

LABOR AND EMPLOYMENT LAWNOTES



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OVERTIME EXEMPTIONS: WHO'S IN AND WHO'S OUT

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A. Introduction

Under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.*, except as otherwise provided, covered employers shall not employ any employee “for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.” 29 U.S.C. § 207(a)(1). The FLSA further specifies, however, that the overtime pay requirements of Section 7 shall not apply to certain employees. 29 U.S.C. § 213. Those employees are known as “exempt,” and all others are referred to as “non-exempt.” While the concept seems simple, its application is highly fact specific. The question of *how* an employee spends his time is a question of fact, while the question of *whether* his activities fall within an exemption is a question of law.” *Schaefer v. Ind. Mich. Power Co.*, 197 F. Supp. 2d 935, 939 (W.D. Mich. 2002) (*citing Reich v. Wyoming*, 993 F.2d 739, 741 (10th Cir. 1993)) (emphasis added).

Exemptions are narrowly construed and an employer seeking to assert an exemption must prove that its employee meets *every* aspect of the specific exemption. *Auer v. Robbins*, 519 U.S. 452 (1997) (FLSA exemptions are to be narrowly construed against the employer and to be withheld except where the employee plainly and unmistakably fits within their terms). *See also, Schaefer*, 197 F. Supp. 2d at 938-39 (*citing Mich. Ass’n of Gov. Emp. v. Mich. Dep’t of Corr.*, 992 F.2d 82, 83 (6th Cir. 1993); *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)). Several federal appeals courts, including the Sixth Circuit, have stated without much elaboration that the employer must present “clear and affirmative evidence” that the exemption applies. *Ale v. Tenn. Valley Auth.*, 269 F.3d 680, 691, n. 4 (6th Cir. 2001). *See also, Donovan v. United Video, Inc.*, 725 F.2d 577, 581 (10th Cir. 1984); *Klinedinst v. Swift Inv., Inc.*, 260 F.3d 1251, 1258 (11th Cir. 2001). While this may suggest a heightened burden of “clear and convincing” evidence, some courts have interpreted this as a different articulation of the “preponderance of evidence” standard. *See Schaefer*, 197 F. Supp. 2d at 939, n. 3, and the cases cited therein. *See also, Neville v. U.S. Fidelity & Guaranty Co.*, 1996 U.S. App. LEXIS 8739, *7-8 (10th Cir. 1996); *Herr v. McCormick Grain-Heiman Co.*, 1994 U.S. Dist. LEXIS 14352, *5 (D. Kan. 1994). *But see, Hagadorn v. M.F. Smith & Assoc.*, 1999 U.S. App. LEXIS 2361, *5 (10th Cir. 1999) (“employer’s burden is heightened beyond the usual preponderance standard, such that the employer must show that the employee fits ‘plainly and unmistakably’ within the exemption’s terms.”).

Employers who fail to pay overtime to employees who have been incorrectly classified as “exempt” face stiff penalties, including back pay for the employees and, possibly, an equal amount in liquidated damages, attorneys’ fees and, if the violation was willful, fines, and for a second willful offense, imprisonment. 29 U.S.C. § 216.

B. The Executive, Administrative, Professional & Outside Sales Exemptions

Section 13(a) of the FLSA provides a maximum hour (overtime) exemption for, among others, executive, administrative and professional employees and for outside salespersons as those terms are defined by the Secretary of the Department of Labor. In turn, the regulations provide, in general, that an exemption will apply only if the employee meets very specific requirements concerning job duties and responsibilities and the amount and form of compensation as explained below. However, because today many executive, administrative and professional employees earn in excess of \$250/week, the “short test” can be utilized often by employers.

1. Executive Exemption

The executive exemption requires -

- (a) that the primary duties consist of the management of the enterprise or of a recognized department or subdivision; and
- (b) that the employee customarily and regularly direct the work of at least two employees; and
- (c) that the employee have the authority to hire/fire other employees or at least have his recommendations concerning hiring, firing and promotions or other changes of statuses be given “particular weight”; and
- (d) that the employee customarily and regularly exercise discretionary power; and
- (e) that the employee not devote more than 20% (or in the case of a retail or service establishment that the employee devote less than 40%) of his time to activities not directly and closely related to the work described above, provided that this requirement is not applied to an employee who is in sole charge of an independent or physically separate establishment or who owns at least 20% interest in it; and
- (f) that the employee receive on a salary basis not less than \$155/week exclusive of board, lodging, or other facilities, *provided that* [SHORT TEST] an employee receiving on a salary basis not less than \$250/week exclusive of board, lodging or other facilities, and whose primary duty is the management of the enterprise or a department or subdivision, and who customarily and regularly directs two or more employees shall be deemed to meet all of the requirements of the executive exemption. 29 C.F.R. § 541.1.

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STATEMENT OF EDITORIAL POLICY

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

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Tip: In order to be considered a bona fide executive, the employee must be *directly concerned* with the hiring, or firing or other change of status of employees under his supervision whether by direct action or by recommendation or, regardless of how high or low in the organization, that individual will not be subject to the executive exemption. 29 C.F.R. § 541.106.

2. Administrative Exemption

The administrative exemption requires -

- (a) that the primary duty consist of office or non-manual work which is directly related to management policies or general business operations of the employer or its customers, or that it consist of performing functions of the administration of a school system or other educational establishment (or a department or subdivision) directly related to the academic institution or the training that it carries on; and
- (b) that the employee customarily and regularly exercise discretion and independent judgment; and
- (c) that the employee -
 - (1) regularly and directly assist the proprietor or an employee falling under the executive or administrative exemption, or
 - (2) perform specialized or technical work requiring special training, experience or knowledge only under general supervision, or
 - (3) perform special assignments and tasks only under general supervision; and
- (d) that the employee not devote more than 20% (or, if employed at a retail or service establishment, that the employee devote less than 40%) of the hours worked to activities not directly and closely related to the performance of the work above; and
- (e) that the employee be compensated on a salary or fee basis of not less than \$155/week exclusive of board, lodging or other facilities (or in the case of academic administrative personnel that they receive the compensation above or, on a salary basis, an amount at least equal to the entrance salary for teachers in the school system, educational establishment or institution by which the employee is employed), *provided that* [SHORT TEST] an employee who is compensated on a salary or fee basis not less than \$250/week exclusive of board, lodging or other facilities, and whose primary duty consists of the performance of work in Paragraph (a) above and which requires the exercise of discretion and independent judgment shall be deemed to meet all of the requirements of the administrative exemption. 29 C.F.R. § 541.2.

3. Professional Exemption

An employee shall be exempt as a professional provided -

- (a) that the primary duty consist of -
 - (1) work requiring knowledge of an advance type in a field of science or learning which customarily requires a prolonged course of specialized intel-

lectual instruction and study (not general academic education, apprenticeship, or training to perform routine mental, manual or physical processes) (the “learned professional”), or

- (2) work that is original and creative in a field of artistic endeavor (not work that can be produced by individuals with general manual or intellectual ability and training), the result of which depends primarily on the invention, imagination or talent of the individual (the “artistic professional”), or
 - (3) teaching, tutoring, instructing, or lecturing at a school system or educational establishment, or
 - (4) work involving the theoretical and practical application of highly specialized knowledge in computer systems analysis, programming and software engineering (as further defined in 29 C.F.R. § 541.303); and
- (b) that the employee consistently exercise discretion and judgment in performing such work; and
 - (c) that the work is predominantly intellectual and varied in character (not routine mental, manual, mechanical or physical work) and of such character that the results cannot be standardized in relation to a given period of time; and
 - (d) that the employee does not devote more than 20% of his time to activities which are not an essential part and necessary to the work described above; and
 - (e) that the employee receive not less than \$170/week on a salary or fee basis exclusive of board, lodging or other facilities, *provided that* this requirement shall not be applied to –
 - an employee holding a valid license or certificate permitting the practice of law or medicine (or any of their branches) and who is engaged in such work, or
 - an employee who has the requisite degree for the general practice of medicine and is performing an internship or residency in medicine, or
 - a teacher (as described in Paragraph (a)(3) above), or
 - an IT employee, if he or she is paid on an hourly basis at a rate not less than 6½ times the minimum wage rate;

provided further [SHORT TEST] that individuals who receive not less than \$250/week on a salary or fee basis exclusive of board, lodging or other facilities, and whose primary duty consists of work described in Paragraphs (a) (1), (3) or (4) above requiring the consistent exercise of discretion and judgment or work requiring invention, imagination or talent in a recognized field of artistic endeavor (as described in Paragraph (a)(2) above) shall be deemed to meet all of the requirements of the professional exemption. 29 C.F.R. § 541.3.

4. Outside Sales Exemption

An outside “salesman” exemption will apply to an employee -

- (a) who is employed for the purpose of, and is customarily and regularly engaged away from the employer’s places of business in,

- (1) making sales, or

- (2) obtaining orders or contracts for services or for the use of facilities paid for by a client or customer; and

- (b) whose hours of work other than above do not exceed 20% of the hours worked during a workweek by the employer’s non-exempt employees, provided that the salesman’s work incidental to, and in conjunction with, his outside sales or solicitations (including, for example, deliveries and collections) shall not be deemed as non-exempt work. 29 C.F.R. § 541.5.

There is no short test for the outside sales exemption.

C. Problems In Classifying Employees And The Loss Of A Valid Exempt Status

Many of the terms utilized in the exemptions above are further defined by the regulations or examples are provided. *See, generally*, 29 C.F.R. §§ 101-508. A firm grasp of these terms is essential to any analysis for the exemptions above. Moreover, it is often a lack of understanding of the duties and compensation tests that results in employees being improperly classified as exempt – or losing an exemption that had been valid.

1. The Duties Test

Titles are not determinative – it is the type of duties that matters for exempt status. *See, e.g.*, 29 C.F.R. § 541.201(b). *See also*, *Walling v. General Indus. Co.*, 155 F.2d 711, 714 (6th Cir. 1946), *aff’d*, 330 U.S. 545 (1947) (the duties test constitutes the most pertinent determination for whether an employee is a bonafide executive). *See also*, *Roberts v. National Autotech, Inc.*, 192 F. Supp. 2d 672, 680 (N.D. Tex. 2002) (“[T]he job title is not dispositive. Under either title [manager trainee or service writer] the Plaintiff did not exercise the degree of supervision, discretion or control necessary to label him either an exempt executive or administrative employee.”).

For example, classifying an employee as “management” within the employer’s organization does not necessarily mean that the employee qualifies for the executive exemption. Nor would any of the exemptions apply to an employee who is still in training and not yet performing the requisite duties of the exemption. 29 C.F.R. §§ 541.116, .210, .310, .508. Continuing to focus on the executive exemption as an example, typical “management” duties include interviewing, selecting and training of employees; setting and adjusting salaries and schedules; directing work; maintaining production or sales records for supervision or control; evaluating productivity and efficiency for the purpose of recommending promotions or job changes; handling complaints, grievances and discipline when necessary; planning work; determining techniques or the type of materials, supplies, machinery or tools to be used, bought, stocked or sold; controlling the flow and distribution of material or merchandise and supplies; and providing for the safety of workers and property. 29 C.F.R. § 541.102. Moreover, management duties (or the specific duties required for the other exemptions) cannot be occasional . . . they must be the employee’s “primary duty.”

To determine whether management (or the requisite duty for other exemptions) is the primary duty, a review of the specific facts must be conducted including the amount of time spent in the performance of managerial duties. As a rule of thumb, it should be over 50% of the employee’s

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time. Where, however, the employee does not spend the majority of time doing such work, managerial duties may still be the primary duty based on factors such as the relative importance of the managerial duties as compared to other duties, how often the employee exercises his discretionary powers, his freedom from supervision, and a comparison between his salary and that of other employees who perform non-exempt work. 29 C.F.R. § 541.103. These same principles are applied to the primary duties required by the administrative and professional exemptions. See 29 C.F.R. §§ 541.206 and .304.

Example: Employee spends *more* than half of his time performing non-managerial work such as production or sales but, while doing so, he supervises other employees, directs the work of warehouse and delivery employees, approves advertising, orders merchandise, handles customer complaints, authorizes accounts payables and performs other management type duties as required by the day-to-day operations. This employee's primary duty is management.

The executive and administrative exemptions require the employee to "customarily and regularly" exercise discretion, which suggests a frequency greater than occasional, but less than constant. The employee must normally and recurrently exercise discretionary powers in his day-to-day performance, not merely occasionally. 29 C.F.R. § 541.107. See also, *Schaefer*, 197 F. Supp. 2d at 948 (employee's argument that he could not customarily and regularly exercise discretion given the plethora of regulations applicable to his primary duty of shipping radioactive materials failed since there are gaps between the regulations and their real world application calls for judgment and discretion). By comparison, the professional employee must "consistently" exercise discretion and judgment. 29 C.F.R. § 541.305(a).

2. On A "Salary or Fee Basis"

Even where an employer has properly classified an employee as exempt, such status can be lost if the employer makes improper deductions from wage payments or otherwise fails to satisfy the specific compensation requirements of the exemption.

Salary Basis:

In order to be paid on a salary basis, the employee, under an employment agreement, must regularly receive "each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.118(a). With few exceptions, the employee must receive the full salary amount for any week in which the employee performs any work without regard to the number of days or hours worked. If, however, the employee does not work at all during the work week, he or she does not have to be paid for that week. An employee is *not* paid on a salary basis where deductions are made for absences caused by the employer or the operating requirements of the business and the employee is

ready, willing and able to work while such work is not available. 29 C.F.R. § 541.118(a)(1). However, deductions can be made under the following limited circumstances:

- Where the employee absents himself from work for a full *day or longer* for personal reasons (other than sickness or accident). 29 C.F.R. § 118(a)(2).
- Where the employee is absent for a *day or longer* because of sickness or disability (including industrial accidents) and the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for lost salary occasioned by sickness or disability. Where the employer's plan, policy or practice provides compensation for such absences, a deduction can be made for absences of a *day or longer* prior to the employee being qualified under the plan, policy or practice and after such leave is exhausted. Where the employee receives payment pursuant to such a plan, policy or practice, the employer is not required to pay any portion of the salary for such days. 29 C.F.R. § 118(a)(3).
- Where an employer imposes penalties in good faith for violations of safety rules of *major significance* (i.e., those relating to the prevention of a serious danger such as rules prohibiting smoking in explosive plants, oil refineries and coal mines). 29 C.F.R. § 118(a)(5).

Where a deduction can be made for a missed day (i.e., an employee is absent a full day for personal reasons), it is not based upon the number of hours missed. Rather, the amount of the deduction is based on the number of days in the work week and the number of days missed (i.e., if one day of the typical five day work week is missed, salary may be reduced by 1/5). Wage & Hour Opinion Letters, No. 555 (December 7, 1966); No. 823 (June 10, 1968).

Deductions may not be made for absences of an employee caused by jury duty, attendance as a witness, or temporary military leave. The employer, however, may offset amounts received by the employee against the salary due for that week. 29 C.F.R. § 541.118(a)(4). Also, the full salary need not be paid where an employee does not work a full week during the first or last week of employment. 29 C.F.R. § 541.118(c).

Under the FLSA regulations an employer may not make a deduction from salary for absences of *less than a full day*. *Reich v. Pierce*, 1994 U.S. App. LEXIS 36194, * 5-6 (6th Cir. 1994). However, the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.*, provides that unpaid leave, even for intermittent and reduced leave schedules, may be granted to exempt employees who are paid on a salary basis without affecting their exempt status. 29 U.S.C. § 2612(c). Where an improper deduction has been made inadvertently, the exemption will not be lost *if* the employee is reimbursed and the employer promises to comply in the future. 29 C.F.R. § 541.118. See also, *Cruz v. McAllister Bros., Inc.*, 52 F. Supp. 2d 269, 291 (D. P.R. 1999) (one time deduction from employee's pay because of half day absence did not alter status as exempt employee since employer reimbursed employee for the deducted amount in the next paycheck).

Tip: It is important that leave, overtime and discipline policies in employee handbooks have special rules applicable to exempt employees. *Takacs v. Hahn Auto. Corp.*, 246 F.3d 776, 782-84 (6th Cir. 2001) (discipline policy creating significant likelihood of pay deductions for infractions and practice of making such deductions from managers' pay made managers non-exempt and employer was not permitted to utilize "window of correction" defense).

Fee Basis:

The compensation requirements under the professional and administrative exemptions (but not executive) may be met where the employee is paid on a "fee basis." These payments are similar to piece work payments except, generally, a fee payment is made for a job which is unique, rather than for a series of jobs which are merely repeated over and over. Payments on a fee basis are pursuant to an agreement for an agreed sum for a specific job regardless of how long it takes for its completion. If payment is made based on the number of hours or days required, and not on the completion of a specific project, these payments are not on a fee basis.

Example: Home health employee receives payment per patient visit and an hourly compensation for visits lasting longer than two hours, and for on-call duty, in-service training, and staff meetings. This employee is not paid on a fee basis since compensation is tied partly to the number of hours worked and not the completion of a given task. *Elwell v. University Hosp. Home Care Serv.*, 276 F.3d 832, 838 (6th Cir. 2002).

As with a salary compensation plan, fee basis payments must satisfy the minimum payment amounts required for the exemption (i.e., \$170/week to a professional employee and \$155/week to the administrative employee). Typically, only after the job is finished can it be determined whether the minimum amounts have been satisfied because the determination is made based on the amount paid and the number of hours it took to complete the job.

Example: Assuming a singer receives \$50 for a song on a 15 minute program, the requirement will be satisfied since she is earning \$200/hour.

Example: An artist is paid \$75 for a picture that takes him 20 hours to complete. Since the earnings at this rate would not yield the artist a sufficient payment for 40 hours (only \$150), he is not exempt.

Example: A photographer is hired to take photos for a law firm's brochure at a fee of \$150. That job took 60 hours. At this rate, the photographer would earn only \$100 per 40 hours of work and he is not exempt.

3. Combination Exemptions

The regulations permit the "tacking" of exempt work under one exemption with exempt work under others. However, the stricter salary and percentage of non-exempt work requirements will apply. For example, when considering time worked as an executive and as an outside salesman, the higher salary requirement for executives will apply. Similarly, any work that would be non-exempt under the executive exemption must be considered along with work that would not be considered exempt under the salesman exemption and together must not exceed (pursuant to the executive exemption) 20% of that employee's time, or (under the salesman's exemption) 20% of the hours worked in the work week by other non-exempt employees of the employer (whichever is the smaller amount). However, because combination exemptions are permitted, work which is exempt under one exemption will not defeat the validity of another exemption. 29 C.F.R. § 541.600.

4. Other Common Problems Resulting In Losing Exempt Status

The Department of Labor recognizes the following problems/misconceptions as common in the application of exemptions:

- Employers without a formal sick leave policy docking salaried, exempt employees for time missed from work because of sickness.
- Employees not receiving full salary payments each week.
- Employees performing routine production-type duties that seem related to general business operations, but which have no bearing on setting of management policies.
- Employees who hold degrees performing jobs which are not professional in nature or to which the degree they hold is not applicable.
- Employers confusing job skills with the exercise of independent judgment and discretion.
- Employees placed on salary and classified as exempt without regard to duties or percentage of time spent in performing exempt duties.

See Department of Labor, Employment Standards Administration, Wage and Hour Division, Fact Sheet No. 017, dated September 28, 1998. An additional common problem is the infamous "four hour rule" where the employer only pays salaried employees their full day's salary when they work a minimum of four hours that day. This is not permissible and will result in the loss of exempt status.

— END NOTES —

¹This article was adapted from "Dealing With The Fair Labor Standards Act" first presented by the Institute for Continuing Legal Education on November 22, 2002.

²Section 13 of the FLSA provides that individuals who are employed as follows are also exempt from the overtime pay requirements of the Act: employees of an amusement or recreational establishment, organized camp or religious or nonprofit educational conference center provided, among other things, that it does not operate for more than seven months in a calendar year or it has limited receipts for six months of the year; employees employed in the "catching, taking, propagating, harvesting, cultivating, or farming" of fish or other marine life or in the "first processing, canning or packing" of such products at sea; certain agricultural employees; employees under "special certificates" issued by the Secretary of Labor (e.g., certain learners, apprentices, messengers, students and workers who are handicapped because of age, physical or mental deficiency or injury); students employed by their elementary or secondary schools as part of their education program; employees of certain small newspapers; "switchboard operators" of very small, independently owned public telephone companies; seamen; domestic service employees hired on a casual basis to babysit or provide companionship to individuals unable to care for themselves; certain criminal investigators receiving availability pay; highly compensated computer systems analysts, computer programmers, software engineers or other similarly skilled workers if performing certain specified duties; certain railroad, motor and air carrier employees; "outside buyers" of poultry, eggs, cream, or milk in their raw or natural state; announcers, news editors, or chief engineers of certain radio/television stations (generally in smaller markets); salesmen, partsmen or mechanics of automobiles, trucks or farm implements, or salesmen of trailers, boats or aircraft, if employed by a nonmanufacturing establishment selling to ultimate purchasers; certain drivers and their helpers making local deliveries if paid on the basis of trip or delivery; employees engaged in agriculture or operating or maintaining certain ditches, canals, reservoirs or waterways; certain employees working in agriculture, notwithstanding their other work involving livestock auctions; certain production employees working with "country elevators"; employees who process maple sap into syrup or sugar (other than refined sugar); certain employees who transport, or prepare for transport, fruits or vegetables; taxicab drivers; firemen and law enforcement officers of public agencies having less than five such workers; domestic service employees residing in the household; certain spousal "foster parents"; employees working at motion picture theaters; certain employees working for small forestry or lumbering operations; certain employees of amusement or recreational establishments in national parks or forests or in the National Wildlife Refuge System; employees who deliver newspapers to consumers; homeworkers making wreaths; and employees working outside of the U.S. (except in Puerto Rico, Virgin Islands, outer Continental Shelf lands, American Samoa, Guam, Wake Island, Eniwetok Atoll, Kwajalein Atoll, or Johnston Island). 29 U.S.C. § 213. Many of these exemptions have specific, often numerous, requirements for their application.

³The "percentage test" is applied on a work week basis and the percent of time attributable to non-exempt work is determined based on the hours worked by the employee. 29 C.F.R. §§ 541.112, .209, .309, .507.

⁴Note that the executive exemption requires payment on a salary basis, whereas the administrative and professional exemptions also permit payment on a fee basis.

⁵This requirement restricts the administrative exemption to white collar employees who meet all of the other tests. Note that, as long as the work is "office" work, it can be manual. However, if the employee is performing so much manual work that he cannot be called a white col-

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lar worker, he will not qualify for the administrative exemption even if such work is directly and closely related to the work requiring discretion and independent judgment. Therefore, employees who spend most of their time using tools, instruments, machinery or other equipment or who perform repetitive tasks with their hands, regardless of the skill required, are not qualified for the administrative exemption. By comparison, an office employee would not lose the exemption simply because he is not primarily doing non-manual work. 29 C.F.R. § 541.203.

⁹Decisions resulting from such discretion and judgment need not be final. 29 C.F.R. § 541.207(e).

⁷Such assistants are typically found in large companies where the executive being assisted has such a broad scope of authority that personal scrutiny, correspondence and interviews must be delegated. Typical titles include executive assistant to the president, confidential assistant, executive secretary, assistant to the general manager, administrative assistant or, in retail and service establishments, assistant manager and assistant buyer. 29 C.F.R. § 541.201(a)(1).

⁸These employees can be described as "staff" rather than line employees or as functional rather than department heads. They act as advisory specialists to management and include advisories to tax, insurance, sales, and research experts, wage rate analysts, investment consultants, statisticians, etc. Such employees may also be in charge of a "functional" department having only one employee such as the credit manager, purchasing agent, buyer, safety director, personnel director, etc. 29 C.F.R. § 541.201(a)(2).

⁹These employees perform special assignments that may be away from the employer's place of business. Typical titles include lease buyers, field representatives of utility companies, location managers of motion picture companies, and district gaugers for oil companies. This group may also include employees who perform special assignments at their employer's place of business such as special organization planners, customers' brokers in stock exchange firms, so-called account executives in advertising firms, and contact or promotion employees. 29 C.F.R. § 541.201(a)(3).

¹⁰To be a learned professional, the individual must be in a profession that requires knowledge of an advance type in a field of science or learning (not mechanical arts) which customarily requires a prolonged course of specialized intellectual instruction (not general academic education, apprenticeship or training). The requirement that a prolonged course of instruction be "customarily" required allows for individuals who have not obtained the requisite degree but who have worked in a profession perhaps for years. The regulations further provide that a "prolonged course of specialized intellectual instruction and study includes law, medicine, nursing, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, including pharmacy and registered or certified medical technology and so forth. The typical symbol of the professional training and the best prima facie evidence of its possession is, of course, the appropriate academic degree, and in these professions an advanced academic degree is a standard (if not universal) prerequisite." 29 C.F.R. § 541.301(e)(1).

The areas in which there is a learned professional exemption is expanding as degrees are offered in new and diverse fields, and the new specialists are coming closer to meeting the test. "However, just as an excellent legal stenographer is not a lawyer, these technical specialists must be more than highly skilled technicians. Many employees in industry rise to executive or administrative positions by their natural ability and good common sense combined with long experience with a company . . . [t]he professional person, on the other hand, attains his status after a prolonged course of specialized intellectual instruction and study." 29 C.F.R. § 541.301(e)(2).

The department has traditionally recognized certain professions as "learned professionals" including registered nurses, CPAs, attorneys, etc. However, the determination must be on the basis of the individual employee's duties and the other criteria in the regulations. For example, accountants who are not CPAs may be exempt, but junior accountants and accounting clerks typically are not because they often perform a great deal of routine work.

¹¹The artistic professional must work in a "recognized field of artistic endeavor" which generally includes music, writing, the theater, and the plastic and graphic arts. The originality and creative character of the work may be demonstrated, for example, where an individual is only provided the subject matter or underlying concept and then left to their own creative powers. Therefore, with regard to newspaper employees, reporters do work which depends on intelligence, diligence and accuracy, but not necessarily on invention, imagination or talent. Only where the writing is analytical, interpretive or highly individualized is it creative in nature. *See, generally*, 29 C.F.R. § 541.302.

¹²Note that this amount is greater than the executive and administrative exemptions' requirement of \$155/week. Also, employees who work for other than the federal government in Puerto Rico, the Virgin Island or American Samoa are subject to lower salary requirements for the exemptions.

¹³Any fixed place of business (e.g., the employer's office or employee's home) used for phone solicitation is not considered "away from the employer's place of business" which, by comparison, requires calling on customers at their place of business. 29 C.F.R. § 541.502(b).

¹⁴For example, "[a] route man who provides the only sales contact between the employer and the customers, who calls on customers and takes orders for products which he delivers from stock . . . and who receives compensation commensurate with the volume of product sold, is employed for the purpose of making sales." 29 C.F.R. § 541.505(b).

¹⁵The regulations provide, however, that for the professional exemption to apply to a teacher, he or she must, in fact, be employed and engaged as a teacher—mere certification or employment by a school will not suffice. 29 C.F.R. § 304(b).

¹⁶This includes payments made to an employee under the Worker's Disability Compensation Act. However, where the absence is caused by an industrial sickness or accident, the employer is only excused from paying the salary for absences of a day or longer if the employer also has some plan, policy or practice of providing compensation for sickness and disability not related to industrial accidents. 29 C.F.R. § 541.118(a)(3).

¹⁷Specifically, 29 C.F.R. § 825.206 provides that "where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the [FLSA] regulations, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek without affecting the exempt status of the employee." ■

IS THE LAWYER'S NOSE BACK UNDER THE ARBITRAL TENT?

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"Heard melodies are sweet, but those unheard are sweeter," wrote a poet who never had to confront the cacophony of unheard judicial discourse. Had Keats seen *First Union Securities Financial Network v. Young and Securities Arbitration Group*, a preliminary injunction issued September 18, 2002, by the Oakland County Circuit Court, he might have held his tongue. For this modest document suggests staggering implications for all arbitration proceedings.

An investor in a small Michigan community retained Young, the C.E.O. of a California corporation, to pursue a claim against a national securities firm for alleged misconduct in the handling of his account. Young at no time held himself out as a member of any Bar, although in the course of many prehearing skirmishes over discovery, he demonstrated considerable zeal and sophistication in lawyerly maneuver. The arbitration, pursuant to the Federal Arbitration Act, was subject to procedures of the National Association of Securities Dealers, Inc., which not only assure a full right of representation by counsel, but whose Arbitrator's Manual proclaims:

Parties need not be represented by an attorney in arbitration. They may choose to appear *pro se* (on their own) or be represented by a person who is not an attorney, such as a business associate, friend or relative.

When Mr. Young appeared at the hearing prepared to act in behalf of the investor, he was accused of illegally "practicing law" in this state and was told that an immediate order to restrain him was being sought.

The ensuing "preliminary injunction" prohibits him and his corporation from "Holding themselves out" to the public as qualified to render advice and services to persons in pursuing claims against securities brokers-dealers and their registered representatives, including but not limited to First Union, "and from representing parties in the initiation or prosecution of new and pending arbitration proceedings before the NASD Dispute Resolution, Inc., the New York Stock Exchange, the American Arbitration Association, or any other arbitration tribunal," as well as in the two cases initiated by the named claimant. The Oakland Court case follows a similar holding in an unreported and little known decision in *Prudential Securities, Inc. v. Partnership Arbitration and Constituent Partners*, File No. 93-19838-CZ, Genesee County Circuit Court (1993), which held that providing "professional guidance" to clients, including advising as to statutes, the "complexity of securities litigation," and selecting legal theories to be used in an arbitration proceeding, constituted the unauthorized practice of law banned by MCL 600.916 and *State Bar v. Cranmer*, 399 Mich 116 (1976). The Genesee County Court rejected the claim that there was a difference between advice for use in an arbitration forum and in a court of law.

The bench and bar have long been of one mind in safeguarding the perquisites of the profession from outside competition. The courts have the duty to define the "practice of law," *Ingham County Bar Association v. Neller Co.*, 342 Mich 214, 221 (1955), and in doing so, judges do not forget their roots. One need not be

in court or preparing to go into court to be engaged in work as an attorney, we were told in *Fletcher v. Board of Education of Fractional No. 5*, 323 Mich 343, 348 (1948); and in *Grand Rapids Bar Ass'n v. Denkema*, 290 Mich 56, 63 (1939), our court held that the practice of law is not confined to practice in the courts, but includes the preparation of pleadings and other papers "incident to any action or special procedure in any court or other judicial body" as well as "the giving of legal advice in any action taken for others in any matter connected with the law." Law practice, it insisted, consists "in no small part of work performed outside of any court and having no immediate relation to proceedings in court."

These observations were not diminished in the last comprehensive review of this issue in *Cranmer*, *supra*. There, the Court chorused the *Denkema* decision in emphasizing that there could be no "all encompassing definition" of the "practice of law" since the practice "must necessarily change with the ever changing business and social order," (399 Mich at 133). It also cautioned:

A broad definition of the 'practice of law' embraces virtually all commercial areas of human endeavor. This, of course, will not do.

Since the statute attempts no definition of the activities constituting the practice of law, the Court in *Cranmer* (399 Mich at 132) observed that the "formidable task of constructing a definition of the practice of law has largely been left to the judiciary." Whether the "changing business and social order" since 1976 dictates a new approach awaits the Supreme Court's review of *Dressel v. Ameribank*, 247 Mich App 133 (2001), presently on its docket.

The general arbitration law, MCL 600.5001, et seq., imposes no restrictions on non-lawyers acting as arbitrators or representing a party in arbitration. In labor disputes submitted to arbitration by the parties, neither the arbitrators nor the representatives are confined to members of the bar, MCL 423.9d, et seq., nor are such requirements imposed in compulsory arbitration proceedings in the police and fire services, MCL 423.231, et seq.

However the "practicing law" statute, MCL 600.916, is currently to be interpreted, it is questionable whether it dictates the drastic and comprehensive restraints imposed by the Oakland County Circuit Court and its radiating message for Michigan arbitration procedures. Standard contracts between national securities firms and their customers require that disputes may not be litigated in the courts, but are to be resolved by arbitration authorized by the Federal Arbitration Act, 9 USC 1; *Shearson/American Exp., Inc. v. McMahon*, 482 US 220 (1987); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 US 52 (1995); *Nemes v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 741 F Supp 657 (ED Mich 1990). That Act not only declares a national policy favoring arbitration, but actually withdraws power of the states to require a judicial forum to resolve claims which the parties have agreed to resolve by arbitration. Even when citizens of different states have contracted to be bound by a particular state's law, if the case falls within reach of the FAA, that statute governs "all aspects of arbitration procedure" and preempts inconsistent state law, *Aviall, Inc. v. Ryder Systems, Inc.* 913 F Supp 826 (SDNY 1996), *affd* 100 F3d 892 (2nd Cir 1998); *Southland Corp v. Keating*, 465 US 1 (1984).

The investor and First Union in the Oakland County case both agreed to proceed by arbitration pursuant to NASD rules, which did not restrict arbitrators or the parties' representatives to

membership in the organized bar. Applying the FAA, the Supreme Court emphasized in *Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 US 468, 479 (1989):

Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issue they will arbitrate, so may they specify by contract the rules under which the arbitration will be conducted.

There is no reason to believe that the FAA would not control a dispute between citizens of different states involving the buying and selling of securities on national markets. Indeed, in *Allied-Brice Terminex Co., Inc., et al v. Datson, et al*, 513 US 265 (1995), a contract to protect a single household in Alabama against termites contained an arbitration clause. State law made unenforceable a pre-dispute agreement to arbitrate. The United States Supreme Court held the state law had to yield to the provisions of the FAA which it found applicable to the furthest reaches of Congressional power over interstate commerce (513 US at 275, 277).

The restraint imposed on Mr. Young by the Oakland County order is not confined to his handling of claims of investors against securities firms. It prohibits him from appearing for another in any kind of arbitration proceeding regardless of subject matter or location. The American Arbitration Association, whose proceedings are mentioned by the court, conducts arbitrations in many areas. Its National Rules for the Resolution of Employment Disputes provide that, "Any party may be represented by counsel or other authorized representative." The same language is found in its Labor Arbitration Rules, Home Buyer Home Seller Arbitration Rules, Commercial Dispute Resolution Procedures, Dispute Resolution Procedures for Insurance Claims, Accident Claims Arbitration Rules and its International Arbitration Rules. Its Construction Industry Dispute Resolution Procedures indicate, "Any party may be represented by persons of the party's choice." The National Arbitration Forum, which administers arbitrations for American Express and other national enterprises with mass consumers, provides that "Parties may act on their own behalf or may be represented by an attorney or by a person who is authorized by the Party to act on behalf of the Party." And, of course, the Federal Mediation and Conciliation Service has facilitated labor arbitrations by non-lawyer arbitrators and representatives for a generation. All of these organizations may be surprised to find their procedures clouded by the Oakland County ruling.

A report by a distinguished committee of the Association of the Bar of the City of New York, "Labor Arbitration and Unauthorized Practice of Law," 30 Record of the Association of the Bar of the City of New York, No. 5/6, pp422, 428 (May/June 1975), stated that "no support has to date been found in judicial decision, statute or ethical code for the proposition that representation of a party in any kind of arbitration amounts to the practice of law." It concluded that the appearance of a non-lawyer in an arbitration proceedings is not the unauthorized practice of law. The quoted language was cited with approval by District Judge Weinfeld in *Williamson v. John D. Quinn Const. Corp.*, 537 F Supp 613 (SDNY 1982). See also *Siegel v. Bidas Sociedad Petrolera Industrial y Commercial*, SDNY 1991, 1991 US Dist Lexis 11455, p 5. Two Michigan circuit judges have now hummed a different tune. Whether this proves a sweeter melody, hear or unheard, remains to be seen — or listened to. ■

WHEN WRIGHT LINE IS THE WRONG TEST

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The *Wright Line* decision is one of the most cited of any Board case. 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Since 1980, it has been cited almost 5,000 times in various contexts arising whenever an employer (or a union) takes adverse action or discriminates against an employee who has engaged in union or other protected concerted activity. However, *Wright Line* is not applicable to every retaliation or discrimination allegation. In certain contexts, the Board and courts utilize an entirely different analysis. Recognition of this distinction may make a dramatic difference in the ultimate outcome of a case.

The *Wright Line* analysis is used to resolve cases where the employer's motivation for taking the allegedly unlawful action is disputed. Specifically, the *Wright Line* analysis is used in dual motive situations to determine whether the employee's union or other protected activity was the motivating factor in the respondent's discipline of the employee, as opposed to some other valid reason asserted by the employer which is totally separate from the employee's protected activity. Stated another way, would the employer have taken the same adverse action against the employee even in the absence of such protected activity.

However, in situations where disciplinary action is directly related to an employee's protected concerted activity and arises during the course of that activity, rather than for some other reason apart from that activity, an analysis under *Wright Line* is not appropriate. *Circle K Corp.*, 305 NLRB 932 (1991), enf. 989 F.2d 498 (6th Cir. 1993). For example, take the hypothetical situation where an employee is circulating a petition among employees complaining about working conditions. If his employer discharges the employee for poor attendance, an analysis under *Wright Line* is necessary. The employer is asserting a motive for discharging the employee wholly apart from the employee's protected activity (or union activity). The task under a *Wright Line* analysis is to determine which reason is the real reason motivating the employer's action, a legitimate reason (attendance) or an unlawful one (circulating a petition).

If, on the other hand, the employer discharges the employee for harassing other employees while circulating the petition, no *Wright Line* analysis is necessary because the basis of the employer's discipline arises from the employee's protected concerted activity itself. The employer's motive is no longer in dispute; it is motivated by the employee's protected concerted activity. But that does not mean the employer's action is necessarily unlawful. The question for resolution is whether the employee has engaged in misconduct that deprives his activity of protection, and that allows the employer to legitimately take adverse action against the employee under its disciplinary rules.

The inapplicability of *Wright Line* may come about in a couple different, albeit related contexts. The first arises when the employer wrongly believes the employee engaged in misconduct during the course of his protected concerted activity, and the second occurs when the employer rightly believes the employee engaged in misconduct, but the misconduct is not legally sufficient to deprive the employee of protection under the Act.

The first situation derives directly from the Supreme Court decision in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). In *Burnup & Sims*, two employees, who were soliciting a union authorization card from a third employee, were discharged based on a rumor that during the course of that solicitation they threatened that the union would use dynamite to get in the plant if it did not acquire the necessary authorizations. There was no dispute that a threat of this nature, if true, went over the line and was not protected even though it occurred during the course of protected activity. However, the rumor turned out to be false; it was determined that the employees had made no such threat. The employer nevertheless defended its action based on its good faith belief that such a threat had been made. The Court in *Burnup & Sims* stated an employer's good faith is an insufficient defense for disciplining an employee for asserted misconduct that occurs during protected concerted activity, if it is proven the employee did not actually engage in the misconduct. The Court believed to find otherwise would place an innocent employee's Section 7 rights in a "precarious status" if his protected concerted activity lost its immunity simply because of the employer's good faith. See *Shamrock Foods Co.*, 337 NLRB No. 138 (2002).

The *Burnup & Sims* analysis is often utilized in picket line misconduct cases. *Beaird Industries*, 311 NLRB 768, 769 fn. 7 (1983); *Allied Industrial Workers Local 289 v. NLRB*, 476 F.2d 868, 878-880 (D.C. Cir. 1973); *Kayser-Roth Hosiery Co. v. NLRB*, 447 F.2d 396, 400 (6th Cir. 1971). In those circumstances, employees are clearly engaged in protected concerted activity, i.e., picketing. However, employees may be accused of various types of picket line misconduct, which the employer contends sanctions its imposition of discipline. For example, the employer may discharge an employee for damaging a vehicle of a non-striker that passes through the picket line. This asserted misconduct clearly arises out of the employees' engagement in protected concerted activity, so motive is not in dispute, and if true would constitute a defense to the discipline. *Siemens Energy & Automation*, 328 NLRB 1175 (1999). However, if it is proven that the accused employee was not the actual perpetrator of the offense, the employer's good faith will not spare it from having violated the Act.

The second situation, a variation of the *Burnup & Sims* analysis, takes place when the employee is actually guilty of the misconduct charged. Again, under these circumstances the employer's motive is not in dispute if the employee was at the time of the misconduct engaged in protected activity. However, even if an employee is found to have engaged in the misconduct, it must be determined if such misconduct was sufficiently egregious to deny him continued protection of the Act, or should be categorized as "a trivial rough incident or a moment of animal exuberance." *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941).

In deciding whether an employee engaged in protected activity loses the protection of the Act by misconduct that crosses the line, the Board considers four factors pursuant to *Atlantic Steel Co.*, 245 NLRB 814 (1979): (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. In *Atlantic Steel*, the Board found that an employee's use of obscenity ("lying s.o.b.") to a supervisor on the production floor, following a question concerning working conditions, was not the same as a spontaneous outburst behind closed doors during the heat of a formal grievance proceeding or in contract negotiations. The former is unprotected, while the latter is protected. See *Mast Advertising*, 304 NLRB 819 (1991). Moreover, under an employer's anti-harassment policy, vulgar, sexually

explicit remarks to a female co-worker during the course of protected concerted activity will deprive the employee of the Act's protection. *PPG Industries*, 337 NLRB No. 176 (2002).

However, "[t]he Board has long held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves." *Health Care & Retirement Corp.*, 306 NLRB 63, 65 (1992), rev'd. on other grounds 511 U.S. 571 (1994). Not every impropriety committed in the course of protected concerted activity deprives an employee of the protective mantle of the Act. See *Clear Pine Mouldings*, 268 NLRB 1044 (1994).

Does it make a difference which analysis is used? It may, as was the case in *Felix Industries, Inc.* 331 NLRB No. 12 (2000), remanded 251 F.3d 1051 (D.C.Cir.2001). The Respondent discharged employee Yonta because of his insulting language during a telephone exchange with supervisor Petrillo. The telephone exchange involved protected concerted activity by Yonta, who was raising the issue of his right to night differential pay under the collective-bargaining agreement. The ALJ found that Respondent had acted consistent with its work rules and had previously discharged an employee who had disobeyed Petrillo's order to work a night shift by stating, "Fuck you, I don't have to work at night." Thus, the ALJ made an alternative finding that even if the conduct might otherwise be protected under *Atlantic Steel*, the Respondent had shown, under a *Wright Line* analysis, that the employee would have been discharged even absent his protected activity. However, the Board rejected such an alternative analysis, finding that since the misconduct for which the Respondent claimed to have discharged Yonta was protected activity, and under *Atlantic Steel* the employee's outburst was not of such a serious nature as to cause him to lose the protection of the Act, the inquiry ends. Resort to the *Wright Line* analysis was not appropriate. Consequently, the discharge of another employee for similar misconduct was irrelevant since that incident did not involve protected activity and therefore did not privilege the Respondent to discharge an employee for conduct that was intertwined with protected activity.

Applying similar analyses to the earlier example involving the discharge of an employee for harassment of other employees in circulating a petition, different outcomes may be reached depending on which analysis is applied. Under *Wright Line*, the employer may be able to successfully defend its actions by establishing a lawful work rule against solicitation during working time, which it has consistently enforced. However, under the *Burnup & Sims* and *Atlantic Steel* line of cases that is entirely irrelevant unless the harassment is extreme enough to deprive the employee of the protections of the Act. See *Honda of America Mfg.*, 334 NLRB No. 99 (2001) (statements by employee which questioned the intelligence and truthfulness of certain individuals in the employer's benefits department were not deliberate or reckless untruths that would render otherwise protected activity unprotected).

Do not despair if the distinction is not always readily apparent. Even Board members disagree which test is appropriate in a given circumstance. In *Whirlpool Corp.*, 337 No. 117 (2002), Chairman Hurtgen agreed with his colleagues that Respondent unlawfully disciplined employees Hamilton and Pore. However, he did not agree that this case presented a *Wright Line* situation. Chairman Hurtgen pointed out that it was clear and uncontested that Respondent disciplined Hamilton and Pore because of the manner in which they solicited fellow employees concerning union matters. In his view, the issue was whether their manner of solicitation crossed the line into unprotected harassment. Chairman Hurtgen agreed with the ALJ that Respondent had not shown a good

RIGHTS NOT VIOLATED IN WESTERN DISTRICT

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Wrzesinski v. District Court Judge Brent Danielson, et al., Case No. 1:01-CV-278, (August 14, 2002). Judge Gordon J. Quist granted Defendant Danielson's Motion for Summary Judgment finding that although a confidential employee's First Amendment rights were violated based upon political activity by the employee's spouse, Danielson did not have fair notice he was violating the First Amendment and thus, was entitled to qualified immunity.

Plaintiff Wrzesinski was a non-attorney judicial magistrate. Danielson was elected Judge of the 85th Judicial District of Michigan. Danielson learned Plaintiff had engaged in political activity and personally observed political signs in the yard of her home. Plaintiff alleged her husband placed the signs on her lawn while she was on vacation. Without undertaking an investigation of Plaintiff's allegations, Danielson terminated her employment believing such conduct violated the judicial ethical canons to which Plaintiff was subject. Danielson based his decision on his ongoing concern about Plaintiff's inappropriate conduct in her capacity as magistrate, and not believing Plaintiff's denial that she did not place the signs.

The District Court found Danielson violated Plaintiff's First Amendment rights by terminating Plaintiff's employment based upon yard signs her husband placed in the yard. However, in order to establish a violation of a constitutional right, the law must be sufficiently clear so that a governmental official in Danielson's position would have known he was violating Plaintiff's constitutional right. The District Court concluded the established case law which only addressed situations involving the right of intimate association in the context of marriage, was insufficient to provide fair notice to Danielson that his decision violated Plaintiff's rights. Accordingly, Danielson's actions were subject to qualified immunity and his Motion was granted.

faith belief that Hamilton and Pore crossed that line. And, even if Respondent had shown this, the evidence indicated that they did not in fact cross that line. Thus, according to the Chairman Hurtgen, the discipline was unlawful under *Burnup & Sims*.

The majority's response to Chairman Hurtgen was that no party contended *Wright Line* was not the appropriate analysis. Thus, they did not pass on the contention that the discipline of Hamilton and Pore should be analyzed pursuant to the standard set forth in *Burnup & Sims*. However, assuming arguendo that *Burnup & Sims* was applicable here, they agreed with their colleague that a violation would be established under that standard as well. Member Liebman observed that the Board was rejecting the Respondent's defense that it held a "reasonable, genuine belief" that either Hamilton or Pore engaged in misconduct in the course of soliciting fellow employees about union matters. Accordingly, it need not decide the issue whether their union activities lost the Act's protection or "crossed over the line separating protected and unprotected activity." *Phoenix Transit System*, 337 NLRB No. 78 (2002). See also *Neff-Perkins Co.*, 315 NLRB 1229 (1994).

— END NOTE —

The views expressed are those of the author and do not constitute NLRB policy. ■

MEDICAL DAMAGES AND MEDICARE RISKS

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Labor and employment lawyers should be aware of Medicare changes announced in 2001 by the Department of Health and Human Services (HHS) that could impact your cases and advice. HHS' Medicare program is the nation's largest health insurer. The Centers for Medicare & Medicaid Services (CMS) administer Medicare, which covers nearly 40 million Americans and handles more than 900 million claims per year.

If your client is, or is soon to be, a Medicare enrollee, you should be aware of the Medicare Secondary Payer Act (MPSA), 42 U.S.C. 1395(b)(2)(A). Under the MPSA, Medicare will not pay for medical bills that fall under other medical coverage. Medicare has the right to recover payments where another proper insurer fails to pay or the covered individual fails to invoke other coverage. Medicare can offset the individual claimant's future social security payments to recover payment. Medicare also has a right to sue a claimant, the claimant's attorney, the employer, or the workers' compensation insurance carrier for double damages if these parties do not repay what Medicare has paid out inappropriately. 42 USC §1395y (b)(2)(B)(ii) and (3)(A). The offset provisions apply to any legal claims where the plaintiff was awarded medical expense damages or could have been awarded damages for medical expenses but decided to settle instead. This includes not only workers' compensation and personal injury claims but also employment claims that involve medical expenses. Medicare would most likely sue the employer or their insurance carrier as the best sources of recovery, but all parties—including lawyers—have the risk.

Medicare now divides the world into three groups. *The first group* consists of claimants who are not anywhere near Medicare coverage. They can settle their cases with no risk. *The second group* consists of claimants who have "reasonable expectations" of Medicare coverage within 30 months of settlement *and* the settlement amount is greater than \$250,000. Practically speaking, virtually no workers' compensation cases settle for this large amount, but personal injury and employment claims may make the economic threshold. *The third group* consists of people who are Medicare enrollees when they settle.

Medicare has strict rules for those in the second and third groups. If they settle without authorization from Medicare, Medicare presumes the net settlement amount will be used by the claimant to pay medical bills related to the claimed injury, and Medicare will refuse to pay such bills until the claimant can prove he spent the settlement amount for the related medical bills. To avoid this impossible position, Medicare insists that all enrollees (and soon-to-be enrollees with settlements over \$250,000) contact Medicare *before* settlement. Medicare will determine how much of the proposed settlement should be "set aside" by the claimant in an interest-bearing trust account which must be used to pay the related medical bills. Only when this account is spent, and the claimant proves to Medicare that it was used only for related medical expenses, will Medicare pick-up the responsibility for these bills.

These rules have a huge impact on Medicare enrollees—who include people 65 and older; people on social security disability; and, in many cases, blind people and people with severe kidney diseases, who qualify for early or automatic Medicare Coverage. When a claimant is awarded social security disability benefits, a disability date is established—say January 1, 2001. The social security disability program has a five-month waiting period so the claimant would not receive a monthly benefit check until July of 2001 in our example. This claimant will become a Medicare enrollee 24 months after the first benefit check—in July 2003. If this claimant also has a workers' compensation claim pending, it is advantageous that the attorneys settle the case—if it is to be settled—before the claimant becomes a Medicare enrollee. If the case is to be settled afterwards, the attorney must get authorization from Medicare, and will likely have to set aside some of the client's money in a trust account. It is common for social security disability recipients to find themselves in the workers' compensation system, so these rules must be clearly understood by their attorneys.

Unfortunately, many attorneys have been settling claims for enrollees without Medicare authorization, risking their clients' Medicare coverage. We've heard that some attorneys try to avoid the issue, having clients agree that the attorneys are not providing advice regarding future Medicare coverage. This is not good representation.

Medicare authorization requests are handled by the Center for Medicare and Medicaid Services (CMS). Michigan is regulated by the CMS office in Chicago (2333 N. Michigan Avenue, Suite 600, Chicago IL 60601-5519). It is possible that CMS will waive Medicare's interest in some cases, but it is too early to predict exactly how the new policy will be applied. So far, CMS has taken the position that Medicare has an interest in all cases involving Medicare enrollees. Time and experience with CMS will clarify the policy. ■



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NLRB PRACTICE AND PROCEDURE

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Best wishes and a fond farewell to Bill Schaub who recently retired as Regional Director for Region Seven. Bill held that position for more than 10 years before finally heeding the call of the links and riding into the sunset in his golf cart. He will be greatly missed by the Region and the labor community for his fairness and objectivity. This year's luncheon at the Gottfried Symposium was held in Bill's honor.

Unfortunately, in Bill's absence the Region's Practice and Procedure Committee is off to an inauspicious start. The recent meeting scheduled in conjunction with the State Bar's annual meeting in Grand Rapids was cancelled due to low attendance. Hopefully, it was not my presence as the moderator or the agenda that scared everybody off. Just in case it was not the latter, I'll provide a summary of some of the items that would have been discussed during the committee meeting.

The Region has implemented the Board's recent decision in *Croft Metal*, 337 NLRB No. 106 (June 21, 2002), which requires that parties in representation cases receive the notice of hearing not less than five days (excluding weekends and holidays) prior to the scheduled hearing, absent unusual circumstances or clear waiver by the parties. This requires written, not oral, notice of the hearing date so as to avoid a Hobson's choice by the parties either to proceed unprepared on short notice or refusing to proceed at all. The employer in *Croft* received notice on Wednesday, April 10 from a regional office that a representation hearing would be held on Monday, April 15. The Board determined the notice to be inadequate and remanded to the acting regional director to reopen the hearing to receive additional evidence on issues raised by the employer.

The public and members of the Bar may also recognize a different look to documents issued by the Region in recent months, including dismissal and deferral letters and pre-election decisions. The Region has revised several documents as part of a nationwide, advanced legal writing program implemented by the Agency in an effort to provide more clarity to its final determinations and make them user-friendlier. The writing program is also aimed at improving the quality and persuasiveness of internal documents between Board agents and their superiors, and documents prepared by Board agents for release to the public, such as briefs and hearing officer reports.

Section 10(j) preliminary injunctions continue on track under General Counsel Arthur Rosenfeld. In a memorandum

to regional offices (GC 02-07), the General Counsel reemphasized that 10(j) continues to be an important tool in administering the Act and should be considered in every case where there is a potential threat to the effectiveness of the Board's ultimate order. Under such circumstances, if the evidence regarding the merits of the alleged violations is sufficiently strong, consideration of 10(j) is warranted. The General Counsel noted a recent decline in the number of cases identified for possible injunctive relief by regional offices and encouraged the submission of cases where the rights of employees to freely choose union representation are being violated. The General Counsel also noted that utilization of 10(j) should be considered where employers unlawfully assist and recognize unions that represent only a minority of unit employees, and where employee free choice must be protected in serious cases of union picket line violence. Although interim bargaining orders under *Gissel* will be rarely sought, interim bargaining orders are appropriate when a successor employer unlawfully refuses to recognize a union that represented its employees with the predecessor.

Also, the General Counsel has issued guidelines (Memorandum OM 02-36) to regional offices concerning contacts with witnesses represented by counsel. Where the Region has been advised that a party is represented by an *attorney*, a Board agent—whether an attorney or field examiner—must contact and obtain consent from the party's attorney before initiating contact with or interviewing a current supervisor or agent. If the party's attorney refuses to consent to the interview being conducted without the presence of the attorney and refuses to attend, the Board agent should not proceed with the interview. In Michigan, this policy does not apply to former supervisors or agents. Under Michigan Ethics Opinion ("EO") R-2 it is permissible for a Michigan-licensed attorney to contact such witnesses *ex parte*. However, if the former supervisor or agent is represented by his own counsel, the trial attorney must obtain that counsel's permission. Also, the policy against contacting current supervisors or agents does not apply if the party is not represented by an attorney, or is represented by a non-attorney, and the witness comes forward voluntarily and indicates that he does not wish to have the party or its representative present. Under these circumstances, a Board agent is free to interview and obtain testimony from the witness without informing the party or its representative. This is not true for current supervisors or agents who come forward voluntarily if the party is represented by an attorney, in which case the Region must contact the General Counsel's Special Litigation section in Washington before interviewing or taking a statement from such a witness.

Both memoranda described above can be found on the Board's website at under the heading "Public Notices."

— END NOTE —

The views expressed are those of the author and do not constitute NLRB policy. ■

JANET COOPER — AN EXTRAORDINARY LIFE REVISITED

John A. Obee

Wood, Kull, Herschfus, Obee & Kull

If the popular mythology is to be believed, deaths come in cycles of threes. If this is so, the Labor and Employment Section of the State Bar has seen its “three,” in the deaths of three remarkable lawyers; Joseph Marshall, John Brady and now Janet C. Cooper. For those of you who are not aware, Janet died on December 8, 2002, not of the cancer for which she was treating with chemotherapy, but ironically of the chemotherapy itself. It reduced her immune system so that an “ordinary” virus could take an “extraordinary” life. For those of you who knew Janet as the Chair of the Labor and Employment Section, you knew her as an extremely knowledgeable employment lawyer who gave enormous amounts of her time to see to it that this Section provided for, and met all of the needs of, those diverse practitioners who are members of the Labor and Employment Section. If, however, you only knew Janet as the Section Chair, you would not have known about the remarkable pioneer Janet was throughout her life. This retrospective from a friend and colleague of over thirty-two years is offered as a retrospective on a life well lived.

This writer first met Janet Cooper in 1970 when he began employment with the Michigan Department of Civil Rights. Janet was one of the first employees of the Department, having begun her employment with the Department in the early 1960s. As anyone with a knowledge and understanding of the Civil Rights Movement is aware, the early 1960s were watershed years in the movement. Indeed, history has glorified these important years, yet all of us who were involved know that it was extremely unpopular in our culture to be part of the movement. People like Janet who espoused the rights of minorities, women and the disabled were often vilified in those years for attempting to shatter the status quo. Janet, as a civil rights pioneer, faced such vilification with the same quiet, forceful, behind the scenes strength that characterized her entire life.

Early in her history with the Department, Janet showed a characteristic which would carry her through her entire working life. As Judge Damon Keith, a former Civil Rights Commissioner, had done before her finding opportunities for minority and woman lawyers, Janet did something very similar. Whether it involved minorities, women or committed men, Janet found and placed talented people in positions enabling them to make the best of their attributes for the sake of others. One example of this, from her early years, is the distinguished lawyer Philip Colista. As Phil related to a tearful audience at Janet’s funeral, Janet approached Phil in the early 1960s to act as a hearing referee for the Department of Civil Rights. Phil approached this opportunity with some circumspection, but because of Janet’s confidence and encouragement, he became one of the best referees the Department has ever had — all of this because one very insightful woman saw a talented, giving person and provided that talented and giving person an opportunity to give back to others.

Janet was a very talented person herself. Over the years she rose from a beginning position with the Department to the highest Civil Service position within the Department, Deputy Director, before she retired in the late 1990s. But the years in between the early 1960s and the late 1990s were years filled with devotion to issues involving women, minorities and others whose rights were victimized. As a conciliator and later as Legal Director of the Department, Janet used her skills to successfully and amicably resolve disputes or in the case of “unresolvable” matters, to help prepare matters for administrative trials within the Department.

As with Phil Colista, early on, Janet had an impact on many of the young eager civil rights workers who joined the department in the late 1960s and early 1970s. She alternatively encouraged, nudged and at times pushed those of us who worked with her to spread our wings to become what our potential would allow us to be, at the same time not allowing us to forget that we had to continue to give back. She fostered a group of young civil rights workers, Nicholas Rine, Andronike Tsagaris, George Wirth, Remona Green and the undersigned to try their hand at law school and the legal careers that have been ours over the years. Many of the people she encouraged ultimately left the Department, others stayed; but all look back on Janet as the mentor who played a pivotal role in our future legal careers. She did not limit herself to lawyers. A young African-American man, who grew up in Hamtramck at a time when he could not use his God-given skills in tennis within the City of Hamtramck as a youth because he was barred from using the public courts, joined the Department in 1970. Henry Bowers was a gifted young man who aspired to higher education. Janet not only encouraged him but also acted as his guide and mentor in ultimately reaching his goal of obtaining a PhD.

While alternatively cajoling others to be the best that they could be, Janet herself took up the same challenge that she imbued in the rest of us by entering Wayne State University Law School in the early 1970s. She excelled in law school, as she did in every other aspect of her life. She did so well that her professors noted her incredible talent and approached her afterwards to offer her insight and expertise as an Adjunct Professor of Employment Law at her alma mater. For almost twenty years, first at Wayne State University Law School and later at Michigan State University/Detroit College of Law, she mentored young women and men in employment and civil rights issues. She was an inspiring teacher, because she taught what she lived and loved. Again, as before, she impacted lives. Many new lawyers, including most recently Mary Anne Helveston, have attested to the fact that they obtained their first passion for employment and civil rights law by taking Janet’s class in law school.

As a friend of Janet Cooper’s for over thirty years, I personally have benefitted enormously from Janet’s keen sense for knowing people and finding a role for people to exercise their passions. Early in my legal career Janet encouraged me to handle cases for the American Civil Liberties Union. While I truly enjoyed these cases, Janet found for me what was to be my “passion” for my legal career. In the early 1980s an organization, the Fair Housing Center of Detroit, was looking for a lawyer to write an amicus brief for a case pending in the Michigan Supreme Court. Janet contacted the Center and me and put us together. Through that first fair housing case, I found the way I could exercise my passion for civil rights

throughout my legal career: by litigating or helping others litigate cases to ensure that persons who have been denied housing because of race, religion or disability are vindicated. She was not through with this initial contact, however, as later on, after I had successfully litigated many fair housing matters, she recommended me to the Dean of Michigan State's law school to offer a class on housing discrimination law, one of only two such programs in the United States. I owe and will owe my friend and mentor a debt of gratitude for all of my life.

This brief outline of Janet Cooper's remarkable life is very incomplete. Not only was she a Civil Rights Department Executive and Adjunct Professor of Law, she had time — she took time — to be involved in many other important activities. The American Civil Liberties Union benefitted enormously from her talents. She was chair of the Metropolitan Detroit Branch of the ACLU and the President of the State ACLU. In her presidency, she oversaw the agency in its transition from the remarkable, long term career of Howard Simon, as Executive Director, to the directorship of Kary Moss. In Kary Moss, Janet saw a talented woman lawyer who could continue to energize the ACLU in its mission of protecting the First Amendment Rights of all persons. In finishing her presidency, Janet again had a major impact on both the organization and upon a friend. Janet helped see to it that a talented African-American woman, Jackie Washington, would succeed her, the first time that the ACLU had been headed up by a minority woman.

As full as Janet Cooper's life was, she was involved in many other organizations and with many people. She was very active with the League of Women Voters. As with all of her life activities, if she volunteered for something she not only lent her name, she would also lend her time and energy. In the community in which she lived, Livonia, she was very active in the political life of that community, volunteering her services, including the establishment of a set of rules of ethics to govern the activities of the elected officials and government employees within the City of Livonia.

This woman with a great laugh, tremendous wit and incredible energy will be missed by all of us who knew her well and by all of us whose lives she touched, even if only briefly. As one of her friends, the talented Arbitrator, Elaine Frost, remarked to me, Janet Cooper was the "hub" for many of us and we were the "spokes." She mentored many people, men, women, minorities. She encouraged all who she met and worked with to reach their potential — but to always find a way to give back — to the community, minorities, women and the disabled — to insure that the rights of all are protected in employment, housing and otherwise. In a day and age when most lawyers are caught up in billable hours and their own portfolios, Jane Cooper is an example to all of us that it is our "obligation" to give back, for we are the fortunate ones, the gifted ones, the ones who must see to it, as Janet did, that the world that is left behind, after we leave, is better off for our having been here. While the tears still form in my eyes because I will truly miss my friend, the world is truly a better place; we all are better for Janet Cooper having been with us. It was a remarkable life, well lived, albeit too short. Can anyone ask for anything better? ■

REFLECTIONS ON JOE MARSHALL AND JOHN BRADY

Michael L. Pitt

Pitt, Dowty, McGehee, Mirer & Palmer, P.C.

If my memory serves me, I worked with Joe and John on a dozen or so employment-discrimination cases, each, over the span of twenty years. Some years I would have two or three cases running with either Joe or John at the same time so that we were in constant contact with each other over a series of weeks and months during depositions, motions and settlement discussions. Each time I filed a case against a major employer, I would await the news of which judge I drew and which defense attorney I would face. My assistant, Pat, when she would discover that Joe or John had been assigned to one of our cases, would gleefully report that "Joe or John got the *Smith* case." I loved those days and I can hardly believe they're gone.

Joe was a tough litigator with a heart of gold and a belly full of laughs. Whenever I would take a preposterous position (intended or not), Joe could not contain himself and would burst out laughing in the middle of the deposition or court proceeding. I always tried to make some absurd remark to generate that kind of a response. Joe always knew when I was pulling his chain but could not resist playing the game with me.

We both had a healthy respect for each other's skills and abilities (we actually tried two cases — I won the first one and he evened the score on the second case). Our respect for one another translated into an expedient handling of the case on behalf of our clients — Joe and I were able to get through the cases with really no muss or fuss and, ultimately, our clients were well served by our congeniality, spirit of cooperation and friendship.

John was the most lovable guy ever created to defend employers from aggressive lawyers like me. Not that John couldn't be tenacious or hyper-prepared, and oh so clever, when it was required. My point is that at the core of this guy was his loyalty.

John was masterful in conducting a plaintiff's deposition. He had some built-in radar which would take him to the inconsistencies in the plaintiff's story and he would slowly (sometimes painfully so) and methodically unscrew the pieces of a plaintiff's case. All the while he would be doing this in a friendly and gentlemanly manner. After a deposition like this would be completed, most defense attorneys would be quick to tell me that my client was a liar and the case should be dismissed. John, on the other hand, would find a gentle way to say it — something like "you're client got a little goofed up in the deposition." That was John's way of telling me it's time to settle.

John was a preeminent employment-discrimination litigator who had the reputation for being "cheap" on settlements. His miserly ways certainly explains why he routinely showed up on case evaluation and arbitration panels representing the employer's interests.

John knew of his reputation and felt honored when you mentioned it to him. He would make a point of telling me that "you have received the highest settlement I have ever paid on a case." Whenever John would tell me this, I would respond by saying, "I bet you tell this to all the plaintiffs lawyers." John would insist that he was telling the truth.

At last winter's labor law conference, I decided to test John's veracity on this point. I gathered together a group of well-known employment plaintiff lawyers and, in the presence of our friend, John, asked each to raise their hand if they had received the highest settlement ever paid by John Brady. Before a hand could be raised, the group broke out laughing with John laughing the hardest of all.

We all know that it "takes a litigator to know a litigator" and I can attest from first-hand experience that Joe and John were the best of our generation. I will sorely miss my noble adversaries and friends. ■

THE NON-AGGRESSION PACT

Shel Stark, *Education Director,
Institute of Continuing Legal Education*

John Brady and I became friends litigating a federal age discrimination case in the mid-1970s. John didn't appear in the case until the final weeks before trial. At the time we were both practicing out of the Ford Building in downtown Detroit: he on the 7th floor; me on the 9th. The defense and I had not been communicating very well. By the time John Brady got involved we were reduced to writing each other long, contentious letters with case citations. John changed the entire dynamic.

Without warning, he came up to my office with his co-counsel and introduced himself. He asked if I had time to talk about our case. Sure, no problem. And, talk he did. Persuasively. John Brady was John Brady even then. He analyzed key precedents and demonstrated the impossibility of overcoming them. He showed me a case with similar facts from the District Court of South Some-where ending in a defense verdict. He marshaled the facts as he planned to present them. See? No discrimination, he said. And, because there is no discrimination, why wasn't I more reasonable and willing to accept his settlement offer?

I believed in my client and I liked my case. We were long past summary judgment. We previously considered the settlement offer and rejected it. We looked forward to trial.

I was not impressed with the message. I had heard most of it before. I was very impressed with the messenger. Always respectful, never disagreeable or contentious, thoughtful, savvy. Just a little cheap! I once asked John if his settlement offers were so low because he had to pay them out of his own pocket.

To my shock and surprise, John returned the next day. And the next. And the next after that. I never experienced such tenacity. He simply popped in. "Got a minute?" He refused to take "no" for an answer. Had I thought about this? Had I thought about that? Did I really understand *Smith vs. Jones, Inc.*? My client found comparable employment in the same industry. Wouldn't he be better off settling the case? He had limited economic losses. Did he really want to litigate? Didn't he want to get on with his life? How is this good for him? Sometimes the arguments were repetitive, but often he had a new angle, a new way of looking at the evidence.

I wouldn't be moved. My client knew what he was doing. He understood what was at stake. He believed he had been discriminated against and so did I. We intended to prove it. Did *his* client really want to litigate? Didn't defendant want to get on with its business? How was trial going to be good for the defendant?

And still John came. Or he called. Or he had read a case and dropped it off for my reading pleasure. And all the time, he was preparing like mad for trial, and so was I. There was some movement in settlement negotiations, but we remained too far apart to believe the case was going to resolve.

With a week to go, John called. "Can I come up to talk?" By now, despite – or because of – the frequency of his visits, I had grown to like and respect him very much. I did not believe he was trying to divert my trial preparation or break my concentration. He genuinely wanted to settle the case albeit on his terms. And, our discussions were no longer limited to the fine points of our litigation. We talked about many things. A friendship was blooming and it was obvious to both of us. I looked forward to seeing John even if we were not going to make any more progress. "Sure," I answered. "Come on up."

John came armed: "Do you realize," he asked as he sat down in my office, "that if you win this case and recover every penny your client lost – which, by the way, pal, is not going to happen – your verdict will be less than our latest settlement offer?" He showed

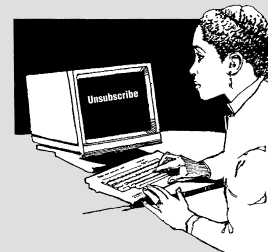
me a set of wage loss calculations. I was a contingency fee lawyer. If we accepted John's offer my client would recover two thirds of the money, and I would receive one-third. Two-thirds of the offer was more than our wage loss. How could this be? On the other hand, if we tried the case and the trial court ordered defendant to pay all my attorney fees on an hourly basis, the *client* would receive one-third and I would receive two-thirds of the recovery!

We accepted the offer. What could I do? Going to trial benefited me alone! He worked and worked until he found an argument I could not refute. John Brady was not only smart, well prepared and tenacious, he was a great strategist and an insightful psychologist who understood people. He came to know me. He knew I would be embarrassed to recover more money than my client. I could not reject his offer once he found the right way to present it. Classic John Brady.

We became friends. We began to consult each other. To confide and share. To have dinner in the fine restaurants he loved so much. To refer cases to one another. To get together with our families.

John had a heart. A big heart. He cared about people. He came up with win-win settlements. He asked for advice. He was open minded. Politically conservative, he got a kick out of representing the ACLU and the UAW. He loved the law. The closer our friendship became, the more we believed our relationship might not survive another law suit. Our solution was The Non-Aggression Pact: I wouldn't deliberately sue one of his clients; he wouldn't knowingly defend one of my cases. We almost succeeded in keeping it! We always remained friends.

John Brady was one of a kind. A fine friend. A man of unquestioned integrity. Generous and open. I shall miss him very much. ■



LISTSERV SNAFU AND STATE BAR MEA CULPA

E-mail listservs are a terrific way to communicate among members in a community of interest . . . *provided* that all members choose to be on the listserv. The State Bar of Michigan, working with the Labor and Employment Law Section, proved the conditional clause last month by creating a listserv consisting of all Section members with e-mail addresses. When a message was sent on Friday, December 20, many members chose to "unsubscribe," and did so by doing what comes naturally — replying directly to the e-mail — rather than following the "fine print" directions in the e-mail message. These replies were then automatically copied to all members on the listserv, which generated still more responses copied to all members. When the problem came to the attention of the State Bar early Monday, December 23, the staff shut the listserv down, and sent an explanatory message to all recipients. Unfortunately, the explanatory message may have left the impression that those who replied to the unwanted message were responsible for this problem. The Bar apologizes for any inconvenience and misunderstanding.

REMEMBERING JANET COOPER

Shel Stark
*Education Director,
Institute of Continuing Legal Education*

In the mid-1980s, I was in the process of hiring a new lawyer. The applicant who seemed best qualified and most impressive threw me a curve ball following one of our interviews: "By the way," she said, "I have Multiple Sclerosis." MS? Multiple Sclerosis? A million questions flew through my brain in the first nanosecond. Could I ask any of them? Were any of them legal? What do I do now? After years of representing the victims of discrimination, I wasn't about to discriminate myself. Nor did I intend to ask illegal questions. On the other hand, the information left me anxious and concerned. I had represented a number of individuals who claimed discrimination because of MS. I had some understanding of the disease and knew it could impact an employee's ability to do the job. How would I proceed?

I immediately had a brainstorm: call Janet Cooper. It was a great idea. When I called Janet, she could not have been more supportive, caring and helpful. She was full of optimism and good will. She loved the idea that I wanted to forge ahead and hire the best candidate despite my inability to figure out how to ask proper questions.

Janet helped me think it through, focus on what was important and develop legitimate — and legal! — questions that were relevant, thoughtful and sensitive all at the same time. The follow up interview based upon Janet's advice went better than I could have expected. The applicant — who soon came to work for us — was thrilled that I was willing to continue the process, that I was asking questions she was happy to answer and that none were illegal or improper.

Janet Cooper was an extraordinary resource like that for virtually everyone who asked for her help, and there were many of us: lawyers on both sides of the "vs.," clients, Department of Civil Rights personnel, the public. Despite being a state "bureaucrat," despite her position at the Department, despite her passion for and commitment to equal employment opportunity, there was no one who ever said a disparaging word about Janet Cooper. Everyone, including her adversaries, found her a font of knowledge, a dispenser of sage advice, a person who personified fairness and good judgment. The community has lost one of its best.



VIEW FROM THE CHAIR

Andrea Roumell Dickson, Chair
Labor and Employment Law Section

This is my first column as Chair of this Section. I am proud to be part of such a vital group. Recent events drive home the unique role labor and employment law plays in society as a whole.

**HEADLINES: "JUDGE PUTS END TO PORT
LOCKOUT"**

**"WALMART DENIES WAGE,
HOUR ABUSES"**

**"LONGBALL HITTERS IN
SUITS/NEGOTIATORS MAKE OR
BREAK FUTURE OF GAME"**

The headlines daily are filled with what we do. What we do really does ultimately matter. We effectuate public policy.

There have been four recent deaths that crystallize reflections on how labor and employment law permeates society and makes us arbiters of social change. Steve Yokich was in charge of a dominant labor force in the world. He, and those who lawyered for and against him, forged the direction of labor relations in our country for decades. Think of some collective bargaining agreement provisions and labor law principles that now are the norm. The magnitude of the role of labor law was never so evident as it was when standing in line — an interminable line (and that is the point) — to pay last respects to Steve Yokich. There were management and union lawyers in line. Key political leaders came, as did corporate powerhouses Bill Ford, Jack Smith and Dieter Zetsche. People from all walks, in elegant clothes and work clothes, stood and waited. It was a scene usually reserved for the death of a head of state. But this was one man, a man who happened to push the country into new territory through labor law.

John Brady and Joe Marshall III were two men with a passion for employment and labor law. Janet Cooper was a woman with a passion for civil rights. It is not empty words when we pay tribute to how these fellow lawyers impacted society. The unyielding commitment and foresight they brought to their chosen calling enriched society and our legacy — almost indiscernible but revealed upon reflection — moving society forward. The vehicle for their influence was also employment and labor law.

We go about the routine of our practices making decisions that have major consequences. For example, labor lawyers worked feverishly behind the scenes to reach accord and end the 10-day lockout in the California port that cost the U.S. economy \$1 to \$2 billion dollars a day. A quick glance at the docket of the U.S. Supreme Court this term reveals six labor and employment related cases. There were 14 cases in this category at the beginning of the Court's past term. How many cases does the U.S. Supreme Court issue in a year? Our specialty, it appears, has the Court's attention. Why? Because the issues we routinely confront have tentacles. They not only impact social policy, they create and shape it. Just look at the headlines if you have any doubt!

BUSINESS IMMIGRATION LAW BASICS

Francyne Stacey

Pear, Sperling, Eggan and Muskovitz, P.C.

Despite a sluggish economy, increased globalization, combined with a shortage of skilled labor, has resulted in a substantial increase in the hiring of foreign workers in the United States. Hiring a foreign worker can be a confusing and overwhelming process. By way of an introduction, the following briefly describes different non-immigrant visa classifications that an individual may be granted for the right to work temporarily in the United States.

B-1 VISITOR FOR BUSINESS. B-1 visas are the most common form of visa entry into the United States. A B-1 visitor visa means that an individual is here for a visit. A B-1 *business* visitor visa, however, is slightly different. A B-1 business visitor visa allows a foreign worker to be admitted to the United States for the purpose of engaging in business but not as an employee. Allowable activities for B-1 business visitors include: (1) engagement in commercial activities that do not involve gainful employment in the United States, (b) contract negotiations, (c) consultation with business associates, (d) participation in scientific, educational, professional or business conventions, conferences or seminars or (e) to undertake independent research. A B-1 business visitor who wishes to stay in the United States as an employee may not do so unless he or she is authorized to work under a different non-immigrant visa classification.

H-1B TEMPORARY WORKERS. While there are several H visa categories, the most common of this category is the H-1B visa. This type of visa is issued to individuals who are qualified to perform services in a specialty occupation. A specialty occupation is defined as an occupation that requires theoretical and practical application of a body of highly specialized knowledge requiring at least a bachelor degree or its equivalent in the specific specialty. Engineering, architecture, medicine and health, mathematics, physical sciences, and social sciences are examples of specialty occupations. An employer that hires a foreign worker in a specialty occupation must file a petition with the Immigration and Naturalization Service seeking H-1B status. Current procedures require employers to attest that they will pay the prevailing wage for the job and profession. A foreign worker may be issued an H-1B visa for a maximum of six years.

TN CANADIAN AND MEXICAN CITIZEN PROFESSIONALS. Mexican or Canadian professionals may file a petition for TN classification provided the profession is contained on the North American Free Trade Agreement list, the alien possesses the specific criteria for that profession, the prospective position requires someone in the professional category, and the alien is going to work for a U.S. employer. The major benefit of TN status, at least

in the case of a Canadian professional, is a streamlined process. Eligible individuals are granted TN status at the border with a letter of support from the hiring employer. Additionally, there is no limit on the number of extensions requested and no limit on the total number of TN admissions that may be granted. For Mexican citizens, however, there are few advantages to TN status as the employer cannot avoid petitioning the Immigration and Naturalization Service for approval.

L-1 CLASSIFICATIONS. Businesses with foreign affiliates may avoid the H-1B process by filing a petition for L-1 classification for an alien. An L-1 classification grants the alien the right to work in the United States on a temporary basis in either a managerial or executive capacity (L-1A), or in a position that requires specialized knowledge of the employer's applications in international markets or an advanced level of knowledge of the employer's processes and procedures (L-1B). In the United States, an alien must be employed with the same corporation or branch, subsidiary or affiliate that employed the alien abroad for one continuous year within the three year period immediately before filing the L-1 petition. The foreign employer must also have a legal business entity in the United States and the petition must be filed with evidence showing the relationship of the United States and foreign entity. L-1 classifications may be valid for seven years and, unlike H-1B's, are not subject to any yearly quota. In addition, certain U.S. employers may be allowed to file "blanket" L-1 petitions and alleviate the need for filing individual L-1 petitions for a group of employees.

Since 9/11, the INS has been engaged in a protracted battle to strictly enforce its existing regulations and regain credibility with the public. Consequently, the immigration practitioner must be vigilant in staying abreast of the many and constant "new" issues. Now, more than ever before, immigration matters must be addressed in a thoughtful and cautious manner so as to increase the chances for success. ■

STATE OF THE ART CLE!



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in one seminar!"*

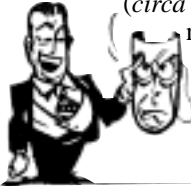
Plan to attend the 28th Annual Labor and Employment Law Institute on April 8 and 9, 2003 at the MSU Management Education Center in Troy. Co-sponsored by the Institute of Continuing Legal Education, the Federal Mediation and Conciliation Service and the State Bar of Michigan Labor and Employment Law Section, this seminar has it all: Title VII, ELCRA, ADEA, ADA, PWDCRA, FMLA, FLSA, HIPAA, NLRA, PERA, privacy, evidence, mediation, negotiation, litigation, arbitration,

lunch on Tuesday and Wednesday, a discount for LELS members, and more!

BODY LANGUAGE

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

Non semper ea sunt quae videntur. I think it was Phaedrus (circa 8 C.E.) who first said it. Truer words were never spoken. Here we are 2000 years later and at least once a week someone or other says it again: "Whoa! Do you believe that!?" *Non semper ea sunt quae videntur!*"



"Things are not always what they seem."

Actually, nowadays you usually hear it said in English: "Things are not always what they seem." Consider, for example, the true case of Juror Number One.

Our trial was in its third week. Pretty much the gamut of human emotion and motivation had been displayed on the witness stand: anger, tears, humor, frustration, egotism, loyalty, greed, hyper-activity, earnestness, guile, self-delusion, indigestion, etc. Through it all our army of lawyers studied the eight jurors (six, plus two alternates) for signs. We pondered the significance in each furl of brow, grimace, chuckle, shift of weight, fold of arms, and roll of eyes. We knew that all is revealed in body language.

We were worried about Juror Number One. The other seven paid rapt attention. When a witness testified, seven jurors swivelled their chairs, looked the witness in the eye, and studied every word and gesture emanating from the witness stand. Seven jurors responded with smiles, empathy and admiration for our witnesses. Seven jurors responded with boredom or hostility to the other side's witnesses. In short, things were looking very good — until we focused on Juror Number One.

Through all the drama and emotion, Juror Number One stared straight ahead. Straight ahead for Number One, unfortunately, was the wall across the courtroom. The witness chair was ninety degrees to Number One's left. For almost three weeks, Number One did not make that ninety degree turn. While witnesses poured out heart and soul thirty feet to his left, Number One's expressionless eyes were directed at the far wall.

Where were we going wrong? Why couldn't we get Juror Number One's attention? Was it hostility? Boredom? Tort reform? What if Number One became the foreman? Was everything falling apart?

One evening we learned the answer to our worried questions. It was late, after hours, near nine o'clock at night. The only people left in the building were a couple of deputies, the cleaning crew, and us. We stayed in the courtroom, preparing for the next day's witnesses. One of our team paced, pontificating on strategy, the art of cross-examination, and the desire to eat dinner. He was in perpetual motion, standing up, sitting down, roaming the courtroom. He sat in the witness chair. He moved behind the bar and reclined on the hardwood spectators' benches. He tried the court reporter's chair. He went from chair to chair in the jury box. He was looking for the enlightenment of new perspective.

He found that enlightenment in Juror Number One's chair. Number One's chair was broken. *It didn't swivel.* Number One hadn't been looking at the wall because he was hostile or bored, but because he didn't want a stiff neck. It hurts to turn your head ninety degrees when the rest of your body, confined by an unswivelling chair bolted to the floor, is facing straight ahead. Number One wasn't a lost cause. He was just doing what any of us would have done in his place: avoiding a pain in the neck.

We were vindicated. We laughed at our misguided self-doubt. At that moment, one of us, I now clearly remember, connected across the ages to Phaedrus. With the rest of us nodding in agreement, he exclaimed: "Whoa! Do you believe that!?" *Non semper ea sunt quae videntur!*" ■

GLASSER NAMED NLRB REGIONAL DIRECTOR

National Labor Relations Board General Counsel Arthur F. Rosenfeld announced, on November 20, 2002, the appointment of Stephen M. Glasser as NLRB Region 7 Director. Glasser succeeds William C. Schaub, Jr. who retired in October 2002.

A career NLRB employee, Glasser has served as Assistant to the Regional Director of the Detroit office since 1991. In his new position, Glasser will supervise the handling of all cases arising in Michigan, except for the 11 counties in the western half of the Upper Peninsula, served by the Milwaukee, Wisconsin Regional Office (Region 30). Region 7 is one of the largest NLRB offices and is the busiest. In announcing the appointment, General Counsel Rosenfeld stated:

The labor organizations, employers and other citizens of the State of Michigan are fortunate to have someone with Steve's technical knowledge and managerial acumen to oversee the large and busy Detroit Regional Office. Steve's 37 years of experience in progressively more responsible positions in Region 7 have provided him with a wealth of experience that will serve him well in his new position. With this appointment, the NLRB will continue the tradition of excellence maintained in the Detroit office over the recent years.

SENATE CONFIRMS FIVE NLRB MEMBERS

The Senate confirmed five nominees to be Members of the NLRB on November 15, 2002, marking the first time since August 2000 that the Board has been at full strength. The package includes three Republicans: Detroit attorney Robert J. Battista, designated Chairman by President Bush, Rene Alexander Acosta, and Peter C. Schaumber. The two Democrats are Wilma B. Liebman and Dennis P. Walsh, both reappointed to second terms.

Chairman Battista was nominated on 10-4-02 for a term expiring 12-16-07. He had practiced employment and labor relations law since 1965 with Butzel Long, a Detroit firm. Member Liebman was nominated on 10-4-02 for a term expiring 8-27-06. She has served as a Member since 11-14-97. Member Schaumber was nominated on 5-10-02 for a term expiring 8-27-05. Prior to his appointment, he was a labor arbitrator in Washington, D.C. and practiced law with Wickwire Gavin (1987 to 1993) and Colton and Boykin (1980-1987). Member Walsh was nominated on 11-6-01 for a term expiring 12-16-04. He served as a Member from 12-30-00 to 12-20-01.

Member Acosta was nominated on 10-4-01 for a term expiring 8-27-03. Previously, he served as Deputy Assistant Attorney General in the Civil Rights Division at the Justice Department and practices law with Kirkland and Ellis in Washington, D.C. (1995-1997).

The Board lacked a quorum to issue cases from December 20, 2002, when Member Walsh's recess appointment ended, until January 22, 2002, when former Members William B. Coven and Michael J. Bartlett received recess appointments. Former Chairman Peter J. Hurtgen departed on August 1, 2002 to be Federal Mediation and Conciliation Service Director.

MERC UPDATE

Alexandra Matish

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

The Michigan Employment Relations Commission has issued, in the past six months, 31 decisions and orders in a variety of cases. A summary of five of those cases follows. Of those 31 cases, 26 were unfair labor practice hearings and five were unit clarification and/or representation hearings. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations' website at <http://www.cis.state.mi.us/ber/merc.htm>

UNFAIR LABOR PRACTICES

Grand Rapids Public Museum and Grand Rapids Employees Independent Union, MERC Case Nos. C01 G-132 and CU01 F-32 (July 18, 2002)

Grand Rapids Public Museum ("Employer") filed an unfair labor practice charge against the Grand Rapids Employees Independent Union ("Union") failed to bargain in good faith by violating the ground rules established for bargaining. Specifically, the Employer alleged that the Union spoke to a newspaper reporter about negotiations without providing the Employer prior notice, as was agreed upon at the onset of bargaining. The Union subsequently filed an unfair labor practice charge against the Employer, alleging that the Employer unlawfully interfered with employees' rights when it sent letters to unit members threatening to file an unfair labor practice charge and then filing an unfair labor practice charge. The Union also filed a charge alleging that the Employer engaged in direct bargaining with employees regarding health insurance. The ALJ found all the charges to be without merit and no exceptions were filed by either party.

The ALJ agreed with the Employer that the question of whether the Union engaged in bad faith bargaining when it violated ground rules in bargaining was an issue of first impression. The ALJ, looking to similar cases in Florida, Pennsylvania and New Jersey, determined that the Commission should not adopt a rule that a party commits a per se violation of its duty to bargain in good faith when it violates a negotiating ground rule. Rather the ALJ held that the Commission should look to the totality of the circumstances to determine whether a party had intended to circumvent its obligation to bargain in good faith.

The Union argued that, because the Employer spoke to the press first, they had violated the ground rule first. The ALJ found, however, that the Employer did not specifically address negotiations when it spoke to the press, whereas the Union did. Nevertheless, the ALJ determined that the Union's conduct did not indicate bad faith. The ALJ noted that the Union's statements to the press generally supported the Employer's position that it need more money. Consequently, the ALJ held that, although the Union violated the ground rules when it spoke to the press, this violation alone did not show an intent on behalf of the Union to circumvent bargaining.

The ALJ also found that the Employer did not engage in direct bargaining when it spoke to its employees about leaving the current health insurance plan because the Employer had already communicated this intent to the Union before speaking with its membership.

Service Employees International Union ("SEIU") and SEIU, Local 517 and SEIU Local 591 and John Britten, et al, SEIU, Local 466 and Anderson Johnson, et al, SEIU Local 26M and Larry Mitchell, et al, SEIU, Local 516M and Bruce Ludington, et al, MERC Case Nos. CU01 C-12 and C-13, C-14 and C-15, C-16 and C-17, and C-18 and C-19 (April 16, 2002)

Charging Parties were several SEIU locals and their members who filed an unfair labor practice charge, alleging that the International Union and Local 517 violated Section 10(3)(a)(i) of PERA by restraining its members in their choice of their representative. The International Union and Local 517 intended to merge the local union charging parties into Local 517. Charging Parties contended that this merge was in violation of 10(3)(a)(i) because it changed the bargaining agent of those locals without the consent of the membership.

The International Union informed the locals in early 2001 that they intended to merge them with Local 517. When the officers of the local unions objected to the merger, the International Union held a hearing before a hearing officer who was designated by the International Executive Board, pursuant to the union's constitution. At the time of the unfair labor practice hearing, however, no decision had been issued by that hearing officer.

The International Union and Local 517 filed a motion for summary dismissal, alleging that the issues involved in the unfair labor practice charge were internal union matters and thus no violation of PERA existed. The Administrative Law Judge granted the Respondent's motion for summary dismissal and the Charging Parties filed exceptions.

The Commission, affirming the decision of the Administrative Law Judge, held that the representative status of labor organizations to their units does not hinge upon the subtle technicalities that govern the structure and nature of the relationships between locals or affiliates and their parent bodies. The Commission held that, because the Charging Parties had already elected to be represented by the International, how the International and its local affiliates choose to service the members is not an issue that should be before the Commission, nor was it a basis for a PERA violation. The Commission cited to several cases in the past where it had refused to become involved in the internal structure and affairs of labor organizations, as it was beyond the realm of PERA. Therefore, the Commission affirmed the decision of the Administrative Law Judge and determined that the actions of the International Union and Local 517 did not rise to a level of a Section 10(3)(a)(i) violation under PERA.

Clairmount Laundry, Inc. and Chicago and Central States Joint Board, UNITE, AFL-CIO, MERC Case No. C01 J-207 (May 21, 2002)

In previous cases between the two parties, Chicago and Central States Joint Board ("Union") had filed repeated unfair labor practice charges against Clairmount Laundry ("Employer"), pursuant to Sections 16 and 23 of the Labor Mediation Act, alleging that the Employer refused to recognize the Union, refused to bargain in good faith, and discharging workers for engaging in protected concerted activity. The Administrative Law Judge found that the Employer had engaged in several unfair labor practices and

directed the Employer to recognize the Union, bargain in good faith, reinstate the employee who was terminated and pay the costs and attorneys fees of the Union.

The Union filed yet another unfair labor practice charge, alleging that the Employer refused to respond to various information requests filed by the Union regarding the identity of bargaining unit members, the wages, hours and working conditions of those employees. The Union also asked for the names and addresses of all of the Employer's shareholders and officers and any information regarding the transfer of assets of the Employer to another business. The Union, through its attorney made repeated attempts via regular mail, over the phone and by hand delivered letters to request information. Each time the Employer did not respond.

The Union also alleged that the Employer discharged an employee due to her participation in the previous ULP hearings before MERC. The employee, who served as a union steward, informed the Employer that she decided not to retire but instead to remain on as employee to assist in bargaining. The employee had testified at the two previous ULP hearings.

The Employer did not attend the hearing, nor did it file a post-hearing brief. The Administrative Law Judge found that the Employer unlawfully terminated the employee and unlawfully refused to furnish information to the Union. No exceptions were filed.

The ALJ determined that the information requested by the Union was necessary in order for the Union to perform its bargaining obligations. The ALJ found that, although the information regarding the Employer's shareholders and the transfer of the Employers' assets wasn't presumptively relevant to the unit members, the information was necessary for the Union to make the determination whether unit work was being diverted by the Employer to other businesses. The ALJ held that, because diversion of unit work is generally a mandatory subject of bargaining, an Employer has a duty to disclose information pertaining to it.

The ALJ also found that the Employer unlawfully terminated the employee for engaging in protected activity. The ALJ noted that the Employer knew of the employee's involvement in the Union during bargaining and of the employee's testimony in the previous hearings. The ALJ also noted that there was clear evidence of the Employer's animosity toward the Union. The Employer continually avoided dealing with the Union, refusing to reply to any of the information requests. Moreover, the ALJ determined that animus can be inferred from the evidence presented at the previous two hearings regarding the Employer's conduct and the Employer's refusal to comply with the decision in a previous hearing.

The ALJ further noted that the Employee was terminated two months after she testified and that, combined with the fact that she had never been disciplined and that she had the most amount of seniority of anyone in the unit, was sufficient evidence that her protected activity was a motivating factor for her termination. Moreover, the Employer never gave an explanation as to why she was terminated. Therefore, the ALJ found that the Employer engaged in unfair labor practices and recommended that they cease and desist, reinstate the terminated employee, and provide the Union with the requested information.

UNIT CLARIFICATION/REPRESENTATION

Dearborn Public Schools and Dearborn Federation of School Employees, Local 4750, Merc Case No. R01 J-133 (September 5, 2002)

A petition for representation election was filed by the Dearborn Federation of School Employees ("Union"), who sought to accrete the position of Cable Television Supervisor Assistant. The Union represented a nonsupervisory, noninstructional support personnel unit that included paraprofessionals, food service, custodial, bus drivers, skilled trades and technical employees. The Union asserted that the Cable Television Supervisor Assistant belonged in the technical classification.

The Dearborn Public Schools ("Employer") opposed the petition, arguing that the position was professional in nature, required creative and intellectual skills, and routinely exercised independent judgment and discretion. Further, the Employer argued that the position was intellectual in nature and involved the supervision of students.

The Commission determined that the position had very similar duties and responsibilities as many other bargaining unit employees and thus, shared a community of interest with those employees. The Commission noted, however, that the Employer, , did not make the argument at hearing that the position in question did not share a community of interest with the rest of the bargaining unit. Instead, the Employer asserted that accretion was improper because the position had been in existence for many years prior to the execution fo the current contract. The Commission disagreed, asserting that, whereas a unit clarification petition is not appropriate for adding positions that have historically been excluded by the collective bargaining agreement or past practice, that same rule does not apply to a petition for an accretion election.

The Employer further argued that the petition should be dismissed because the language of the collective bargaining agreement does not allow for flexible work schedule, which was a requirement for the Assistant position. Nevertheless, the Commission held that the terms of the collective bargaining agreement do not automatically apply to a newly accreted position. Moreover, the parties had, in the past, negotiated exceptions to certain provisions of the collective bargaining agreement.

Finally, the Employer argued that the position was more closely related to the professional status of the unrepresented positions than to the unit positions. The Commission, however, noting they are not required to find the optimum unit but rather only a unit appropriate for collective bargaining based upon the facts of each case, concluded that the unit in this case was presumptively appropriate. It, thereby granted the petition and directed an election in the matter.

Ferris State University and Ferris Faculty Association, MEA/NEA, MERC Case Nos. UC00 E-19 and R01 F-078 (September 3, 2002)

The Ferris Faculty Association ("FFA") filed a petition for unit clarification, seeking to add the full-time faculty of Kendall College of Art and Design to the full-time faculty bargaining unit at Ferris State University. The College and the University were

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MERC UPDATE

(Continued from page 19)

planning on merging and are now one institution. The FFA contended that the adjunct faculty would remain in the current Kendall Faculty Association ("KFA") unit. The FFA also sought to represent Kendall librarians and counselors, which were not currently represented by the KFA. The FFA later filed a petition seeking an election among only the KFA full-time faculty to be added to the FFA unit.

The FFA alleged that in the course of the merger, Kendall and Ferris State were so integrated that the KFA and FFA faculty units shared a sufficient community of interest with each other. The Employer maintained that the addition of the faculty to the FFA unit would improperly fragment the KFA unit and create a residual unit of adjunct faculty. Moreover, the Employer argued that there has been no substantial change in the duties and responsibilities as a result of the merger so no clarification of the existing units was required. The employer asserted that Kendall continued to operate independently of Ferris State.

The Commission acknowledged that a reorganization of an employer could impact bargaining unit configuration, but found that after a merger, accretion without an election is only appropriate where the unit to which the employees are accreted is the only appropriate unit. The FFA argued that MERC case law held that when an employer takes over the operations of another employer, and hires the second employer's employees, the first employer acts appropriately in accreting the new employees to its existing unit if a separate unit would no longer be appropriate. The Commission referred to cases where they directed an election due to a merger, concluding that the employees had a right to a voice in the selection of their bargaining representative. Nevertheless, they subsequently determined that those cases were different from the case presently before them.

The Commission found that the few changes that took place as a result of the merger – that Ferris State has ultimate authority over Kendall, that they shared the same academic calendar, email, registration procedures and shared classroom space—did not supersede the bargaining history of the KFA unit. Moreover, Kendall, the Commission argued, remained substantially autonomous in such areas as academic governance, curriculum, budget, labor relations and employment policies. The two faculty units also had different salaries, tenure procedures and benefit plans and there was no interchange of the faculty.

The Commission finally held that the longstanding history including full-time and adjunct faculty in the KFA unit was a presumptively appropriate unit. The Commission found that simply because the Kendall full-time faculty may have shared a community of interest with the Ferris State full-time faculty, does not destroy the community of interest in the original unit. Moreover, the Commission, referring to *Wayne County (Airport Police Dept.)*, 2001 MERC Lab Op ___ (7/3/01), held that only where a unit is per se inappropriate or where there is an extreme divergence in community of interest, will the Commission break up an already existing unit. Consequently, they denied the FFA's request for an election to accrete the KFA faculty unit members into the FFA faculty unit. ■

SIXTH CIRCUIT ADDRESSES TITLE VII AND NLRA ISSUES

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

From August of 2002 through October of 2002, the Sixth Circuit published about 12 cases dealing with a variety of labor and employment issues. The full text of Sixth Circuit decisions are available on the Internet at: "<http://pacer.ca6.uscourts.gov/opinions/main.php>".

Race Discrimination – Pretext

In *Hopson v. DaimlerChrysler Corp.*, Docket No. 01-1192 (September 30, 2002), the Sixth Circuit reversed the district court's grant of summary judgment to the employer on Plaintiff's race discrimination claims. In this case, the Plaintiff, a security guard, claimed that he was discriminatorily denied a promotion. The Sixth Circuit relied, in part, on statistical evidence showing that 34.8% of DaimlerChrysler's security guards were black, while only 18.5% of the security managers were black, in finding a genuine issue of material as to pretext. The Sixth Circuit also relied on the fact that a non-decision making manager gave deposition testimony that, in his opinion, race was a factor in Hopson not obtaining a promotion.

NLRA – No Solicitation Rules

In *Albertsons v. NLRB*, Docket Nos. 00-2359; 01-1002 (August 20, 2002), the Sixth Circuit denied enforcement to an NLRB order finding that the employer had committed an unfair labor practice by refusing to allow unions to solicit on its property while allowing occasional charitable solicitation.

Retaliation – Adverse Employment Action

In *Ford v. General Motors*, Docket No. 01-5060 (September 27, 2002), the Sixth Circuit reversed a district court ruling dismissing plaintiff's Title VII retaliation claim. The dismissal by the district court was based, in part, on a finding that the plaintiff did not suffer an adverse employment action. However, on appeal, the Sixth Circuit concluded that the plaintiff's allegations included claims that he was subject to higher scrutiny than other employees and was given an increased workload. The Court held that both heightened scrutiny and increased work load constitute adverse employment actions.

Title VII – Continuing Violations/Hostile Environment

In *McFarland v. Henderson*, Docket No. 01-3517 (September 20, 2002), the Sixth Circuit reversed the district court's dismissal of the plaintiff's sex discrimination claim. In this case, the plaintiff brought a Title VII claim against his employer (the U.S. Postal Service). The district court dismissed the case because the plaintiff did not timely file an EEOC charge regarding some of the incidents that he alleged to constitute a hostile work environment. The Sixth Circuit reversed the district court holding that a hostile environment claim is similar to a continuing violation allegation when the hostile environment is allegedly caused by a series of discrete acts. The Court held that the existence of a hostile environment within the actionable period may encompass conduct that occurred outside of the limitations period.

Tortious Interference With Employment Relationship

In *ADR v. Agway*, Docket No. 01-1552 (September 6, 2002), the Sixth Circuit upheld the district court's grant of summary judgment to the defendant on plaintiff's tortious interference with

(Continued on page 21)

EASTERN DISTRICT UPDATE

Jeffrey A. Steele

Brady, Hathaway, Brady & Bretz

Independent Contractors Can Sue Under § 1983, But Not Title VII.

Judge Edmunds ruled in *Savas v. William Beaumont Hospital, Royal Oak*, 216 F.Supp.2d 660 (ED Mich, 2002), that a physician with staff privileges was outside the scope of Title VII's definition of the term "employee." The plaintiff had testified in an unrelated case that she was not a hospital employee. The economic realities test also established that the plaintiff was an independent contractor, not an employee, because the hospital did not withhold taxes from Plaintiff, did not pay the plaintiff's social security obligations, gave the plaintiff no benefits, and had not established a "permanent" relationship with the plaintiff. Consequently, the Court dismissed the plaintiff's Title VII claims against the hospital.

Judge Edmunds also dismissed the plaintiff's tortious interference and intentional infliction of emotional distress claims. Judge Edmunds reasoned that addressing these claims would "necessarily involve a review of the decision to terminate [the plaintiff's staff privileges] and the methods behind that decision, thus making a mockery of the rule that prohibits judicial review of such decisions by private hospitals."

Although agreeing that independent contractors fall outside the scope of Title VII, Judge Lawson ruled in *Ebelt v. County of Ogemaw*, 2002 U.S. Dist. LEXIS 18431, that "statutory limitations on relief under Title VII do not diminish relief independently available under the Equal Protection Clause" or the First Amendment. Accordingly, independent contractors who allege sexual harassment in violation of the Equal Protection Clause of the Fourteenth Amendment or retaliation for speech protected by the First Amendment may pursue §1983 actions.

Plaintiffs Alleging Harassment Are Bound By Limitations Language in Employment Applications.

In *Wright v. DaimlerChrysler Corporation*, 2002 U.S. Dist. LEXIS 19756, Judge Edmunds held the Title VII plaintiff to the six month limitations period contained in her signed employment application. Applying the three-prong test the Michigan Court of Appeals created in *Timko v. Oakwood*, 244 Mich App 234 (1997), Judge Edmunds concluded that there was no evidence that the plaintiff was unable to investigate, file or evaluate the damages stemming from her claim within the six month period. Judge Edmunds also ruled that the six month limitations period does not abrogate the intent of the Michigan Legislature because it is an employment contract, not a construction of the Michigan Civil Rights Act, that limits the plaintiff's right to sue.

Proof That Other Unions Successfully Arbitrated Similar Claims Does Not Establish That The Plaintiff's Union Breached Its Duty of Fair Representation.

In *Damphousse v. Great Lakes Steel*, 2002 U.S. Dist. LEXIS 16425, Judge Steeh dismissed the plaintiff's claim that his union breached its duty of fair representation by failing to arbitrate his grievance. The plaintiff, who was working under two "last-chance agreements," provided his union no evidence to refute the employer's accusation that he threatened to kill a coworker. Moreover, the union had proceeded to arbitration in only one case out of ten and had no practice of taking similar discharges to arbitration. Accordingly, there was insufficient evidence to prove that the union's decision was arbi-

trary, discriminatory or made in bad faith. This conclusion was not belied by the plaintiff's showing that other unions had successfully challenged discharges resulting from threats. Judge Steeh ruled that the "Union was under no duty to pursue arbitration simply because other unions had been successful against other employers in 16 of 46 discharge cases that proceeded to arbitration."

Prima Facie Showing Requires Proof That Plaintiff Was Either Replaced by or Treated Worse than Younger Employees With Substantially Identical Records.

In *Baur v. J.B. Hunt Transport, Inc*, 2002 U.S. Dist. LEXIS 17637, Judge Lawson ruled that an over-the-road truck driver failed to establish a *prima facie* case of age discrimination because he (1) was not replaced by a younger person and (2) failed to prove that younger employees with similar driving records were retained after getting into similar accidents. Evidence that the plaintiff's job responsibilities were spread out among the existing work force does not prove that the driver was replaced by younger employees. The plaintiff's testimony that he had heard that younger drivers were retained after getting into accidents was unavailing because the plaintiff could neither identify these younger drivers nor proffer "evidence that the drivers about which he had heard were involved in similar accidents, or had similar safety records, or were otherwise similar in all relevant respects."

Judge Lawson also rejected the plaintiff's legitimate expectations theory. Successful completion of a probationary period during which employees can be fired for any reason does not guarantee just cause employment. Nor does testimony from the employer's safety manager "that the company's custom was to terminate only when it had a reason to do so establish a *promise* J.B. Hunt to limit its discretion in that fashion." (Emphasis in original). ■

SIXTH CIRCUIT ADDRESSES TITLE VII AND NLRA ISSUES

(Continued from page 20)

employment relationship claim under Michigan law. In this case, the plaintiff and the defendant had a business relationship in which the defendant provided consulting services to plaintiff. After the defendant hired one of plaintiff's consultants, the plaintiff sued alleging breach of contract and tortious interference. The Sixth Circuit upheld the dismissal of the tortious interference claim because the consultant that was hired by defendant approached the defendant about employment opportunities.

NLRA – Challenge to Ballots

In *Heritage Broadcasting Co. v. NLRB* (Docket Nos. 01-1003-1209) (October 18, 2002), the Sixth Circuit enforced a Board finding that the employer failed to bargain with the union after a decertification petition was unsuccessful. The employer claimed that the Board erred by striking the ballots of four employees after the union objected to their ballots on the grounds that they were not part of the unit. These four challenged ballots could have determined the outcome of the election. After an evidentiary hearing, the Board held that evidence could have supported either a finding that these four employees were production employees or were excluded from the unit. The Board, however, concluded that evidence favored a finding that these employees should not be included in the unit based on their job duties. On appeal the Sixth Circuit enforced the Board's order despite evidence of "mixed past practices" regarding the duties of the employees in question because the Board's decision was "reasonably based on substantial evidence." ■

NLRB UPDATE

George M. Mesrey
The Dow Chemical Company

Jack VanHoorelbeke
Clark Hill PLC

NLRB Regional Director Bill Schaub recently retired from the Detroit Regional Office. Bill is a leader, mentor and a great labor lawyer. He has inspired many people and we wish him the best in his future endeavors. This NLRB Update is dedicated to him.

1. SUCCESSORSHIP

Dattco, Inc., 338 NLRB No. 7. The Board held that the Respondent is not a successor employer to Laidlaw, Inc. with respect to its Hartford, CT operations and that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union because the unit in which bargaining was requested was not an appropriate unit.

2. ACCESS TO EMPLOYER PREMISES

Peck/Jones Construction Corp., 338 NLRB No. 4. The Board dismissed a complaint alleging that the Respondent unlawfully denied two union business agents access to its construction site because the agents failed to follow the Respondent's reasonable and non-discriminatory sign-in rule.

3. EMPLOYER INTERFERENCE

Crown Electrical Contracting, Inc., 338 NLRB No. 36. The Board found that the Employer's statement that it would do whatever it took to keep employees' current benefits was nothing more than a lawful promise to maintain the status quo and was not meant to cause employees to interpret the statement as a promise to increase benefits.

4. REMEDIES/BARGAINING ORDERS

Aldworth Co, Inc. and Dunkin' Donuts Mid-Atlantic Distribution Center Inc., Joint Employers, 338 NLRB No. 22. The Board held that an order requiring Respondent Aldworth to bargain with Food and Commercial Workers Local 1360 is necessary to remedy the effects of Respondent's misconduct which included several "hallmark" violations involving high-level management representatives.

Wake Electric Membership Corp., 338 NLRB No. 32. The Board concluded that a remedial bargaining order was not warranted because the Respondent's violations did not include the more typical "hallmark" violations found in cases warranting *Gissel* bargaining orders.

5. RESTRAINT AND COERCION

Denver Newspaper and Graphic Communications Local 22 (Rocky Mountain News), 338 NLRB No. 21. The Board found that the Respondent violated Section 8(b)(1)(A) of the Act by causing the denial of overtime opportunities to a member because he was delinquent in paying union imposed fines.

Sheet Metal Workers Local 33 (DaimlerChrysler Corp. and Ford Motor Co.), 338 NLRB No. 17. The Board ordered the union to rescind unlawful fines imposed on four members who worked for non-union companies.

6. SECTION 8(e)

Iron Workers Local 416 (Pacific Reinforcing Steel, Inc. and J.L. Davidson Co.), 338 NLRB No. 15. The Board concluded that the Union violated Section 8(e) of the Act by entering into, main-

taining, and giving effect to agreements with the employers containing picket line clauses which permit employees to refuse to cross any picket line established by any union, and thereby have the effect of causing the employees to agree not to handle or otherwise deal in the products of, or do business with, another employee or person.

7. PROTECTED CONCERTED ACTIVITIES

JCR Hotel, Inc., 338 NLRB No. 27. The Board found that the Respondent discharged Patsy Wilson in violation of Section 8(a)(1) because it believed she had concertedly encouraged employees to walk out of work in protest of working conditions.

8. BARGAINING UNITS

United Operations, Inc., 338 NLRB No. 18. The Board reversed the Regional Director's decision that the smallest appropriate unit sought by the Petitioner must include all field service employees and found that the HVAC technicians constitute a readily identifiable and functionally distinct group.

9. SECTION 9(a) STATUS

Saylor's, Inc., 338 NLRB No. 35. The Board denied the Petitioner's request for review of the Regional Director's decision that a 9(a) relationship was established by the contractual language in the collective bargaining agreement.

10. VOLUNTARY RECOGNITION

Triangle Bldg. Products Corp., 338 NLRB No. 29. The Board found that the Employer's voluntary recognition of the Intervenor (Carpenters Local 2682) as the collective-bargaining representative of the employees in a wall-to-wall unit is a bar to a rival petition filed by Teamsters Local 1205.

11. REFUSAL TO HIRE/SALTING

Norton Audubon Hospital, 338 NLRB No. 34. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to employ Wilma McCombs.

Tejas Electrical Services, 338 NLRB No. 39. The Board affirmed the administrative law judge's dismissal of the complaint alleging that the Respondent refused to hire two applicants. The judge found that the General Counsel failed to establish union animus in the decision not to hire Smith and Bornsheuer.

12. FAILURE TO BARGAIN

King Soopers, Inc., 338 NLRB No. 30. The Board found that the Respondent did not violate Section 8(a)(5) of the Act by refusing to deal with the Union business agent, who it had discharged 4 years earlier for "volatile and disruptive workplace misconduct."

The Post-Tribune co., A Div. Of the Sun Times Co., a Subsidiary of Hollinger International Publishing, Inc., 337 NLRB No. 192. The Board found that the Respondent violated the Act by unilaterally increasing the amount deducted from employees' paychecks for health insurance coverage without giving the Union notice and an opportunity to bargain.

13. ELECTION OBJECTIONS

Bally's Park Place, Inc., d/b/a Bally's Atlantic City, 338 NLRB No. 43. The Board found that the Regional Director properly applied the "blocking charge" policy by impounding the election ballots pending resolution of the Union's unfair labor practice charge. ■



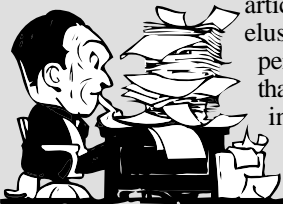
AN ARBITRATOR'S LAMENT

Barry Goldman
Arbitrator and Mediator

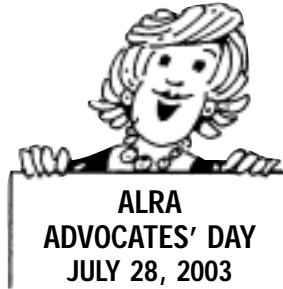
Flight 713 was scheduled to leave
at a quarter after three
But the sign said DELAYED and no one would say
how long the delay might be
Then the sign changed to FOUR and at four changed to FIVE
and at five changed to QUARTER PAST SIX
At six the man said they had fixed what was wrong
but by then we weren't fooled by their tricks
At seven o'clock they brought a new plane
but the crew had all gone home to bed
So we all had to wait while they got a new crew
"It will be a few minutes" they said
Then we all got on board but we couldn't take off
cause something was wrong with a gauge
Then the cops had to come and arrest some poor jerk
cause he'd gone on a blind, screaming rage
We finally took off at ten minutes to nine
and they're "sorry for the delay"
But they're not going to feed us, there ain't no free drinks
and they're not giving miles away
It's airline pretzels for dinner again
with my legs crammed under my chin
Oh, it's a glamorous business
this glamorous business we're in
I'm tired and bored and wired and sore
and angry and greasy and itchy
And queasy and hungry and grumpy and creepy
and sleepy and weary and twitchy
The gods are cruel and men are fools
and fate is unforgiving
But, though I curse, it could be worse:
I could have to *work* for a living ■

WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for *Lawnotes*. But the muse is elusive. And you just can't find the perfect topic. You make the excuse that it's the press of other business but in your heart you know it's just writer's block. We can help. On request, we will help you with ideas for article topics, no strings



attached, free consultation. Also, we will give you our expert assessment of your ideas, at no charge. No idea is too ridiculous to get assessed. This is how Larry Flynt got started. You have been unpublished too long. Contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., 1400 North Park Plaza, 17117 West Nine Mile Road, Southfield, Michigan 48075 or (248) 559-2110 or israel@martensice.com.



MICHIGAN LABOR RELATIONS AGENCIES TO HOST NATIONAL CONFERENCE

In late July of 2003, labor relations advocates and agencies in Michigan will have the unique opportunity to showcase our state and the wealth of labor history in our area when we host the Annual Conference of the Association of Labor Relations Agencies (ALRA).

ALRA is a nonprofit organization of some 67 private and public labor relations agencies at the federal, state, and provincial levels in the United States, Canada and elsewhere. Member agencies include MERC, NLRB, Canada Labour Relations Board, FMCS, National Mediation Board, Federal Labor Relations Authority, Michigan Civil Service Commission and other labor relations agencies from around the world.



Every summer, ALRA hosts an annual conference in the locale of a member agency, featuring nationally known speakers and providing member agencies with the opportunity to share information. The July 2001 Conference was held in Montreal, and presenters included John Truesdale, former NLRB member and Chairperson, along with Bob White, former head of the Canadian Auto Workers. At the July 2002 San Diego conference, presenters included Arturo Rodriguez, President of the United Farm Workers of America, and former NLRB Chairperson Bill Gould.

The 2003 ALRA Conference will take place on July 26-30, 2003, at the Marriott Detroit Renaissance Center, and will be hosted by MERC, FMCS (U.S. and Canada), NLRB, Michigan Civil Service Commission, and the Ontario Provincial Labour Relations Agency. On Monday, July 28, 2003 we will host an Advocates' Day, and the program will be open to attorneys, arbitrators, labor union representatives, management personnel, mediators, and other labor relations professionals.

**PLAN TO ATTEND ALRA ADVOCATES'
DAY AT THE MARRIOTT DETROIT
RENAISSANCE CENTER ON JULY 28, 2003**

A reception will follow the Advocates' Day presenters, who will share their unique perspectives on the nuances of labor relations. All of this will occur in our great City of Detroit – the catalyst of the labor movement.

**FOR MORE INFORMATION ON ALRA
ADVOCATES' DAY, CONTACT MERC DIRECTOR
RUTHANNE OKUN AT (313) 456-3519.**

INSIDE *LAWNOTES*



- Claudia Orr explores the mysteries and complexities of the Fair Labor Standards Act.
 - Erwin Ellmann writes about the intersection of arbitration, injunctions, the Oakland County Circuit Court, and the unauthorized practice of law.
 - Kevin Kales addresses why changes in Medicare policies may affect medical damages in employment and workers' compensation cases
 - NLRB Deputy Regional Attorney Joe Barker writes about when *Wright Line* is the wrong test.
- Fran Stacey presents a primer on immigration basics.
 - Shel Stark, Mike Pitt, and John Obee remember Joe Marshall, John Brady, and Janet Cooper.
 - 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, and more.
 - Authors Joseph A. Barker, John T. Below, Andrea Roumell Dickson, Erwin B. Ellmann, Gary S. Fealk, Barry Goldman, Stuart M. Israel, Kevin P. Kales, Alexandra Matish, George M. Mesrey, John A. Obee, Claudia Orr, Michael L. Pitt, Heather G. Ptasznik, Francyne Stacey, Sheldon Stark, Jeffrey A. Steele, Jack VanHoorelbeke, and more.

Labor and Employment Law Section

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