violation of the FMLA, gender discrimination under the CRA, retaliation under the CRA, and defamation. Barrett's retaliation, breach of contract, and FMLA claims went to trial. The jury found no violation of the FMLA. However, the jury found that KCC retaliated against Barrett for filing with the MDCR and assessed damages of \$99,960 in regard to that claim. The jury also found that KCC breached Barrett's employment contract resulting in damages of \$750. KCC brought a motion for JNOV, or alternatively, for a new trial, arguing that there was no evidence of a causal link between protected activity by Barrett and adverse actions taken by KCC, nor evidence that Barrett was terminated without just cause or that his employment contract was otherwise breached. The trial court denied KCC's motion. Thereafter, the court assessed \$46,500 in attorney fees and \$986 in costs with respect to the retaliation claim.

During the appeal, KCC relied upon evidence, which it had offered at trial, that the College had considered terminating Barrett, and had definitely decided not to renew his contract, on March 3, 1994. Because Barrett had not filed his first MDCR complaint until March 11, 1994, the Court of Appeals held that there was no evidence of retaliation.

Barrett also argued on appeal that the jury's verdict of retaliation may have been based upon his oral complaints during a January 1994 meeting. The court held that Barrett's oral complaints did not qualify as "opposing a violation" of the Elliott-Larsen Civil Rights Act as they only asserted "generic, non-sex-based complaints regarding his working conditions." Specifically, the court held that complaints of harassment based upon romantic jealousy are not the

same as conduct based upon sex and are not actionable under Elliott Larsen. The court stated, by way of example, that if the supervisor's motive was to win the affection of the female employee, "it would not matter if the person [he] perceived to be standing in the way was male or female." The Appeals Court reversed the trial court on the retaliation claim, but affirmed the breach of contract claim.

Appeals Court Applies the *Respondeat Superior* Requirement As Directed by the Supreme Court: *Chambers v. Trettco, Inc.* (on remand), 244 Mich. App. 614 (O'Connell, J.), April 5, 2001.

This case returned to the Court of Appeals on remand from the Michigan Supreme Court. The Supreme Court had held that Michigan requires that an employer have notice of the allegedly hostile environment in a sexual harassment claim, thereby rejecting the recent federal holdings in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998).

At trial, Chambers alleged that a temporary supervisor, assigned to her work station for four days while her regular supervisor was on vacation, engaged in a pattern of seriously suggestive and offensive behavior, and did so over her clear objections. Chambers complained to co-workers about wishing to leave her job, but she did not initiate the proceedings for sexual harassment complaints set forth in defendant's employee handbook. Chambers did, however, happen to answer the telephone when defendant's regional director of operations telephoned. The latter sensed that something was wrong, but Chambers chose not to explain the problem, apparently because the offender was nearby. The director indicated that he would talk to Chambers later, but no meeting between them followed. Plaintiff did complain to her regular supervisor when the latter returned from vacation. The record does not indicate what action, if any, defendant took against the offender in response, but the offender never confronted plaintiff at work again.

The Court of Appeals discussed the various differences in the structure of Elliott-Larsen as compared to Title VII. That is, Elliott-Larsen specifically distinguishes quid pro quo and hostile environment claims while Title VII merely prohibits discrimination on the basis of sex. The court also relied upon Michigan precedent, which had traditionally required notice before imputing liability upon the employer. Finally, the Court held that Chamber's general indication to the regional director over the telephone that something was wrong did not sufficiently alert him to the extent that the director, and thus Trettco, could reasonably be charged with actual or constructive notice that sexual harassment was taking place. The court continued, "[n]or did the evidence otherwise indicate that anyone with supervisory responsibility knew of plaintiff's four-day plight until she spoke with her normal supervisor after the offending temporary supervisor was no longer visiting plaintiff's workplace." Finally, borrowing from his dissent in the prior ruling on this matter, Judge O'Connell stated that "[i]mputing notice of sexual harassment to an employer on the basis of such nebulous implications would have the effect of making an employer an insurer of an employee's personal anguish of which the employer had little or no understanding." The case was remanded with directions to enter a judgment in favor of Trettco. ■

MERC UPDATE

Alexandra Matish

White, Schneider, Baird, Young & Chiodini, P.C.

Since the previous issue of *Lawnotes*, the Michigan Employment Relations Commission has issued 22 decisions and orders in a variety of cases. A brief summary of four of those cases follows. Of those 22 decisions, seven were representation hearings and/or unit clarification hearings, 12 were unfair labor practice hearings, one was on compliance, and two were motions for reconsideration. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations' website at www.cis.state.mi.us/ber.

New Buffalo Board of Education and New Buffalo Education Association, MEA/NEA -and- Charles W. Covert Case No. C99 J-192 (March 1, 2001)

The New Buffalo Education Association ("Union") filed an unfair labor practice charge against the New Buffalo Board of Education ("Employer") alleging that the Employer threatened member Charles Covert in retaliation for his protected concerted activity. The Commission reversed the administrative law judge and held that statements made to Covert by the school superintendent constituted a threat in violation of PERA.

Covert, a probationary instructor in the Employer's building trades program, had been assigned earlier to a housing construction project. At a June 14, 1999 disciplinary meeting, Covert was directed by the superintendent to complete this housing construction project by the end of the month. Because Covert's contract had expired, his union representative asked whether Covert would be paid for the extra time required to complete the project, as was provided by the parties' collective bargaining agreement, which required compensation for extra work hours. The superintendent then responded that if Covert did not complete the work without additional compensation, he "might as well turn in [his] keys." Shortly after that meeting, the superintendent issued a written reprimand to Covert for failing to complete the house on time. The superintendent indicated in this reprimand that he did not intend to renew Covert's contract for the following year prior to May 1, 2000, "with reconsideration if [the next project] is completed by the end of the year." The parties met a few months later to attempt to resolve the grievances resulting from the June 14 meeting and subsequent reprimand [September 22, 1999]. During this meeting, the Union representative indicated that additional charges would be filed by the Union regarding the incident. The superintendent responded by stating that Covert would be terminated under the Tenure Act at the end of the school year.

Charging Party contended in its unfair labor practice charge that the superintendent's statements made on June 14 and September 22 constituted threats in violation of PERA. The ALJ concluded that neither statement constituted a threat in violation in PERA. The ALJ held that the superintendent's statement to Covert that "he might as well turn in his keys" was not motivated by a threat of grievance, but instead was the result of the superintendent's annoyance of incompleteness of the project. Although the Commission agreed with the ALJ that the September 22 remark was simply a reiteration of what was previously stated to Covert and thus not a threat, they disagreed with the ALJ with respect to the June 14 statement. The Commission, citing *City of Greenville*, 2001 MERC Lab Op _____ (issued March 1, 2000), held that a violation of Section 10(1)(a) does not depend upon the employer's motive or on whether the employee was actually coerced.

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MERC UPDATE

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The Commission further held that regardless of whether the union representative used the word "grievance" during the conversation on June 14, the superintendent testified that he interpreted this statement made by the union representative that the "Union may have a problem" with the Employer's position regarding completion of the house to mean it may file a grievance. Accordingly, the Commission held that based on the context in which the remark was made, Covert could have reasonably interpreted the superintendent's statements as a threat, with the intent to dissuade him from filing a grievance.

City of Greenville Police Officers Ass'n of Michigan Case No. C99 K-206 (March 1, 2001)

The Commission upheld an ALJ's decision finding that the City of Greenville ("Employer") interfered with, restrained, and coerced employees in violation of PERA. In March 1999, six public safety officers represented by the Police Officers Association of Michigan ("Union") attended a City Council meeting with the hopes of persuading the Council to purchase two public safety cruisers instead of one. One of the officers present was Brian Blomstrom, a probationary officer with the City of Greenville. Following the meeting, the City manager met with the Union president and vice president, who were at the March City Council meeting, to discuss the matter further.

In April of 1999, the mayor sent a letter to the six public safety officers, indicating that although he was happy to see the officers in attendance at the meeting, they did not follow proper protocol. The mayor further indicated that "to be effective and to be proper, all City employees are to bring issues to the department head and then to the City manager. . . . This did not happen prior to your visit on March 16." On May 5, 1999, Blomstrom had an unscheduled meeting with the City manager, during which the manager informed Blomstrom that he and his fellow officers could have been issued a written reprimand due to their comments at the City Council meeting. The City manager also told Blomstrom that because he was a probationary employee this reprimand might have resulted in loss of his job. Although the City manager assured Blomstrom he was not "in trouble," he also warned him that showing support for the Union president and vice president is an indication he is "one of the officers that likes to stir up trouble." He also told Blomstrom that such a reputation could be detrimental to a newer employee and that he should be careful of the Union president and vice president because they have "hidden agendas." Finally, the City manager told Blomstrom that he did not want to see him "act like the others act or have - people have the same idea the way the other officers act by how the Union was handling the issue." The Union subsequently filed an unfair labor practice charge regarding the content and context of the City manager's statements.

The ALJ concluded that the Employer had committed an unfair labor practice and the Employer filed exceptions. The Commission, citing *North Central Community Health Services*, 1998 MERC Lab Op 427 and *Residential Systems*, 1991 MERC Lab Op 394, 406, held that when determining whether an employer is engaged in unlawful activity, the totality of the circumstances surrounding the action will be examined. To determine whether an employer's statements constitute an implied or express threat, both the content and context of the remarks must be analyzed. *New Haven Community Schools*, 1990 MERC Lab Op 167, 179.

The Commission agreed with the ALJ that the statements made by the City manager, when viewed in light of the context in which they were made, could reasonably be interpreted as a threat to dissuade Blomstrom from engaging in further protected activity.

City of Lansing, Board of Water & Light -and- International Brotherhood of Electrical Workers, Local 352, Case No. R00 F-65 (February 1, 2001)

In this representation case, the Union sought to represent a unit of full-time and regular part-time clerical and technical persons, but excluding professional and supervisory employees. The employer maintained that there was no community of interest between the clerical and technical employees, and therefore a combined unit was not appropriate.

Both the clerical and technical employees are only required to have a high school diploma. Unlike the clerical employees, many of the technical employees are required to have specialized training or an associate's degree; however, some clericals are required to have specialized computer training. Both classifications of employees have similar if not the same work hours and are governed by the same personnel policies and handbooks of the Employer. All of the clericals performed work in an office setting, where as many of the technicals worked primarily in the field. Nevertheless, technicals, such as computer employees, accountants, and drafters, also worked in the office. Employees classified as para-technicals performed clerical work, as well as technical work such as preparing charts and graphs. Finally, the salary and benefits of both the clerical and technical classifications were similar.

The Commission held that, although clerical employees share a community of interest and constitute a presumptively appropriate bargaining unit (*Waverly Community Schools*, 1989 MERC Lab Op 819, 820; *City of Wayne*, 1986 MERC Lab Op 200, 204), it is not inherently inappropriate to combine clericals in the unit with other employees, and the circumstances of each case must be carefully examined. *Fowlerville Community Schools*, 1980 MERC Lab Op 820; *Village of Beverly Hills*, 1980 MERC Lab Op 850. In such cases, the Commission considers factors such as bargaining history, size of bargaining unit, interchangeably and contact among employees, work location, similar skills, benefits, and working conditions.

The Commission held that the clerical and technical employees shared a community of interest, thus making a single bargaining unit appropriate. They work in the same or similar locations and have routine contact with one another. Moreover, there is an overlap between the two groups in terms of job function and skills utilized. Some of the employees performed both clerical and technical functions. Although the skill level of most technical employees is generally higher than that of the clericals, the Commission held that the functions and skills of both groups were not so diverse as to prevent their being included in one unit.

The Commission further found that this unit was even more appropriate in light of the relatively small number of clericals. A separate unit of these clericals would, the Commission found, cause fragmentation of bargaining units contrary to Commission policy. Consequently, the Commission found that the unit of clerical and technical employees was appropriate and directed an election including those employees.

City of Detroit, Department of Public Works -and- Association of Detroit Supervisors, Case Nos. R99 H-100 and UC99 H-30 (February 2, 2001)

The Union sought to accrete a unit of eight unrepresented employees classified as instructors. The Union also sought to add a training specialist position into the bargaining unit. The Employer argued that the instructors and training specialists are part of the city-wide unrepresented, professional, non-supervisory classifi-

cation which could not be added to the Union's supervisory bargaining unit. The training specialist position and the instructor position were in the Department of Public Works.

The duties of a training specialist are to develop, design, implement, run, and evaluate training programs for City employees and to oversee training consultants hired by the City. Some of the training specialists are assigned to other City departments, where they are subject to that department's supervision. The training specialist position in question became vacant when that specialist was moved to another department. Some of the duties and responsibilities of that training specialist were assigned to a refuse collection packer operator foreman who was in the supervisory unit. The foreman subsequently applied for the specialist position after the transfer of the former specialist, but was not reclassified because he did not have a college degree. Shortly thereafter, he obtained the required degree and, after passing the necessary Civil Service examination, was reclassified as a junior training specialist because he had experience training employees in the Department of Public Works. Upon his reclassification, the Union was notified he was no longer part of the supervisory bargaining unit. Although a new employee held the position of training specialist, the duties performed by the training specialist position were not substantially different from those which had been done prior to the employee's promotion.

The Public Works equipment instructors also the subject of the representation petition, like the training specialist, train and instruct employees on such matters as compliance with state laws and regulations, safety issues, and maintenance of equipment. They are also involved in training conducted in the yard or in the field, on a route or other work site. When the training is completed to the satisfaction of the instructor, a certificate is issued and the trainee's foreman is notified. During the training process, the specialist and the instructors have all the responsibilities and authority that instructional employees normally possess: they instruct and assign work to the trainees, evaluate their progress and performance, return them to the work pool if they do not master the necessary skills, and are in charge of them when they are working as a crew in the field. They may warn trainees of any problems and refer serious matters to the assistant superintendent.

Employees with training or instructional duties with regard to other employees, such as monitoring or reviewing their work, are not supervisory employees absent real authority or power in a labor relations sense to effectively impact their employment status. *Livonia PS*, 1988 MERC Lab Op 1068, 1084-1085; *Kleen-O-Rama*, 1971 MERC Lab Op 88, 89-91. The Commission found that this was the case even where the word "supervisor" is used in the title of the classification.

The Commission in this case held that the employees at issue may be considered to exercise temporary and isolated supervisory authority over the trainees entrusted to them for a short period of time. Nevertheless, such temporary authority did not merit a finding of supervisory status.

The Commission also found that the training specialist subject to the unit clarification petition only performed routine direction regarding the instructors, such as preparing their training schedule for the week and making their work assignments. Moreover, the training specialists had limited discretion and no independent authority to discipline or otherwise materially effect the instructors' employment status. The Commission consequently found that the training specialist was similar to a "crew leader" and that effective supervisory authority did not rest with him. Consequently, the Commission dismissed the Union's petition. ■

NLRB UPDATE

George M. Mesrey and Jack VanHoorelbeke
Clark Hill PLC

1. Solicitation Rules

Brockton Hospital, 333 NLRB No. 165. The Board held that the Employer violated the Act by prohibiting the distribution of union literature in the vestibule adjacent to its front lobby and by prohibiting any solicitation or distribution of literature in "halls and corridors used by patients."

2. Information Requests

Frito-Lay, Inc., 333 NLRB No. 154. The Board held that the Employer violated the Act by failing to provide the Union with information reflecting the average wage rate and racial makeup of the workforces at the Employer's other facilities.

3. Intra-Union Discipline

Teamsters Local 170 (Leaseway Motor Car Transport Company), 333 NLRB No. 152. The Board held that the Union did not violate the Act by imposing intraunion discipline against members and by removing one of the from an elected union office.

4. Temporary Replacements

Tidewater Construction Corporation, 333 NLRB No. 147. The Board's dismissal of the complaint alleging that the Company violated the Act by refusing to consider hiring certain former employees as temporary replacements during a lockout.

5. Superseniority

Electrical Workers IUE Local 221 (Kidder, Inc.), 333 NLRB No. 138. The Board held that the Union violated the Act by demanding that the Employer interpret the parties' contractual superseniority clause to accord the Respondent Union officials superseniority for terms and conditions of employment that are not limited to layoff and recall and are not otherwise required to further the effective administration of the collective-bargaining agreement and by demanding arbitration of the matter.

6. Bargaining Orders

Orland Park Motor Cars, Inc., d/b/a Mercedes Benz of Orland Park, 333 NLRB No. 127. The Board found that a *Gissel* bargaining order in this category II case (less pervasive misconduct which nonetheless still has the tendency to undermine majority strength and impede the election processes) is necessary to remedy the Respondent's unfair labor practices.

7. Amendments to the Complaint

GPS Terminal Services, 333 NLRB No. 121. The Board held meritorious the General Counsel's exception to the judge's decision to "sua sponte" amend the complaint.

8. Secondary Pressure

Food & Commercial Workers Local 367, 333 NLRB No. 84. The Board held that the Union violated the Act by coercing and threatening Quality Food Centers, Inc., by filing a grievance and demanding arbitration with an object of forcing it to cease doing business with Cinnabon, Inc.

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NLRB UPDATE

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9. Fraudulent Concealment

Morgan's Holiday Markets, 333 NLRB No. 92. In this case, the Board clarified the standard set forth in *Brown & Sharpe Mfg. Co. III*, 321 NLRB No. 924 (1996), to determine whether the "materiality" element of the fraudulent concealment doctrine has been met.

10. Campaign Videotapes

Allegheny Ludlum Corporation, 333 NLRB No. 109. The Board revised its standards governing employee participation in an employer's campaign videotape. The Board also held that an employer may include an employee in a campaign video without his permission if the video does not indicate the employee's position on unionization.

11. Withdrawal of Recognition

Levitz Furniture Company of the Pacific, 333 NLRB No. 105. The Board held that an employer may unilaterally withdraw recognition from an incumbent union only on a showing that the union has actually lost the support of a majority of the bargaining unit employees. The Board overruled *Celanese Corp.*, 95 NLRB 664 (1951), and other decisions that allowed employers to withdraw recognition merely by establishing an objectively based, good-faith reasonable doubt as to unions' majority support.

12. Temporary Employees — Bargaining Unit

Interstate Warehousing of Ohio, 333 NLRB No. 83. Applying its decision in *M.B. Sturgis*, 331 NLRB No. 173, the Board majority of Chairman Truesdale and Member Walsh in the instant case found appropriate a bargaining unit of the Employer's solely-employed permanent employees and its jointly-employed temporary employees.

13. Objectionable Conduct — Captive Audience Speech

AP Automotive Systems, 333 NLRB No. 68. The Board found that the Employer's captive audience speech to employees two days before the election contained an objectionable threat of plant closure and a prediction of the futility of union representation. ■

WESTERN DISTRICT UPDATE

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

A "De Minimus" Adverse Employment Action Not Enough to Preclude Summary Judgment in Favor of Employer on Plaintiff's Retaliation Claim

Bowman v. Postmaster General William J. Henderson, et. al., 1:99-CV-795 (March 16, 2001). Plaintiff filed a claim for retaliation after her supervisor denied a request for four hours of "official time" to research a discrimination claim. Judge Robert Holmes Bell, granted summary judgment for the defendant employer.

While 29 CFR Section 1614.605(b) requires employers to grant reasonable official time in connection with the prosecution of EEOC matters, the issue in this case was whether defendant's denial of "official time" can form the basis of a retaliation claim. In particular, is this an adverse employment action? In *Hollins v. Atlantic Co.*, 188 F.3d 652 (6th Cir. 1999), the Sixth Circuit set forth the requirements to establishing a material adverse employment action:

[A] materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

In this case, even though defendant's failure to grant plaintiff's request violated a federal regulation, the court found it was a *de minimis* action that does not qualify as an adverse employment action. Therefore, Judge Bell decided, plaintiff's retaliation claim fails as a matter of law.

No Federal Claim or Protection for Spurned Wife with Telephone Problem

Layman v. Ingham County Sheriff Dep't, Case No. 5:99-CV-126 (February 6, 2001). Judge Richard Alan Enslen, granted defendant's motion for summary judgment with respect to the plaintiff's federal claims that the defendant violated her rights to intimate association, equal protection, and privacy. The plaintiff also asserted state claims of discrimination based on marital status under state law, which were remanded to the Ingham County Circuit Court.

Plaintiff was suspended from her job at the Sheriff's Department because of irate and inappropriate telephone calls made to her estranged husband, his roommate, as well as his girlfriend. The defendant ordered the plaintiff to stop making the calls; however, the plaintiff persisted with the inappropriate conduct. The plaintiff was discharged from employment as a result of her inappropriate conduct, which discipline was later reduced to a suspension. Evidence indicated the defendant had disciplined a number of male officers for similar offenses and, thus, all of the plaintiff's federal claims were dismissed. ■



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THE JOY OF LABOR LAW

Ninth Circuit Judges Suffer Blackouts. The Supreme Court has reversed the Ninth Circuit, www.ca9.uscourts.gov, faster than it reversed the Florida Supreme Court in the election cases, and faster than the president can spend the projected surplus, cause a stock market crash, convert republicans into "independents," or bail out his college daughters. In less than 100 days of Bush part II, and in less time than the Vice President suffered two heart attacks (i.e., raised enzyme levels), the Ninth Circuit was reversed four times. In a "summary reversal" (i.e., without briefs or argument!) the Supreme Court in a *per curiam* opinion tossed out a Ninth Circuit decision and enforced a baseball labor arbitration award, noting: "no serious error on the arbitrator's part is apparent in this case... The arbitrator's analysis may have been unpersuasive to the Court of Appeals, but his decision hardly qualifies as serious error, let alone irrational or inexplicable error. And, as we have said, any such error would not justify the actions taken by the court." *Major League Baseball Players Assn. v. Garvey*, 121 S.Ct. 1724 (May 14, 2001).

In a second *per curiam* opinion, the Supreme Court ruled that the plaintiffs' single allegation of sexual harassment was paper thin: "Her supervisor's comment, made at a meeting to review the [job] application, that he did not know what the statement meant; her co-worker's responding comment; and the chuckling of both are at worst an 'isolated incident[t]' that cannot remotely be considered 'extremely serious,' as our cases require. The judgment of the Court of Appeals is reversed." *Clark County School Dist. v. Breeden*, 2001 WL 402573 (Apr. 23, 2001). In the third case, the Supreme Court held, 9/0, that the California Labor Code which authorizes the State to order withholding of payments due a contractor on a public works project if a subcontractor on the project fails to comply with certain code requirements did not violate the Due Process Clause of the Fourteenth Amendment because the statutory scheme allegedly did not afford the subcontractor a hearing before or after such action is taken. *Lujan v. G & G Fire Sprinklers, Inc.*, 121 S.Ct. 1446, 1448 (April 17, 2001) ("Ninth Circuit held that the relevant Code provisions violate the Due Process Clause of the Fourteenth Amendment... We granted certiorari ... and we reverse."). While not a labor case, an "inmate law clerk" lost in another 9/0 reversal by the Supreme Court. *Shaw v. Murphy*, 121 S.Ct. 1475, 1481 (April 18, 2001) ("Ninth Circuit erred in holding that the First Amendment secures to prisoners a freestanding right to provide legal assistance to other inmates.")

Perhaps the Ninth Circuit judges deciding these cases were suffering from California "blackouts" due to "youthful indiscretions."

Ninth Circuit Up To Par. The Supreme Court, resolving a split between the Ninth and Seventh Circuits, affirmed the Ninth Circuit in the PGA/ADA lawsuit finding that walking is not an essential job duty, so to speak. *PGA Tour Inc. v. Casey Martin*, 2001 WL 567717 (May 29, 2001). Written by the 80-year-old Justice Stevens, reportedly an avid golfer, the Supreme Court 7/2, ruled that Title III of the ADA applied to a "gifted athlete" and rejected the PGA's argument that Casey should be denied the use of a golf cart because it would "fundamentally alter the nature" of the tournaments. Perhaps the PGA can force him to do push-ups in between shots.

Only Justices Scalia and Thomas dissented, noting that "today's opinion exercises a benevolent compassion that the law does not place it within our power to impose. The judgment distorts the text of Title III, the structure of the ADA, and common sense." Perhaps they are right but Justice Scalia better not protest too much, or would he like us to forget about his equally outrageous invocation of "equal protection" to award the election to Bush, some "benevolent conservatism."

Supreme Court Upholds Contracts of Adhesion. By another 5/4 split, the Bush II majority, ignoring the plain text of the Federal Arbitration Act ruled that "arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law..." That is, as the majority cannot overturn the Civil Rights laws, we will permit employers to force employees to waive their rights to enforce these laws in court by "agreeing" to compulsory arbitration as a condition of getting hired. *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302 (March 21, 2001).

Yet, as the dissenters point out, the FAA does not apply to employment contracts, and only makes enforceable written agreements to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce," 9 USC 2, while Section 1 exempts "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." As almost every worker affects interstate commerce, the FAA virtually never applied — until this decision. I thought that federal policy favored "voluntary" arbitration, not contracts of adhesion. The majority sounds like it would welcome the chance to revive the "yellow dog contract" — by which employees "agreed" to refrain from union activity, outlawed over 65 years ago in the Norris-La Guardia Act of 1932, 29 USC 103.

The 5/4 decision did not stop the Ninth Circuit from ruling that FAA did not apply. "The Supreme Court recently affirmed that Section 1 exempts transportation workers from the FAA. See *Circuit City Stores, Inc. v. Adams*. As a delivery driver for RPS, Harden contracted to deliver packages 'throughout the United States, with connecting international service.' Thus, he engaged in interstate commerce that is exempt from the FAA." *Harden v Roadway Package*, 2001 WL 536845 (9th Cir. May 22, 2001).

Fourth Circuit Wrong Again. The Fourth Circuit should face summary reversal for its unscholarly and outrageous *per curiam* decision throwing out an employee's Title VII lawsuit filed after the union would not arbitrate and ruling that a CBA waived an individual employee's right to file Title VII charges because the CBA stated the parties agreed that they would "abide by all the requirements of Title VII" and that "[u]nresolved grievances arising under this Section are the proper subjects for arbitration." *Safrit v. Cone Mills Corp.*, 85 FEP Cases 833 (4th Cir. April 27, 2001). Finding this pablum to be a clear and express waiver of an employee's right to file suit, ignoring *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (union employee gets two bites of apple, arbitration and EEOC), and common sense, the Fourth Circuit professes to apply *Wright v. Universal Maritime Serv. Corp.*, 525 70 (1998). The Fourth Circuit did not address the fact that a union cannot waive an individual's right to file EEOC charges by noting that a union can waive the right to strike. But as was pointed out by me in "Arbitration of Statutory Claims: The *Wright* decision But Wrong *Dictum*," *Labor and Employment Lawnotes*, Vol 8, No. 4, p. 1 (Winter, 1998), a union cannot waive employee access to federal or state agency or courts. Regardless, this CBA does not expressly state that an employee's right to pursue federal or state charges are waived. The Court must have no imagination to say "it is hard to imagine a waiver that would be more definite or absolute." The Court uses a clause that benefits employees to cut down the rights of employees to file a lawsuit. The fact that the CBA requires the employer or union to abide by Title VII does not mean the employee gives up her rights. Ironically, in *Wright* the Court reversed the Fourth Circuit because it had incorrectly "concluded that the general arbitration provision in the CBA governing *Wright's* employment was sufficiently broad to encompass a statutory claim arising under the ADA." As in *Wright*, the Fourth Circuit is Wrong, Again.

John G. Adam

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- George Roumell remembers Ted Sachs, Michigan labor lawyer.
- Judge Roy Roulhac reviews the recent appellate fate of MERC decisions.
- 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, Brian S. Ahearn, John T. Below, Carrick D. Craig, Gary S. Fealk, Adam S. Forman, Kurt M. Graham, Stuart M. Israel, Danielle N. Mammel, Alexandra Matish, George M. Mesrey, James M. Moore, Andrew M. Mudryk, Arthur R. Przbylowicz, Roy L. Roulhac, George T. Roumell, Jr., Charlotte G. Rowan, William C. Schaub, Jr., Rosemary G. Schikora, Jack VanHoorelbeke, and more.

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