

## LABOR AND EMPLOYMENT LAWNOTES

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OFFICIALLY  
DEFUNCT?

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Professor Edgar Durfee, whose casebook I studied in Ann Arbor some sixty years ago, cited a wise jurisprudential axiom that “The bedbug has no wings at all but he gets there just the same.” After delivering a paper<sup>1</sup> to the National Academy of Arbitrators in 1992, I sought solace in this testament to the inevitability of gradualness. I had urged deleting from the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes the injunction in Section 6(D)(1) that without the consent of both parties “no clarification or interpretation of an award is permissible.” I agreed that awards should be conclusive and binding but I did not think that even the slightest postscript by an arbitrator should be treated as a lapse from sound professional ethical standards of behavior. The courts had simply recognized too many exceptions to the rule and the Code was being regularly circumvented as arbitrators were reserving jurisdiction to resolve disputes in implementing awards once rendered. There were voices of dissent at the meeting and at the end of my presentation to a sizeable audience of Academy members, it was suggested that a straw poll be taken to see what support I had. From that assembled multitude I received one single, isolated vote. The Academy was unalterably committed to *functus officio* in labor arbitration.

The Academy was also unmoved by my amplified views in the Industrial Relations Law Journal.<sup>2</sup> My pleas to at least reopen debate to the two other framers of the Code — the AAA and FMCS — also met with disdainful silence. *Functus officio* had never oppressed me as an arbitrator but these rebuffs were enough to persuade me to stack my quarrel with the Code into the bundle of lost causes I have championed over the years.

Two years later, however, the Seventh Circuit, *per* Richard Posner, J., cast a new and luminous look at *functus officio* in arbitration. In *Glass Molders Local 182B v Excelsior Foundry Company*,<sup>3</sup> Judge Posner found the doctrine “riddled with exceptions,” and “hanging on by its fingernails and whether it can even be said to exist in labor arbitration is uncertain.” He did not officially pronounce its burial, as did Judge Brown in his earlier brief concurrence in *Red Star Express Lanes v Brotherhood of Teamsters, Local 170*,<sup>4</sup> but he certainly raised fundamental doubts about the vitality of the dogma reflected in the Code. That decision stirred the bedbugs into motion. See *Teamsters Local 312 v Matlock, Inc.*, 118 F3d 985 (3rd Cir, 1997); *Teamsters Local 631 v Silver State Disposal Service*, 109 F3rd 1409 (9th Cir, 1997); *Dean Foods v United Steelworkers of America*, 911 F Supp 1116, 1127 (N.D., Ind, 1995); *Cadillac Uniform & Linen Supply, Inc. v Union de Tranquistas de Puerto Rico, Local 901*, 920 F Supp 19 (D.P.R. 1996).

There have been radiations — if modest — within the Academy. Though noting that the “Continued viability of *functus officio* must be recognized,” John E. Dunford, a distinguished member of the Academy, in a 78-page article, was able to justify to himself that the arbitrator’s reservation of jurisdiction, for even a period without limit, did not offend the doctrine.<sup>5</sup> And at the 1998 annual meeting of the Academy, another of its most distinguished members, George Nicolau, presented a paper, “O *Functus Officio*: Is it Time to Go?”<sup>6</sup> The title alone signalled a willingness to consider what six years before had seemed unspeakable. Arbitrator Nicolau discussed Judge Posner’s decision at some length, stressing what he deemed some infirmities in his logic. The criticism merits a commentary more extended than is appropriate here.

Most surprising, Arbitrator Nicolau quarrels with the court’s statement that since arbitration services are “sold in a competitive market, the rules adopted by the suppliers are presumptively efficient.” “I’m sure,” he says, “that Judge Posner meant buyers rather than sellers, since it is the parties, the buyers of the services, who essentially set the rules.” I have yet to encounter a living management or union representative who claimed any role in the formulation of the Code and very few who express a desire to preserve unaltered Section 6(D)(1). It is the arbitration establishment, not its users, who say they will not be moved. Yet even their voices now are less strident. Arbitrator Nicolau himself suggests a modification of the existing Code language<sup>7</sup> which, with Solomonic insight, is perhaps designed to please no one.

The present Code language, it now seems clear, does not preclude post-award rectifying — without the parties’ mutual consent — of numerous kinds of mistakes, omissions and misinterpretations. It is thus not too difficult, as Judge Posner pointed out, to “crawl through the loophole in the doctrine of *functus officio* for clarification or completion, as distinct from alteration of the arbitration award.” What many decisions, both judicial and arbitral, continue to do, is to pursue this logomachic crawl, though at peril still of being branded “unethical” under the code. Deletion of the provision would simply remove the moral stain and relegate to the arbitrator the abiding responsibility for seeing that genuine final judgments remain final.

## END NOTES

<sup>1</sup>*Functus Officio* under the Code of Professional Responsibility: The Ethics of Staying Wrong,” Arbitration 1992, Proceedings of the Forty-Fifth Annual Meeting, National Academy of Arbitrators 190 (1993).

<sup>2</sup>Arbitration Ethics and the Second Look — *Functus Officio* in the National Labor Policy,” 13 Ind. Rel. L. J. 416 (1993).

<sup>3</sup>56 F3d 844 (7th Cir, 1995).

<sup>4</sup>809 F2d 103, 108 (1st Cir, 1987). See also *Enterprise Wheel & Car Corp. v Steelworkers*, 268 F2d 327, 332 (4th Cir, 1959).

<sup>5</sup>Dunford, “The Case for Retention of Jurisdiction in Labor Arbitration Awards,” 31 Ga L.R. 201 (1996).

<sup>6</sup>This will no doubt be published in the forthcoming volume of the Academy’s proceedings.

<sup>7</sup>Unless directed to do so by appropriate authority, an arbitrator may not reconsider the merits of a final award or accept a motion for such reconsideration. If, however, a party considers an award or a portion thereof unclear, that party, within 10 days of the issuance of the award, may request the arbitrator to clarify or explain the award. Said request must be on notice to the other party, must specify the portion of the award considered unclear or in need of explanation or interpretation and state the reasons for that assertion. After affording both parties an opportunity to be heard, the arbitrator shall promptly dispose of the request. ■

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### STATEMENT OF EDITORIAL POLICY

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

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# MICHIGAN SUPREME COURT BREAKS WITH EEOC: “HANDICAP” MUST BE JUDGED IN MEDICATED STATE

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The Michigan Handicappers’ Civil Rights Act (“MHCRA”), MCLA 37.1101 et seq, defines a protected “handicap” as:

A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic;

(A) . . . substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual’s ability to perform the duties of a particular job or position. MCLA 37.1103(e)(i)(A).

The statute is silent as to whether the condition is considered in a medicated or unmedicated state. Many serious conditions can be entirely or substantially controlled with medication, or effectively mitigated with the use of a prosthetic device or adaptive aid. Therefore, if a condition is considered in its unmedicated state it may well meet the requirement of limiting a major life activity, while considering the condition in its medicated or mitigated state would result in the opposite conclusion.

In *Chimielewski v Xermac*, 457 Mich 593 (6/9/98), the Michigan Supreme Court considered for the first time whether, in determining if a person has a condition that meets the MHCRA definition of “handicap,” the trier of fact should assess the condition with or without the benefit of medication or other mitigating measures. The Court held that conditions are considered as they currently exist, in their medicated or mitigated state.

Mr. Chimielewski was an alcoholic who had received a liver transplant. After the transplant, he was dependent on antirejection medication. His medical expert testified at trial that if plaintiff were to discontinue his medication the liver would be rejected and, without a new transplant, plaintiff would die. However, it was undisputed that with the benefit of the medication plaintiff was in good health and had no functional limitation. In closing arguments defense counsel contended that the condition must be considered in its present condition, with benefit of medication. Plaintiff’s counsel argued, conversely, that the jury should consider the condition as it would be in its unmedicated state, and requested a jury instruction to that effect. The trial court refused to give that instruction, deciding instead to simply provide the jury with the language of the act, without further guidance on the issue of whether the condition should be considered in its medicated or unmedicated state. During deliberations the jury sent a note inquiring as to the relevance of plaintiff’s dependence on medication, but the court gave no further guidance, telling the jury to rely on the testimony and previous instructions. The jury returned a verdict for defendant, which the Court of Appeals affirmed.

Michigan courts generally find federal authority to be persuasive, and the Michigan Supreme Court noted that the definition of “handicap” under the Americans With Disabilities Act (“ADA”), 42 USC 12101 *et seq.*, is virtually identical to the MHCRA definition. The Equal Employment Opportunity Commission (“EEOC”), the agency responsible for investigating ADA charges, has issued guidelines which state that for ADA purposes a condition should be judged in its *unmedicated* state. 29 CFR 1630.

The Michigan Supreme Court rejected that approach, and affirmed the judgment for defendant. The Court determined that for purposes of the MHCRA, a condition must be considered in its medicated state in deciding whether it meets the definition of a protected “handicap”. The Court rejected the EEOC guidelines, finding that the EEOC approach contravenes the plain language of the statute. The Court stated that the EEOC interpretation would read the requirement that the condition “limit” a major life activity out of the statute, since an individual who is not currently limited, but who would theoretically be limited but for the medication, would nonetheless be considered handicapped. Thus, the Court stated that a finder of fact “must examine the plaintiff’s condition as it exists, with the benefit of his” medication.

The Court in *Xermac* was addressing a situation in which the current state of the condition *was* the medicated state. The Court was correct that to extend MHCRA protection to such a situation would be to consider “handicapped” one who has no current functional limitation, something at odds with the language of the statute. The Court’s rejection of the EEOC guidelines was based at least in part on its belief that considering conditions in their unmedicated state would result in “many commonplace and relatively benign and easily remedied conditions” being protected handicaps, a result the Court believed to be inconsistent with the intent of the MHCRA.

Yet, considering a condition only in its current state, ignoring the issue of whether an unmedicated condition could be easily controlled, conflicts with at least some of the *Xermac* Court’s stated goals. If the “current state” controls, it is clear that there will be situations in which an individual who has an easily controllable but currently unmedicated condition, would fall within the Act’s protection. For example, the Court cited myopia and hypertension as two examples of “easily remedied” conditions, and was satisfied that in their medicated or mitigated state those conditions typically were not protected because they would no longer substantially limit a major life activity. It is not clear how the situation should be addressed when one has such an easily controllable condition but refuses to accept the “easy remedy.” When the refusal to remedy the situation is for vain or foolish reasons, for example refusing to wear a hearing aid because it makes one “look old”, the issue is even less clear. It seems clear from a policy standpoint that individuals who do their best to help themselves by attempting to control their conditions, but who nonetheless are still substantially limited by the condition, ought to be within the Act’s protection. It is far less obvious that the Act was designed to, or should, protect an individual who could easily be without any functional limitation but by his or her own choice refuses to mitigate the situation, particularly if for unjustified reasons.

Employers with employees in different states may already also be facing such an anomalous situation. There is currently a significant split among the federal courts of appeal with regard to whether the EEOC guidelines should be followed. The Tenth Circuit (*Murphy v United Parcel Service*, US App LEXIS 4439; WL 105933 (10th Cir. 3/11/98)), the Sixth Circuit (*Gilday v Mecosta County*, 124 F3d 760 (6th Cir. 1997) *reh’g en banc den* US App LEXIS 32120 (1997)) and the Seventh Circuit (implicitly in *Siefken v Village of Arlington Heights*, 65 F3d 664 (7th Cir. 1995)) have rejected the EEOC guidelines and consider a condition in its medicated state, while the First Circuit (*Arnold v United Parcel Service Inc.*, 136 F3d 854 (1st Cir. 2/20/98)), Eighth Circuit (*Doane v City of Omaha*, 115 F3d 624 (1997) *reh’g en banc den* US App LEXIS 20816 (1997) *cert den* 118 S Ct 693 (1998)), Ninth Circuit (*Holihan v Lucky Stores Inc.*, 87 F3d 362 (1996) *cert den* 117 S Ct 1349 (1997)) and Eleventh Circuit (*Harris v H & W Contracting Co.*, 109 F3d 773 (1997)) adopted the guidelines and look to the unmedicated condition. Thus, an employer with facilities in different federal circuits could be faced with a situation in which two similar employees with the same condition are subject to different standards, one who is considered to have a protected handicap, the other of which is unprotected (indeed, this is precisely the situation facing UPS, given the contradictory holdings in *Murphy* and *Arnold*).

Employers in Michigan should not face this situation. A majority of the court in *Gilday v Mecosta Co.*, 124 F3d 760 (6th Cir. 1997) rejected the EEOC guidelines and determined that a condition must be considered in its medicated state. Thus, when a matter is pending in Michigan, whether in state or federal court, whether brought under the ADA or the MHCRA, the condition will be considered in its medicated or mitigated state.

*Xermac* will exclude from the Act’s protection many individuals with serious but controlled conditions, a result which the *Xermac* Court seemed to openly endorse. It is important, however, that the MHCRA also protects those who are “regarded as” having a condition which is a protected handicap, MCLA 37.1103(e)(iii), as well as those who have “a history of” a condition which is a protected handicap, MCLA 37.1103(e)(ii). It can be also argued that the requirement that the condition must be considered in its medicated state must also be read into these alternate definitions. Thus, in order to be entitled to protection under the “regarded as” definition, the employer would have to perceive the individual to have a condition which, *in its medicated state*, constituted a protected handicap. Similarly, the “history of” definition would mean that one would be required to have a history of a condition which, in its medicated state, would constitute a handicap. This gloss, if adopted by the courts, will also have the effect of reducing the number of individuals who will meet either of these alternate definitions.

The Court was aware that its holding would reduce who would be entitled to protection under the Act, but believed that result consistent with legislative intent to protect only serious conditions.

While the language of *Xermac* seems to suggest otherwise, until there is a decision which addresses a case in which an individual has an easily controllable, but currently uncontrolled condition, it may be possible for employers to argue that such a condition does not constitute a protected “handicap.” ■

# COMMON SITUS PICKETING

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Secondary boycott issues frequently arise when a union pickets an employer at a jobsite where other employers with whom the union has no primary dispute are also working. In the recent case of *Oil Workers Local 1-591 (Burlington Northern Railroad)*, 325 NLRB No. 45, 157 LRRM 1097 (1998), the National Labor Relations Board, by a 3-2 vote, held that a union which was engaged in a labor dispute with a subcontractor working on the premises of a neutral refinery violated Section 8(b)(4) of the National Labor Relations Act (NLRA) by picketing at the refinery gate reserved for the railroad that transported the product of the neutral refinery. NLRB Chairman William B. Gould IV stated that this was “one of the more important Board cases” decided in 1998.

## A. Common Situs Defined

*Common situs* is the term used when two or more employers are engaged in normal business activities at a single job site. *Building Service Employees Local 254 (United Bldg. Maint. Corp.)*, 173 NLRB 280, 69 LRRM 1323 (1968). Examples include construction sites, office buildings and shopping malls. The controlling consideration is that picketing be conducted so as to minimize its impact on neutral employers insofar as this can be done without substantial impairment on the effectiveness of the picketing in reaching the primary employer. *Electrical Workers IBEW Local 970 (Interox America)*, 306 NLRB 54, 139 LRRM 1169 (1992).

## B. The Statutory Scheme

Section 8(b)(4) of the NLRA attempts to balance the right of unions to bring pressure to offending employers in primary labor disputes with the right of unoffending (neutral) employers. *NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675, 28 LRRM 2108 (1951). Under Section 8(b)(4), the union retains the right to engage in direct action against an employer with whom it is engaged in a primary labor dispute. The union’s right includes inducing or attempting to induce employees of the primary employer to engage in a strike or refusal to handle goods of the primary.

However, the NLRA restricts the union’s right by narrowly focusing on the area of conflict. Although the right of the primary employer’s employees to engage in a work stoppage includes the right to induce suppliers and customers of the primary to cease doing business with the primary, a union may not widen the conflict through coercion of neutral employers.

Section 8(b)(4) focuses both on the conduct of a union and the object of such conduct. Union conduct that induces or encourages individuals to engage in a strike or refusal to perform services for a neutral employer or which threatens, coerces or restrains any neutral employer or person is prohibited by subsections (i) and (ii) of 8(b)(4). Subsections (i) and (ii) are in the disjunctive. However, under Section (8)(b)(4)(B), the unlawful object (not necessarily the sole object) of the conduct must be to force or require any person to cease doing business with any other persons. *Electrical Workers IBEW Local 761 v. NLRB*, 366 U.S. 667, 48 LRRM 2210 (1961); *Denver Bldg. Trades Council, supra*, at 2.

## C. The Primary Employer

A primary employer is an employer with whom the union directly has a dispute, such as a non-union employer that the union desires to prevent from working at a *common situs* job. A relationship between a primary employer and another person may make both the primary employer. A contractual relationship, such as a general-subcontractor relationship or a building owner-subcontractor relationship, is not itself enough to make the general contractor who hired a subcontractor a primary employer. In a situation where the union attacks the fact that a general contractor hired a non-union subcontractor, the subcontractor and not the general is the real subject of the union’s conduct and thus makes the subcontractor the primary employer. *Edward J. De Bartolo Corp. v. NLRB*, 485 U.S. 568, 128 LRRM 2001 (1988); *Service Employees Local 32B-32J (Nevins Realty Corp.)*, 313 NLRB 399, 144 LRRM 2865 (1993), *enfd. in pertinent part* 68 F.3d 490, 150 LRRM 2513 (CA DC, 1995); *Carpenters (Siebke-Hoyt & Co.)*, 283 NLRB 115, 125 LRRM 1270 (1987). If the general contractor terminates a subcontractor that was the object of the union’s concern, however, the general would become the primary employer if it performed the work with its own employees. *Teamsters Local 70 (Military Traffic Mgmt. Command)*, 288 NLRB 1224, 128 LRRM 1177 (1988); *Teamsters Local 25 (Boston Deliveries)*, 282 NLRB 910, 124 LRRM 1149 (1987).

## D. Legal Restrictions on Picketing

Picketing by its very nature may induce action irrespective of the ideas which are disseminated. Accordingly, picketing is deemed to induce or encourage employees within the meaning of Section 8(b)(4)(i) and to restrain and coerce employees within the meaning of Section 8(b)(4)(ii). Traditionally, picketing is defined as individuals patrolling or carrying placards attached to sticks. *Teamsters Local 315 (Atchison, Topeka & Santa Fe Railway Co.)*, 306 NLRB 616, 140 LRRM 1259 (1992); *Teamsters Local 677 (J.H. Hogan, Inc.)*, 299 NLRB 499, 135 LRRM 1018 (1992). Neither patrolling alone nor patrolling combined with the carrying of placards are essential elements to a finding of picketing. Rather, the essential feature of picketing involves individuals being placed at entrances to a job site or engaging in some form of confrontation. *Service Employees Local 87 (Trinity Bldg. Maintenance)*, 312 NLRB 715, 146 LRRM 1034 (1993); *Laborers Local 389 (Calcon Construction Co.)*, 287 NLRB 570, 128 LRRM 1175 (1987); *Teamsters Local 282 (General Contractors Assn. of New York)*, 262 NLRB 528, 110 LRRM 1342 (1982).

Signal picketing may also result in an unfair labor practice. It involves activity that does not rise to the level of actual picketing, but rather is a signal to induce action. Signal picketing includes the stationing of union business agents near the entrances to *common situs* job sites or the placing of placards near the entrances so that anyone approaching can read the printed message. *Calcon Construction, supra*, at 4; *Operating Engineers Local 12 (Hansel Phelps Construction Co.)*, 284 NLRB 246, 126 LRRM 1181 (1987); *Teamsters Local 688 (Levitz Furniture Co. of Missouri)*, 205 NLRB 1131, 84 LRRM 1103 (1973).

## E. Legal Tests for Determining the Legality of Picketing

Where a neutral secondary employer performs work on the same jobsite as the primary employer with whom the union has a dispute, union picketing must be conducted in a way that minimizes its impact on the neutral employer, while still allowing the union

to effectively picket the primary employer. *Denver Building Trades Council v. NLRB*, 341 U.S. 675, 28 LRRM 2108 (1951). Some well developed tests have been adopted by the Board for determining the legality of union picketing at a multiple employer worksite where separate entrances have been established for primary and neutral employers. *Burlington Northern R.R.*, *supra*. These tests include the related-work (*Carrier*) test and the *Moore Dry Dock* test, including the supplier exception to *Moore Dry Dock*.

**1. The Related Work Test.** Where premises are owned and operated by the primary employer, the related-work test is applied. *Electrical Workers Local 761 (General Electric) v. NLRB*, 366 U.S. 667, 48 LRRM 2210 (1961); *United Steelworkers of America (Carrier Corp.) v. NLRB*, 376 U.S. 492, 55 LRRM 2698 (1964). This test, which is broader than the *Moore Dry Dock* presumption-based test discussed below, focuses on the type of work being performed by the secondary employees. *Burlington Northern R.R.*, *supra*, at 5. Under the related-work test, if the duties of the secondary employees are connected with the normal operations of the primary employer, picketing directed toward these employees is primary activity and is protected. *Carrier Corp.*, *supra*, at 5. However, if the work of the secondary employees is unrelated to the normal operations of the primary employer, the picketing is an unfair labor practice. *Id.* This test is only applied when the picketing is taking place at the place of operations of the primary employer, not when a union pickets the premises of a neutral employer. *Teamsters Local 315 (Atchison, Topeka & Santa Fe Railway)*, 306 NLRB 616, 140 LRRM 1259 (1992), *enfd.* 20 F.3d 1017, 146 LRRM 2009 (9th Cir. 1994).

**2. Moore Dry Dock.** Generally, direct evidence of the union's object for its conduct, especially in *common situs* cases where the primary employer is not the owner of the premises, is not readily discernible. Thus, a presumption-based (*Moore Dry Dock*) analysis is undertaken to distinguish lawful primary activity from unlawful secondary conduct. To be considered primary (lawful), the union's picketing must meet the following criteria: (1) the picketing is strictly limited to a time when the primary employer's workers are actual present at the job site; (2) at the time of the picketing, the primary employer is engaged in its normal business at the site; (3) the picketing is limited to places reasonably close to the location of the primary employer's workers; and (4) the picketing discloses clearly that the dispute is with the primary employer. *Sailors Union (Moore Dry Dock)*, 92 NLRB 547, 27 LRRM 1108 (1950). These standards are not to be applied on an indiscriminate "per se" basis, but rather are to be regarded merely as aids in determining the underlying question of statutory violation. *Electrical Workers Local 861 (Plauche Elec.)*, 135 NLRB 250, 49 LRRM 1446 (1962).

Under the first of the *Moore Dry Dock* criteria, picketing only when the primary employer is on the site, the Board focuses on the reasonableness of the union's assertion that the primary employer was maintaining a presence on the site at the time of picketing. *Seafarers (SIU) (American Commercial Barge Line Co.)*, 253 NLRB 337, 105 LRRM 1671 (1980), *enfd.*, 672 F.2d 897, 109 LRRM 2360 (CA DC, 1981). Factors such as employees temporarily being absent from the site for lunch, coffee breaks, or other personal needs do not mean that the primary employer is not engaged in its normal business during this type of temporary work interruption. *Plauche Elec.*, *supra*, at 8. A union is not relieved of liability merely because neutral employees did not report to work at the time the union picketed a neutral gate. *Carpenters Local 1622 (Robert*

*Wood & Assocs.)*, 262 NLRB 1211, 111 LRRM 1057 (1982), *enfd.*, 786 F.2d 903, 117 LRRM 1410 (1984). In fact, the Board has held that the failure of neutral employees to report when scheduled justified an inference that the picketing was intended to cause that effect. *Id.*

The second *Moore Dry Dock* criterion, whether the primary employer is engaged in its normal business at the situs, is evaluated according to the nature of the business at the situs and the primary employer's function there. *Steelworkers Local 6991 (Auburndale Freezer Corp.)*, 177 NLRB 791, 71 LRRM 1503 (1969), *rev'd* 434 F.2d 1219, 75 LRRM 2752 (CA 5, 1970). For example, the Board found unlawful both a union's picketing of a common carrier at the terminals of two other common carriers that interlined with the primary employer and a union's picketing at the construction site of the primary's new facility because it was merely incidental to its normal business of developing, manufacturing, and marketing equipment and chemicals. *Teamsters Local 208 (DeAnza Delivery Sys.)*, 224 NLRB 1116, 93 LRRM 1382 (1976); *Bio-Rad Laboratories v. Longshoremen (ILEU) Local 6*, 125 LRRM 2048 (ND Cal., 1987).

The third *Moore Dry Dock* criterion requires that the picketing be conducted reasonably close to the situs of the primary employer. Under this requirement, a union's effort to minimize the impact of its picketing on neutrals is the conduct evaluated. Thus, the location of the picketing is generally violative when it is conducted at a gate reserved for neutral employees, unless the gate is improperly or unreasonably established, is not honored, or is misused. *T.W. Helgesen, Inc. v. Iron Workers Local 498*, 548 F.2d 175, 94 LRRM 2254 (CA 7, 1977); *Service Employees Local 32B-32J (New York Ass'n for the Blind)*, 250 NLRB 240, 104 LRRM 1531 (1980); *J.F. Hoff Electric Co. v. NLRB*, 642 F.2d 1266, 105 LRRM 2345 (1980).

Finally, the fourth *Moore Dry Dock* criterion requires that picket signs identify the primary employer. The Board and the courts demand clear identification of the employer being picketed. *NLRB v. Iron Workers Local 433 (United Steel)*, 850 F.2d 551, 124 LRRM 1531 (1980). Even threats to picket that do not fairly identify the primary employer have been held to violate the Act. *Plumbers & Pipe Fitters Local 32 (Ramada, Inc.)*, 294 NLRB 501, 131 LRRM 1453 (1989).

Failure to comply with any of the *Moore Dry Dock* standards gives rise to a strong, but rebuttal, presumption of an unlawful secondary object. *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168, 122 LRRM 1018 (1986).

**3. Reserved Gate Systems.** In view of the *Moore Dry Dock* standards a reserved gate system generally is set up at common situs facilities. Such a system includes the posting of signs at entrances to a job site stating that a certain gate is reserved for the primary employer, suppliers and customers. The reserved gate may be located anywhere, as long as it can be seen by some of the public because the union is not entitled to "maximum" public exposure. *Electrical Workers IBEW Local 970 (Interox America)*, *supra*, at 1; *Electrical Workers IBEW Local 501 (C.W. Pond Electric Service)*, 269 NLRB 274, 115 LRRM 1225 (1984). Generally, another gate (or gates) is reserved for neutral employers. However, gates reserved for neutral employers do not necessarily have to be posted if there are safeguards to prevent the primary from entering through those gates. *Broadcast Employees NABET Local 31*

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## COMMON SITUS PICKETING

(Continued from page 5)

(*CBS, Inc.*), 237 NLRB 1370, 99 LRRM 1534 (1978). Where the union knows a reserved gate exists, picketing at a neutral gate is violative of the Act, even if formal notice of the reserved gate was not given to the union. *Operating Engineers Local 150 (Heckett Multiserv Division) v. NLRB*, 47 F.3d 218, 148 LRRM 2449 (CA 7, 1995). The union must comply with the reserved gate system and *Moore Dry Dock* even if the primary employer being picketed at the construction site is the general contractor rather than a sub-contractor. *Building & Construction Trades Council (Markwell & Hartz, Inc.)*, 155 NLRB 319, 60 LRRM 1018 (1965), *enfd.* 387 F.2d 79, 66 LRRM 2712 (CA 5, 1967).

**4. Direct Evidence of Secondary Object.** Where there is direct evidence that the object of the union's picketing is to force a neutral employer to cease doing business with the primary, there is no need to resort to presumptions for determining the legality of the union's conduct. Rather, such conduct will be found to be unlawful without the need to engage in a *Moore Dry Dock* analysis. *Service Employees Local 254 (Women & Infants Hospital)*, 324 NLRB No. 126 (1997). Such direct evidence would include a statement by the union's business agent that the purpose of the picketing was to force the general contractor to cease doing business with a non-union subcontractor on the premises. A statement that the purpose of the picketing was "to have a prevailing wage contractor do the work" would not constitute such direct evidence of an unlawful object. *Carpenters District Council of Detroit and Southeastern Michigan (Douglas Co.)*, 322 NLRB 612, 153 LRRM 1286 (1996).

The Act prohibits inducements to withhold services for a proscribed purpose, but it does not preclude appeals to managerial discretion if not accompanied by threats, coercion, or restraint. *NLRB v. Servette, Inc.*, 377 U.S. 46, 55 LRRM 2957 (1964). In *Rollins Communications*, the Board clarified what is and is not lawful for a union representative to say to a neutral. *Electrical Workers Local 441 (Rollins Communications)*, 208 NLRB 943, 85 LRRM 1262 (1974), *enfd.* 569 F.2d 160, 97 LRRM 3228 (CA DC 1977). It is not unlawful to give notice to a primary or general contractor of a prospective strike action against a subcontractor, or for a union representative, upon being informed that the primary contractor intends to remove an offending employer from the jobsite, to inform the primary contractor that the union will cease its picketing activities. *Id.* However, it is unlawful for a union to condition the removal of a picket line upon some action to be taken by the neutral. *Id.* Such a condition constitutes deliberate entanglement of a neutral party.

**5. Supplier Exception to *Moore Dry Dock*.** The supplier exception allows picketing at "any gate used to deliver materials essential to the primary employer's normal operations or solely for the use of the primary employees." *Operating Engineers Local 450 (Linebeck Construction)*, 219 NLRB 997, 90 LRRM 1104 (1975), *enfd.* 550 F.2d 311, 94 LRRM 3230 (5th Cir. 1977); *Burlington Northern R.R.*, *supra* at 5. The controlling question involving the supplier exception is not who has title to the materials being delivered but rather for whose use the materials are intended. *J.F. Hoff Electric Co. v. NLRB*, *supra*; *Linebeck Construction*, *supra*. For example, a union was found not to have violated the Act, where it picketed a neutral gate because electrical fixtures intended to be

used by a neutral subcontractor, but ordered and owned by the primary employer, were delivered through the neutral gate being picketed. Thus, if the essential materials are for the use of the neutral, under the related-work test, a union may picket a neutral gate.

### F. The Burlington Decision

The issues presented were whether the picketing was primary or common situs picketing, whether the picketing was lawful under the "related-work" test, and, if the picketing was common situs, whether the picketing was unlawful because it did not take place reasonably close to the situs of the dispute with the primary employer or lawful because it was related to the service provided to the primary.

The Board's majority opinion discussed the "well-established" tests summarized above: the *Moore Dry Dock* test, the related-work (*Carrier*) test, and the supplier exception to *Moore Dry Dock*. The Board determined that Texaco's refinery was a common situs because the refinery was owned by Texaco, a neutral, and occupied by Texaco, WPS, and other subcontractors and suppliers. The Board stated, "because both the primary employer (WPS) and secondary employers occupy the premises, the refinery is a common situs." The Board rejected the Union's contention that the situs should be limited to the delayed coking unit (DCU). The Board found that the DCU was part of the larger refinery owned by Texaco and concluded that the *Moore Dry Test* was applicable.

Applying *Moore Dry Dock*, the Board's majority concluded that the Union's picketing of Burlington violated Section 8(b)(4) because there was a valid reserved gate system established and the Union failed to limit its picketing to places reasonably close to the situs of the primary dispute — the gate reserved for use by employees and suppliers of WPS. The majority criticized the dissent for "purportedly" applying the principles of *Moore Dry Dock*, but in reality applying the related-work test, in arguing for dismissal of the complaint. The majority also criticized what it characterized as the dissent's attempt to apply the related-work test where the picketing was at the premises of a neutral employer (a *common situs*). Board Chairman Gould's concurrence, providing the third opinion to establish the majority in what, as mentioned above, he described as "one of the more important Board cases this year," criticized the dissent as follows: "The dissent would circumvent and thus reverse sub silentio *Denver Building Trades* and its *Moore Dry Dock* progeny. This initiative is properly left to the Congress and the President and not the Board."

### G. Conclusion

The opinions (majority, concurrence and dissent) in *Burlington* not only provide a good summary of Board and Court precedent, but make clear the importance of analyzing a particular case under the proper, well-established tests. As the Board majority stated, the recognized tests are the "only . . . existing analytical doctrines that can be applied" when determining the legality of picketing. Thus, although *common situs* cases may be fact specific, the tests to be applied to such facts are well-established. Applying the wrong test to a particular set of facts could result in failure before the Board and the Courts. ■

*(Editors' note: A discussion of other aspects of the law of secondary boycotts is in "Secondary Boycotts" by NLRB Deputy Regional Attorney Joseph A. Barker, in the Summer 1998 issue of Lawnotes, Vol. 8, No. 2.)*

# SUPREME COURT CLARIFIES SEXUAL HARASSMENT STANDARDS, ADDRESSES ADA, COBRA, NLRA, ADEA AND OTHER LABOR ISSUES IN 1997-98 TERM

**Russell S. Linden and Timothy O. McMahon**  
*Honigman Miller Schwartz and Cohn*

The U.S. Supreme Court concluded its 1997-1998 term by issuing several landmark decisions addressing sexual harassment, the Americans with Disabilities Act, and COBRA. During the term the Court also addressed same sex harassment, employer polling under the NLRA, releases under the ADEA, the statute of limitations for withdrawal liability under ERISA, and whether a union can maintain a Section 301 lawsuit for fraudulent inducement to sign a collective bargaining agreement. Overall, the Court's labor and employment decisions constituted almost 15 percent of the Court's shrinking docket.

Below, we provide an alphabetical listing of the most significant cases, with a brief description of the Court's holding.

1. *Air Line Pilots Assoc. v. Miller*, 118 S.Ct. 1761 (1998)

Disputes over agency fees charged nonunion employees are not subject to mandatory arbitration.

2. *Allentown Mack Sales and Serv., Inc. v. NLRB*, 118 S.Ct. 818 (1998)

The NLRB must apply its "objective reasonable doubt" standard in a manner consistent with the phrase's generally accepted legal meaning when evaluating whether an employer had the right to poll its employees regarding union support.

3. *Baker v. General Motors Corp.*, 118 S.Ct. 657 (1998)

Permanent injunction barring a former employee's testimony in future actions is not entitled to full faith and credit.

4. *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 118 S.Ct. 542 (1997)

Statute of limitations for an employer's pension fund withdrawal liability does not begin to run until the trustee establishes a payment schedule and a payment is actually missed.

5. *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998)

Asymptomatic HIV positive condition is a disability covered by the ADA where the condition substantially limits the major life activity of reproduction.

6. *Burlington Indus., Inc. v. Ellerth*, 118 S.Ct. 2257 (1998)

Unfulfilled threats regarding a job benefit may constitute a hostile work environment.

7. *Faragher v. Boca Raton*, 118 S.Ct. 2275 (1998)

Employers may be vicariously liable for a supervisor's sexual harassment.

8. *Gebser v. Lago Vista Indep. School Dist.*, 118 S.Ct. 1989 (1998)

School districts are entitled to "actual notice" of alleged sexual harassment before being held liable in an action for monetary damages under Title IX.

9. *Geissal v. Moore Med. Corp.*, 118 S.Ct. 1869 (1998)

Employees with pre-existing medical coverage at the time of election are entitled to COBRA benefits.

10. *Hetzel v. Prince William County*, 118 S.Ct. 2336 (1998)

A plaintiff is entitled to the option of requesting a new trial when a court adjusts a jury's award downward.

11. *Oncale v. Sundowner Offshore Serv. Inc.*, 118 S.Ct. 998 (1998)

Same-sex sexual harassment is barred by Title VII.

12. *Oubre v. Entergy Operations Inc.*, 118 S.Ct. 838 (1998)

A release which does not comply with the OWBPA is not ratified by an employee's retention of the amounts paid for the release. Further, an employee asserting an ADEA claim is not required to tender back the amounts received in consideration for the invalid release before bringing suit.

13. *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. UAW*, 118 S.Ct. 1626 (1998)

A union may not maintain an independent action under Section 301 of the LMRA for the alleged fraudulent inducement to enter into a collective bargaining agreement.

The Supreme Court granted *certiorari* in the following cases.

1. *Wright v. Universal Maritime Services*, 121 F.3d 702 (4th Cir. 1997)(table), *cert. granted*, 118 S.Ct. 1162 (1998)

The issue presented is whether a union member is required to submit his ADA claim to arbitration under the collective bargaining agreement.

2. *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288 (9th Cir. 1997), *cert. granted*, 66 USLW 3531 (April 27, 1998)

The Court will review whether an employer used surplus pension funds in violation of ERISA.

3. *Haddle v. Garrison*, 132 F.3d 46 (11th Cir. 1997)(table), *cert. granted*, 118 S.Ct. 1838 (1998)

The Court will determine whether an employee may recover damages for the loss of an at-will position under 42 U.S.C. Sec. 1985(2). ■

## SIXTH CIRCUIT ADDRESSES WARN ACT, DUTY TO BARGAIN, ADA, AND SEXUAL HARASSMENT

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

Between April 15 and July 1998, the Sixth Circuit published approximately 20 labor and employment cases. The court addressed the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Workers Adjustment and Retraining Notification Act (WARN), Title VII of the Civil Rights Act of 1964 (Title VII), and the National Labor Relations Act (NLRA). The full text of these Sixth Circuit decisions are available on the Web at: <http://www.law.emory.edu/6circuit/>.

### SIXTH CIRCUIT EXAMINES THE MEANING OF "AFFECTED EMPLOYEE" UNDER THE WARN ACT

In *Kildea et. al. v. Electro-Wire Products, Inc.*, 144 F.3d 400 (May 13, 1998), the Sixth Circuit held that laid off employees who expected to return to work are "affected employees" under the WARN Act and are entitled to the notice of the plant closing. The past practice of Electro-Wire was to employ individuals permanently, but lay them off temporarily when production levels were low and recall them when production levels increased. Laid-off employees retained their seniority status.

### NLRA CASES

In *Don Lee Distributor, Inc. v. NLRB*, Nos. 96-6074 and 97-5140 (June 2, 1998) the Sixth Circuit upheld the Board's determination that the six beer distributors who entered a secret bargaining pact violated the NLRA by engaging in joint bargaining without union consent.

*Mid-America Care Foundation v. NLRB*, Nos. 97-5433/5535 (July 8, 1998). The Sixth Circuit vacated a Board decision that found that licensed practical nurses (LPNs) were not supervisors. The court held that because LPNs had the authority to mandate overtime, make recommendations concerning retention or dismissal that carried "great weight," and are often the highest ranking employee on duty, they are statutory supervisors and should be excluded from the bargaining unit.

*NLRB v. Good Shepherd Home, Inc.*, Nos. 97-5192/5314 (May 29, 1998). The employer refused to recognize the union after the union won a certification election because the union paid at least one employee in excess of his actual travel expenses incurred in traveling to and from the election site. The Sixth Circuit enforced the Board's finding that the employer violated the duty to bargain despite the payment made. The payment was about \$6.40 in excess of the employee's actual travel expenses and, in the NLRB's judgment, was a "good-faith attempt to cover actual travel expenses." The court upheld an NLRB holding that because this overpayment was *de minimis* it was not grounds for setting aside the election.

*Calex Corp. v. NLRB*, Nos. 97-5341/5434 (May 11, 1998). A company that repeatedly failed to schedule meetings with the union and canceled seven bargaining sessions failed to bargain in good faith. The court enforced an NLRB order holding that the employer used dilatory tactics that undermined the process of collective bargaining.

### BENEFITS EXCLUSION FOR HEART TRANSPLANTS

A public employer and a health benefit insurer did not violate the ADA by providing employees with coverage for certain organ transplants but not heart transplants. In *Lenox v. Healthwise of Kentucky Ltd.*, No. 96-6319 (July 8, 1998), a school teacher who was denied coverage for her heart transplant sued, alleging that her employer violated the ADA by imposing certain conditions on participating insurers and approved eligible health plans. Each insurer agreed to a master group contract with the state finance administration department.

The Sixth Circuit ruled that neither the employer nor the insurance company violated the ADA. The court explained that the ADA prohibits discrimination between the disabled and non-disabled but does not mandate equality between individuals with different disabilities.

### OTHER ADA CASES

*Gantt v. Wilson Sporting Goods*, No. 97-5355 (May 12, 1998). Plaintiff was on a disability leave for one year and gave no indication whether she would return to work. She was terminated in accordance with a written company policy which limited leave to 12 months. The Sixth Circuit held that plaintiff's failure to accommodate claim was properly dismissed by district court because plaintiff did not request an accommodation, among other things.

*Keever v. City of Middletown*, No. 97-3078 (May 29, 1998). Dismissal of ADA claim upheld by the Sixth Circuit since a plaintiff with neck, shoulder, back and leg injuries was not "otherwise qualified" for a police officer position.

*Brickers v. Cleveland Board of Education*, 97-3364 (July 16, 1998). Dismissal of ADA claim was affirmed by the Sixth Circuit because a plaintiff with back pain could not perform an essential function of a bus driver position.

### MAXIMUM ENTRY AGE FOR EMPLOYEES DOES NOT VIOLATE ADEA

In *Reed v. Reno*, No. 97-5602 (July 8, 1998), two applicants for employment with the Federal Bureau of Prisons brought age discrimination claims under the ADEA.

The Bureau of Prisons claimed that the positions sought by the two applicants had been properly classified as "law enforcement officer positions" because all prison personnel must train in self-defense, emergency response and firearms usage. Additionally, all prison personnel must be available for area searches and escape control. As such, the Bureau claimed that under 5 U.S.C. 3307(d), a maximum entry age as of 36 could be properly be required of all prison personnel.

The Sixth Circuit agreed with the Bureau, holding the Bureau's classification of all employees as law enforcement officers was proper. The court stated, "applying the ADEA to the establishment of maximum entry ages for law enforcement officers would require us to adopt a strained reading of section 3307(d) and to ignore Congress' clear intent to employ maximum entry ages as a means towards securing a 'young and vigorous' work force of law enforcement officers." The court therefore held that "section 3307(d) is an exception to the ADEA."

### GOOD FAITH RESPONSE TO COMPLAINTS OF HARASSMENT BARS TITLE VII CLAIM

In *Birone v. Indian River School*, No. 97-3212 (April 15, 1998), the Sixth Circuit held that the plaintiff could not succeed on her sexual and racial harassment claims because she could not show that her employer failed to implement prompt and appropriate corrective action. The court found that the employer made a good-faith response to plaintiff's complaints.

The Sixth Circuit stated that it is difficult to sustain a discrimination claim on the basis of failure to quell rumors. Although idle gossip about an alleged office romance may be hurtful, Birone's allegations, standing alone, were insufficiently slanderous, pervasive, narrowly targeted and/or clearly tied to sex or race to succeed on a discrimination claim.

*Rivers v. Barborton Board of Ed.*, No. 96-4404 (May 11, 1998). Dismissal of plaintiff's Title VII race discrimination claim on res judicata grounds was affirmed. In plaintiff's first lawsuit she brought race discrimination claims under 42 U.S.C. 1981 and 1983, and other theories, that were dismissed on the merits. Therefore, plaintiff's Title VII claim which could have and should have been litigated in *Rivers I* was res judicata.

*Robinson v. Runyon*, No. 96-4100 (July 22, 1998). The district court did not err in failing to instruct the jury to consider punitive damages. Defendant, the United States Postal Service, is a government agency and is exempted from punitive damages under the Civil Rights Act of 1991, 42 U.S.C. 1981a(b)(1). ■



## LOOKING FOR Lawnotes Contributors!

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

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

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

## NLRB PRACTICE AND PROCEDURE

William C. Schaub, Jr., Regional Director  
National Labor Relations Board, Region 7

**Website.** The NLRB has created a website for the dissemination of information about the Agency. The website also has a "help desk" feature that describes what the NLRB does followed by an alphabetized list of 37 topics, ranging from age discrimination to wrongful discharge, that can be accessed by clicking on the topic item, providing the viewer with a brief explanation of the topic and where to go for more information. Recently, the Agency began a six-month experiment making NLRB charge forms available to the public on its website. The website program will include instructions for completing the charge form and will encourage individuals to call an information officer in the regional office for assistance in drafting and filing a charge. While charge forms may be obtained from the website, they cannot be filed via the internet.

Each regional office will be keeping track of the charges filed by individuals who access its website during this six-month experimental period. The charge forms provided through the Agency website will have the word "Internet" above the form number.

**No Trials.** The NLRB has cancelled all trials for the month of September 1998. These cancellations were necessitated by the tight budget situation we are experiencing and the need to conserve resources. Hopefully this is a one time situation.

**Gissel Issues.** In a recent decision, *Naburs Alaska Drilling*, 325 NLRB No. 104 (4/8/98), a Board panel, Chairman Gould dissenting in part, refused to consider the imposition of a non-majority bargaining order, reaffirming existing precedent. See *Gourmet Foods*, 270 NLRB 578 (1984). Member Fox, who was part of this panel, did not think this was the appropriate case to consider "overruling of Board precedent on the issue of non-majority bargaining orders." Panel Member Hurtgen, indicated that he was of the view that *Gourmet Foods* "was correctly decided and would not reconsider it." Chairman Gould, finding inadequate the traditional remedies of the Board for the violations committed by respondent, would overrule *Gourmet Foods*. The Chairman, in his partial dissent, indicated that the respondent had committed "outrageous and pervasive violations envisioned by the *Gissel* category paradigm" such that no "fair election among the employees could take place in the foreseeable future." As many of you know Chairman Gould resigned the date his term expired, August 27, 1998, which leaves the Board with only four members. As of the drafting of this column [late July 1998] I have not heard any names mentioned to fill this vacancy.

**Gottfried Symposium.** Note on your calendar that the sixth annual Bernard Gottfried Memorial Labor Law Symposium will be held on Thursday, October 22, 1998 at Wayne State University, McGregor Conference Center. Our featured speaker will be Board member Wilma B. Liebman, who will brief us on recent developments at the Board. I hope to see you there.

The next meeting of the NLRB Local Practice and Procedure Committee will be held on September 16, 1998 in conjunction with the annual meeting of the State Bar. The meeting will be in Lansing, Michigan at the Lansing offices of Varnum, Riddering, Schmidt and Howlett. Anyone having an issue or question that they would like to have addressed by the Committee may present their questions or issues to the undersigned or any member of the Practice and Procedure Committee. ■



**From Carl E. Ver Beek to Sheldon Stark, in response to Stark's "View From The Chair" in *Lawnotes*, Vol. 8, No. 2, summer 1998:**

This will confirm my telephone discussion with you in which I expressed my disappointment with your *View From the Chair*. I indicated that I was disappointed with the tone, content, and inaccuracy of what you wrote.

I recognize that you have chosen to be controversial in your writing to stimulate interest. Nevertheless, as Chair of the Section, it seems to me that you need to maintain some balance to the comments you make since you speak for the Section, not just for a view of some Section members.

Even if a zealous advocacy for a particular viewpoint were appropriate, it is still essential to be accurate. Your reference to the Due Process Protocol does not meet that test when you state: "Even the so-called "Due Process Protocol," an effort to encourage employers to provide some small measure of due process in the arbitration proceeding, provides no right to full discovery, no right to take depositions, no right to compel the presence of the witnesses, no right to a written decision, and no right to an appeal." I remind you that the due process protocol was written by a task force designed to include all viewpoints to ensure due process, not a "small measure" of due process.

The protocol states: "Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims." It also provides "necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available." Why did you say there was "no right to take depositions?"

With reference to the authority of the arbitrator, the protocol says, among other things, that the arbitrator should have authority to "issue subpoenas." Why did you say that it provides "no right to compel the presence of the witnesses?"

The protocol goes on to say: "The arbitrator should be empowered to award whatever relief would be available in court under the law. The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s)." Why did you say that the protocol included "no right to a written decision?"

With regard to scope of review, the protocol says: "The arbitrator's award should be final and binding and the scope of review should be limited." Why did you say the protocol provided for "no right to an appeal?"

Your histrionic references to the Civil War, the *Dred Scott* decision, and the 1960s riots appear to be disproportionate to the focus of the due process protocol. The due process protocol is designed to address a choice of forum, not the sacrifice of fundamental rights.

Frankly, I do not understand your statement that "civil rights litigation is about justice. Arbitration is about dispute resolution. The two are not the same." To conclude that arbitration cannot provide justice is a totally unwarranted conclusion, particularly in a newsletter for a Section which includes many professional arbitrators as members and hundreds of other members who appear as advocates in arbitration consistently.

Your prediction of violence seems a bit "alarmist." Your claim that the "experiment with mandatory arbitration has proven to be a failure" is a gross overstatement of the law and facts. The plaintiffs' bar seems extraordinarily apprehensive about pre-dispute submission agreements. I recognize that fair minded people can have different views on the appropriateness of such agreements. That was the one issue upon which the Protocol Task Force could not reach consensus (mostly because the National Employment Lawyers Association participant apparently was instructed not to concede the point).

As a long time Section member, I have always been proud of the role that the Section has played. Although the writings of previous Chairs may have been bland to your taste, I believe it is possible to be stimulating without being strident. I ask you to recognize that you speak as Chairman for all of us, not just for one segment of our membership. Those outside of the Section (including the courts) might otherwise misunderstand the balance which has been the hallmark of our Section.

Please re-read the Protocol and thanks for listening.

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#### **Sheldon Stark responds:**

Thank you for your letter regarding the "View from the Chair" I wrote on mandatory, employer imposed arbitration. I was hoping to stimulate a reaction. I am aware of the depth of your feelings on the subject and appreciate the civility and professionalism of your response.

I, too, have strong feelings on the subject, which came to the surface in the writing. Accordingly, I cannot say I'm sorry for the tone or content of the article. I did not mean to be overly strident. Yes, I am chair of all the Section members; but I did not relinquish my viewpoint when elected to office. Nor did anyone expect me to do so. I am not worried about balance because the Section Council and its leadership is balanced and represents every constituent group in the labor bar. When it is the turn of a management lawyer to be chair, I am certain she will feel equally free to express her point of view.

I did err in some of my comments about the due Process Protocol. You are right in criticizing me on that score. I had in mind the arbitration procedure employed in *Rembert v Ryan's Family Steak House*. I should have been more careful. I apologize for that and gladly accept your effort to correct the record.

I said there was no right to full discovery and no right to take depositions. The Protocol "encourages" but does not compel depositions. Instead, it provides depositions "should be available." Other discovery is available if "reasonably relevant." In practice, this formulation promises to mean arguments about whose deposition is appropriate, what documents are relevant, and why. Argument of course leaves discovery to the discretion of the arbitrator. That is a practice to which I object. I believe full discovery is necessary in order to develop these cases. It should be a guaranteed procedure. Attorneys should not be required as a matter of course to explain to their opponent and an arbitrator the relevance and importance of each witness to be deposed and each document sought.

I also said there was no right to compel witnesses. Yes, the Protocol says arbitrators should have the authority to issue subpoenas. But what is the source of that authority when a subpoena is issued to a third party? A number of experienced and veteran arbitrators have explained to me that there are many legal questions about the enforceability of the subpoenas that they issue should anyone choose to challenge them. The arbitrators admit they have no power of enforcement should a third party witness refuse to appear. There are no similar questions about the authority of subpoenas in state and federal court.

I said there was no right to a written decision. This is clearly an over-statement and again I apologize. However, the Protocol does not require that the reasons for the decision be explained or that the law supporting the determination be provided. Under the Protocol, an arbitrator could easily limit an opinion to a description of the issues, as for example: "Was the grievant terminated because she rejected the sexual advances of her manager?" and then write that the evidence failed to support her claim. The arbitrator need not provide an explanation, legal reasoning or analysis. That happened to me in an arbitration under the rules of the NYSE. In this regard, the Protocol's requirements are insufficient.

I also said there was no right to appeal. I should have said there is no meaningful right to appeal. Generally, arbitration decisions can be appealed only on the basis of fraud, bad faith or corruption. In addition, the employer may appeal if it can show a decision contravenes public policy. In collectively bargained arbitration, not relevant here, a party can appeal if the decision is outside the scope of the contract. So limited a scope of review for the vast majority of cases means an appeal is not meaningful.

The Due Process Protocol suffers from other shortcomings. First, arbitration does not allow for the growth and development of the common law through precedent. If mandatory arbitration of employment discrimination becomes widespread, civil rights law will virtually freeze in its current state. Moreover, arbitration is a private and often confidential procedure. Therefore, arbitration undermines public confidence and more importantly public accountability. I also believe juries should be involved in the process of civil rights enforcement. It is good for our democratic values. According to Adele Rapport, Regional Attorney for the EEOC and a member of the Labor and Employment Law Section Council, arbitration is not appropriate for pattern and practice cases which often begin with a single charge to the EEOC. She also questions whether an arbitrator will be able to order the class-wide, broad remedies available to state or federal judges, despite the provision in the Protocol that an award may be for "whatever relief would be available at law."

When I wrote that civil rights litigation is about justice, and arbitration about dispute resolution, I thought I was stating the obvious. Supporters of arbitration typically start the list of arbitration's virtues with an assertion that arbitration is the greatest system available for resolving disputes. Some civil rights cases are merely about resolving disputes. Therefore, I am willing, in the appropriate case, to stipulate to placing a matter in arbitration where the parties can fashion a protocol and a procedure tailored to individual needs and interests. For many of my clients, however, these cases are about justice, and arbitration is inappropriate.

The difference between the judiciary — the third branch of our constitutional system of government — and arbitration is not merely a choice of forum. Justice in federal court means an Article III judge; in state court it means a judge duly elected by the people. It does not include an individual whose livelihood depends upon satisfying both parties to the dispute. Employment cases are often intense, bitter and highly partisan. State and federal judges can't worry in the same way about getting in the middle of such issues. Neither do many arbitrators whose character and integrity are above reproach. But I much prefer the services of a public servant. Justice also means full discovery, argued on the record, with a full right of appellate review. Justice means public accountability, before a jury of one's peers. Justice means written decisions explaining the decisional reasoning, whether on summary judgment or in post-trial motions following entry of a verdict. Finally, justice means being part of the great sweep of the common law. It means creating precedents benefitting everyone else similarly situated coming after. For many of my clients, stopping a racist or discriminatory practice is much more important than the compensation. The

claimants whose names are associated with the great Supreme Court civil rights precedents all started by calling a labor lawyer for help. If they had been channeled into arbitration we might never have heard of them nor obtained the benefit of the result they achieved. Even a good decision, well reasoned and thoughtful from a respected arbitrator, is merely one arbitrator's opinion, not binding on anyone else.

I, too, am proud of the role that the Section has played. I am very proud of the part that I have had in the work of the Section. I am grateful for your letter and your documents. It's a pleasure working with you, and I look forward to doing so again in the future. In fact, we have set aside time at the next annual meeting for you to discuss the Due Process Protocol and provide the Section with your views on its virtues.

Please re-read the Protocol and thanks for listening. ■

## VENTING ON THE INTERNET

Scott G Hornsby  
*Esordi, Hornby & Sawicki*

Most industries use some type of computer technology network such as the Internet, Intranet and E-mail systems to increase employee productivity and efficiency. The potential for abuse and other problems, include: employee misuse, corporate espionage, computer hacking, confidential information disclosures, creation of discriminatorily charged work environments (e.g., explicit pictures, statements or jokes sent and/or posted on line or through E-mail). As such, the trend is for companies to draft, implement and enforce policies to regulate the use of these communication mediums in the workplace. Labor and employment practitioners must have a firm grasp of the issues relative to advising clients in this explosively expanding area.

Several web sites provide information on drafting internet solutions: 1) <http://www.edfoundation.org/emailpolicy.htm>, lists items and procedures to be covered when drafting E-mail and/or Internet policies for Clients; and, 2) <http://www.courttrv.com>, that has a model E-mail policy online.

Unlimited access to computer systems fuels creativity, and several web sites exist that demonstrate this. The Internet search engine, Yahoo!, has a number of anti-employer web sites. One that stands out is *Disgruntled*, <http://www.disgruntled.com>. This web site is touted as "The Business Magazine for People Who Work for a Living," and it has several features, such as: current events update, detailing the latest media stories and relevant court decisions; employee editorial sections; explanations and discussion of labor and employment statutes; and, perhaps the most interesting area, employee chat rooms, where employees "vent" online about their bosses, companies and other workplace issues. *Disgruntled* also provides access to related links, where other unique web sites, such as <http://www.lazyass.com> and <http://www.jobhater.com>, can be searched. It even has what I refer to as a facade or masking screen (an annual corporate report) for workplace users/viewers to display on the monitor when the boss is nearby.

These web sites can prove to be informative and useful because they provide insight into the minds of employees in various positions and disciplines.



## VIEW FROM THE CHAIR

Sheldon J. Stark, *Chair*  
*Labor and Employment Law Section,*  
*State Bar of Michigan*

Affirmative action is one of the most important and controversial issues we face in society today. I'd be remiss if I didn't write about it before leaving office.

Equal employment opportunity seems to be a universally accepted principle of modern American life. Affirmative action, on the other hand, though a continuation of the EEO laws, does not enjoy nearly the same widespread support. Yet, the goal of affirmative action, to begin to redress years of exclusion and discrimination against women, minorities and the underprivileged, seems an unimpeachable one. In fact, affirmative action as it now exists under law, is so modest in scope and so limited in application that lack of public support is surprising. Quotas have been rejected; the rights of "innocent whites" are carefully protected; seniority rights trump virtually every time; goals and timetables are viewed with skepticism; all programs are subject to strict scrutiny; voluntary efforts at affirmative action are unacceptable absent a history of past discrimination in the industry or at a particular employer; minority "set asides" rarely stand up; and colleges and universities are limited to taking race or sex into account as merely one factor in a whole constellation of criteria for admission, and then only where an interest in diversity prevails. My experience in speaking on the subject or deposing executives in civil rights litigation is that few people really understand what it is. Most lay persons I talk to seem to believe that affirmative action involves the hiring of a black or female, who is unqualified, over the hiring of a white person or male, who is better qualified. Nothing could be farther from the truth. I don't think ignorance or lack of adequate information is the main cause of this misunderstanding today, however. If that were the case, our leaders and the media could easily dispel peoples' mistaken notions on the subject and would eagerly do so. Racial justice, religious equality and gender harmony would be greatly enhanced, and society would take a giant leap forward. The media isn't providing adequate information, nor are our leaders, many of whom prefer to demagogue on the subject rather than explain it. Indeed, the politicians and leaders doing most of the talking about affirmative action are attacking it, not defending it.

The concerted attack on affirmative action has me deeply worried. It does not bode well for our future as a just and fair minded society. On the one hand, the state of affirmative action is not as bad as it could be. Yes, it has been rolled back by the voters in California. Yes, it is under attack in the courts here in Michigan. Yes, it is subject to strict scrutiny even where benevolent rather than invidious. Yes, the Fifth Circuit, once one of our best, has declared it illegal at the University of Texas. Yes, it is a so-called wedge issue often used by venal and unscrupulous politicians to further divide people. And, yes, a

fresh but confusing decision from a deeply and ideologically divided Supreme Court was only avoided by a last minute settlement in the *Taxman* case. On the other hand, the University of Michigan has decided to fight back in support of its program, and many people of good will have joined in that effort. President Lee C. Bollinger, who spoke in its defense at our Mid-Winter Meeting last year, has shown a willingness to educate the public to its benefits. Another President, Bill Clinton, has demonstrated unexpected courage by publicly embracing affirmative action — reform it; don't end it, he argued — and by starting a national dialogue on race. The battle to kill it in the Michigan legislature sputtered out. A national consensus, albeit a fragile one, seems to have developed behind it. And, finally, there is a significant segment of the business community that has found affirmative action beneficial.

To what can we attribute the resilience of affirmative action in the face of a highly organized and well-financed effort to kill it? First, it has been good for us as a society. For many, in Jesse Jackson's words, it "keeps hope alive." People without hope are desperate and destructive. It has benefitted minorities and women who have suffered discrimination and exclusion for generations, bringing into the system and allowing for the contributions of a diverse population. The problems we face today are too great for us to squander or waste the talent that lies out there. We need everyone's help to advance and progress. Affirmative action has done much to increase the talent pool of human resources we can tap into as a society. We may be that much closer to a "cure" for cancer or AIDS because so many more people are now in the pool of talent available to be called upon. The demographers tell us that the days when whites dominated the census are, to coin a phrase, "numbered." If the barriers to the advancement of women, Hispanics, African Americans and other minorities are not removed before enormous numbers of these individuals are knocking at the door seeking admission to the best schools and entry into the best jobs, the situation becomes explosive. We don't have to look farther than the evening news to see the consequences of blocked or frustrated racial and ethnic and religious pressures for equality around the world. Ironically, affirmative action has actually enhanced the opportunities available for large numbers of whites and males. Once, admission to the best schools and the best jobs was limited to a small elite, those who could make a call to smooth admission to Harvard or Brown; those who could call the Vice President of Manufacturing at Oldsmobile to solicit an employment opportunity; or those who owned the companies and were themselves decision makers. Today, while "who-you-know" is still important, affirmative action generally requires rules that opportunities be announced, that openings be posted, and that applications be taken across the board. The president of a prestigious Eastern college recently noted that opportunities for ordinary people have never been so great in the finest schools in the country. All because of affirmative action.

I would like to think that what continuing public support there is for affirmative action is the result of public perceptions of its virtues. Regrettably, I believe the more likely reason is

the continuing economic expansion. When the assault on affirmative action programs began in earnest in the mid-1980's, many commentators argued that the public had previously supported civil rights and special programs because the economy was good and the size of the pie available to be shared was increasing. In the mid-eighties as the economy contracted and moved into recession, white males came to see that their share of that pie was threatened. I cannot forget the television ads of that era, where politicians played on these fears and anxieties, showing white workers "pink slipped" as affirmative action programs provided opportunities for minorities. With unemployment down to record lows, the white male "haves" seem to feel a lot less threatened. As a result, unscrupulous politicians today look elsewhere to exploit other wedge issues. I fear that if the economy contracts again, however, affirmative action and public support for it may contract as well.

What is affirmative action? Despite public perception that it means giving jobs and academic placement to people unqualified for it over those who are, affirmative action is really very limited. Not many people remember that affirmative action in employment was a program that was developed in the Nixon administration. Starting with what was then called the "Philadelphia Plan," affirmative action then as now was not very radical at all. Instead, it called for self analysis, removal of barriers to the advancement of women and minorities and outreach to under-utilized populations. There were no actual preferences. Since such programs tended to bring about racial peace, enlightened but hard headed business executives supported them enthusiastically. Moreover, the Supreme Court, despite deep divisions, has never allowed affirmative action to grow much beyond its original limited conception. One reason for the bad rap affirmative action has had with the public is that everybody knows someone who was told they weren't being hired because management was looking for a black female. In my view, this is the result of weakness and deception. We all know how difficult it is for people to hear the truth about their qualifications. Who doesn't feel over qualified, over worked and under paid? So the human resource types don't want an argument about not hiring a person because they lack the qualifications. It is much easier to assure an applicant he or she is perfectly suited for the position, but merely the wrong color.

When Richard Reeves, the author and journalist, spoke to our Section several years ago, he told us a story I've never forgotten. He told us that near the end of his life, John Quincy Adams, who defended the mutineers on the Amistad, was asked by a journalist what he thought was the greatest problem facing America as it began to celebrate its fiftieth birthday. "America," he said, "faces only one issue in the future. It is the same issue it faces today. The problem with America is race. It has always been race. It will always be race." Adams' words resonate today. I remember as a college student listening to Dick Gregory assert that the ink wasn't dry on the Constitution and the Bill of Rights before the Founding Fathers were

violating its principles in regard to black people. The provision that blacks were only three-fifths of a citizen, is of course, gone. The problem remains.

By contrast, consider the very wide-spread support that exists for an enormous piece of affirmative action legislation called the Americans with Disabilities Act. Of course, we don't refer to the more stringent provisions of the ADA as "affirmative action requirements." Instead, we call them "the duty to accommodate." Nonetheless, the ADA imposes many affirmative duties upon an employer to remediate the present effects of past disabilities. Some have called the ADA "the Emancipation Proclamation for the Disabled," and with good reason. Where the beneficiary is a person with a disability, the need for an accommodation is obvious. Our innate sense of fairness comes into play; we sympathize and support. Where the beneficiary is a woman or a member of a minority group, the need for an accommodation is equally obvious - but only when viewed through the prism of historical perspective. Regrettably, Americans don't really know their history and rarely study it. As a result, we are often doomed to repeat it. For the same reason, Americans find it hard to believe that generations of slavery, inferior schools, Jim Crow laws, and exclusion continue to impact the way things work out today. Nonetheless, those factors continue to influence all of us. Women and minorities do continue to require some accommodations, otherwise known as affirmative action.

We may never solve the problem of discrimination in our society, but we need always to continue working on it. We need to keep hope alive. I was taught as a young boy that if one of us is oppressed, all of us are oppressed. I believe it. We should understand that we need to constantly struggle against discrimination, to reach for a just society where the content of one's character is the measure of an individual, not the color of their skin or their gender. We're all in this together, and we need the contribution and the best from everyone. Moreover, the anti-discrimination laws and affirmative action are part of a continuum. They are intertwined and not mutually exclusive. Affirmative action not only remedies past discrimination, it prevents present discrimination. Destroy it and the edifice of equal employment opportunity will suffer greatly as well.

I am proud to say that as a labor and employment lawyer I have been able to participate in efforts to bring about a more just and fair society in my professional life. I am honored to have been Chair of this Section of labor and employment lawyers this last year. I know most of you believe as I do that a just society, where equal opportunity for all is an appropriate goal, affirmative action is the right thing to do in order for society to make up for a past of exclusion and segregation and mistreatment. I want to thank the members of the Section and the Council for their support and encouragement this last year as I've written these Views from the Chair and revealed what is important to me. I especially want to thank Janet Cooper, our Vice Chair; Ginny Metz, Secretary and Art Przybylowicz, Treasurer. This has been a wonderful opportunity for me and I won't ever forget it. ■

## EASTERN DISTRICT UPDATE

Valerie L. MacFarlane  
*Van Suilichem & Associates, P.C.*

### PUNITIVE DAMAGES AVAILABLE EVEN IF COMPENSATORY DAMAGES ARE NOT AWARDED.

In *Paciorek v. Michigan Consolidated Gas Co.*, 179 F.R.D. 216; 8 A.D. Cases 28 (E.D. Mich., April 20, 1998), a jury awarded the plaintiff \$30,000 in punitive damages on her ADA claim. The jury did not award compensatory damages. MichCon filed a motion to vacate the punitive damages in light of the fact that the jury had failed to award compensatory damages. Following the approach of the Seventh Circuit, Judge Cook ruled that punitive damages may be awarded upon a showing that the defendant "engaged in a discriminatory practice . . . with malice or reckless indifference to the federally protected rights of an aggrieved individual."

### ARBITRATOR EXCEEDS AUTHORITY.

In *Logistics Personnel Corp. v. Truck Drivers Local Union No. 299*, 158 L.R.R.M. 2744 (E.D. Mich., May 22, 1998), the court ruled an arbitrator exceeded his authority. Under the collective bargaining agreement, the employer had the right to terminate an employee who tested positive for drugs. A driver was discharged after failing a random drug screen. After he completed a drug rehabilitation program, he was reinstated. When the driver tested positive for drugs a second time, he was terminated again. The driver filed a grievance claiming that the employer's drug testing procedures were improper. The arbitrator agreed that there were some irregularities in the specimen taking procedure but concluded both that a valid sample had been taken and that the driver had been employed in a safety critical position. However, the arbitrator ordered that the driver be reinstated and awarded full backpay, seniority and benefits because of his finding that the employer had failed to prove that the positive drug test had been properly performed, due to the employer's reliance upon a form rather than a full report indicating the quantity of drugs in the specimen and its failure to provide evidence of the chain of custody after the specimen reached the lab.

The employer refused to reinstate the driver and brought suit. Judge Gadola ruled that the arbitrator exceeded his authority by requiring the employer to prove chain of custody and provide full reports of quantitation from the lab. The court concluded that such requirements were inconsistent with the parties' CBA and relevant DOT regulations. Because the arbitrator imposed obligations not included in the CBA, the arbitrator's award was reversed.

### UNION DECISION NOT TO DEMAND ARBITRATION IS NOT ARBITRARY, CAPRICIOUS OR IN BAD FAITH.

In *Walters v. Local Union No. 337*, 1998 WL 264143 (E.D. Mich., April 30, 1998), plaintiffs were discharged for dishonesty (stealing two duffel bags with the Pepsi logo on it). Their hybrid section 301 claim was dismissed because the union did not breach its duty of fair representation when it decided not to pursue arbitration after its investigation showed that the grievants had taken the bags. Judge Gadola concluded that the union did not act arbitrarily, capriciously or in bad faith when it made its decision and found that the union was not irrational when it concluded that the men had stolen the bags. Noting that the plaintiffs were correct in their assertion that an arbitrator might have reduced their penalty, the court concluded, nonetheless, that the union was not obligated to seek a lesser penalty for grievants once it determined that they were guilty of serious misconduct. ■

## WESTERN DISTRICT THROWS OUT ADA CLAIMS AND ADDRESSES ARBITRATION AND FLSA

John T. Below  
*Kotz, Sangster, Wysocki and Berg, P.C.*

Plaintiffs alleging ADA and other discrimination claims lost motions for summary judgment, while an FLSA plaintiff won some overtime pay and a union successfully enforced a labor arbitration award.

### EMPLOYEE WHO COULD NOT PERFORM GENERAL JOB FUNCTIONS, MUCH LESS ESSENTIAL FUNCTIONS, COULD NOT ASSERT ADA CLAIM.

*Claspell v. Denso Manufacturing Michigan, Inc.*, No. 5: 97-CV-69 (June 23, 1998). Plaintiff claimed unlawful termination and failure to accommodate under the Americans With Disabilities Act. He suffered a closed-head injury in an automobile accident. After rehabilitation, he returned to work handling heavy equipment, power tools and using ladders, among other duties. Although the plaintiff eventually went back to work full time and without any restrictions, he had "sudden mood changes" and would black out. He would also walk off the job due to the blackouts. Plaintiff was terminated when he left the plant after becoming upset, without punching out and without getting permission. After the defendant provided plaintiff with several opportunities to use its internal tribunal to challenge his discharge, to which the plaintiff did not avail himself, the discharge was confirmed. Plaintiff then received social security benefits, claiming "total disability."

Judge Quist granted summary judgment for the employer. First, the court ruled that while "judicial estoppel" did not apply to representations of "total disability" made to the Social Security Administration, such admissions would be considered as part of the analysis with respect to whether or not the plaintiff was able or not to perform job duties. (citing *Griffith v. Wal-Mart Stores, Inc.*, 135 F2d 376, 382 (6th Cir. 1998)). The court then ruled the plaintiff was not a qualified individual with a disability, with or without accommodation, as the plaintiff had blacked out on several occasions, lost conscientiousness, walked off the job and went to drink beer, and was prone to outbursts in stressful situations. "Regular attendance is an important and essential function of most jobs." See *Gantt v. Wilson Sporting Goods, Co.*, 143 F3d 1042 (6th Cir. 1998) (quoting *Tyndall v. National Educ. Ctrs. Inc. of California*, 31 F3d 209, 213 (4th Cir. 1994)) (further citations omitted). With respect to the accommodation claim, the court ruled that "the ADA does not require employers to eliminate job duties or 'fundamentally alter the nature of the job' to accommodate a disabled employee." (quoting in part *White v. York Int'l Corp.* 45 F3d 357, 362 (10th Cir. 1995)). Plaintiff essentially could not perform any functions, much less the essential job duties, thus, no accommodation could be provided. In response to the plaintiff's suggestion that the employer should have transferred him away from other employees (due to his inability to cooperate) and essentially monitor his conduct, the court stated "such a requirement would have been 'simply too vague to reasonably inform [the employer] of a reasonable accommodation.'" (quoting *Cassidy v. Detroit Edison Co.*, 138 F3d 629, 635 (6th Cir. 1998)). The employer could not be forced to monitor the plaintiff for his cognitive abilities or any other type of similar problem. With respect to accommodation, the court stated that the employer was not required to accept the plaintiff's request for "indefinite" leave because "[r]easonable

accommodation does not require the employer to wait indefinitely for an employee's medical condition to be corrected." *Gantt, supra*, 143 F3d at 1047; *See also Monette v. Electronic Data Sys. Corp.*, 90 F3d 1173, 1187 (6th Cir. 1996).

**DATE OF DISCRIMINATORY ACT IS DATE PLAINTIFF LEARNED OF DENIAL OF PROMOTION, NOT WHEN HE LEARNED ANOTHER PERSON WAS HIRED FOR A DIFFERENT POSITION.**

*Ipina v. State of Michigan, et al.*, No. 5: 97-CV-161 (June 30, 1998). Plaintiff, an Hispanic male, sued the State of Michigan under Title VII, alleging national origin discrimination in connection with a promotion denial. The defendant moved for summary judgment principally based on the untimeliness of the Title VII complaint (the 300 day rule for the MDCR).

Judge Bell ruled that "[p]laintiff's Title VII claim is barred by plaintiff's failure to file his administrative charge within 300 days of the alleged act of discrimination." The court observed that the Supreme Court in *Delaware State College v. Ricks*, 449 US 250, 257 (1980), held that the analysis to be employed with respect to the timely administrative claim-statute of limitations defense "requires courts to 'identify precisely the unlawful employment practice' of which the plaintiff complains." *Id.* "Decisions not to promote are generally considered discrete actions and should alert an individual to the existence of a possible claim." (citing *Rush v. Scott Specialty Gases, Inc.*, 113 F3d 476, 483-85 (3rd Cir. 1997)). Plaintiff's claim, according to this standard, occurred on the date that he was denied the promotion, November 1, 1989. The administrative charge was not filed until October 2, 1990, 335 days later. The court dismissed the plaintiff's argument that it should have used the date of April 25, 1990 for the date the limitations period would begin, which is when he discovered that a caucasian woman received a different job at the MESC. The unlawful act, if any, was discrimination against plaintiff in denying him the promotion, not the granting of a job to another applicant sometime later." (citing *Chardon v. Fernandez*, 454 US 6, 8 (1981) (per curiam)).

**TRAINEE WHO REPLACED SUPERVISOR IS ENTITLED TO FLSA OVERTIME.**

*Farmer v. Ottawa County*, No. 1: 97-CV-97 (June 18, 1998). Plaintiff alleged violations of the Fair Labor Standards Act, 29 USC §201 et seq. The issue was whether or not hours spent by plaintiff participating in a training program were compensable under the FLSA. The parties requested the court to resolve the matter based on stipulated facts under Fed R Civ P 52.

Judge Enslin held that when the plaintiff-trainee actually took the place of his supervisor during the alleged training periods, his "work must be considered productive and is therefore, compensable." The court also stated that the plaintiff was entitled to compensation for the training conducted on "regularly scheduled" work days. Lastly, the court held that the Act's "liquidated damages" section applied to the defendant because it had a clear understanding of the requirements of the Act and it was "well aware" of the provisions with respect to its training program.

**NATIONAL ORIGIN DISCRIMINATION CLAIM DISMISSED.**

*Romanelli v. Michigan Indian and Employment Services & Training, Inc.*, No. 1: 97-CV-605 (June 29, 1998). Plaintiff *pro se* alleged discrimination under Title VII based on national origin (American-Indian and Italian), gender (reverse discrimination) and sexual harassment.

Judge Enslin ruled that plaintiff's national origin discrimination claim, based on the assertion that comments made regarding his "Sons of Italy" membership, plus other isolated comments, failed to support the plaintiff's claim that he had been "singled out" for dismissal. Plaintiff was replaced by an American Indian. The court also dismissed the reverse gender discrimination claim which was merely based on the circulation of a women's management magazine discussing female supervision of male subordinates as well as other comments by low-level employees about men. The court stated that the plaintiff failed to show that the defendant was that "unusual employer who discriminates against the majority," and/or that the employer had treated a similarly situated, but unprotected, class member differently in the hiring process. The court also found that the plaintiff's sexual discrimination claim, based on a voluntary kiss and an isolated comment, was barred because in a "deferral state" such as Michigan a Title VII claim for sexual harassment had to be filed with the EEOC within 300 days of the alleged harassment.

**PLAINTIFF CAPABLE OF WORKING FULL TIME IN CHOSEN FIELD NOT ENTITLED TO ADA ACCOMMODATION.**

*Doren v. Battle Creek Health System*, No. 4: 97-CV-27 (June 5, 1998). The plaintiff, a registered nurse, alleged violations of the ADA with respect to its alleged failure to accommodate her request to work only 8 hour shifts at defendant's pediatrics department. Defendant's nurses ordinarily worked 12 hour days. Plaintiff was discharged from employment because her arthritic condition prevented her from working in excess of 8 hours per day.

The court ruled that the plaintiff failed to show that she was a qualified individual with a disability and, thus, was not protected under the Act. This is so, because "anyone who can work 40 hours a week as a limitation of their abilities is not suffering a substantial impairment of a major life activity, namely, the ability to work." (quoting *Brennan v. Nat'l Telephone Directory Corp.*, 850 F. Supp 331, 343 (ED Pa. 1994)). The court stated that an "impairment which merely limits the plaintiff's ability to perform tasks longer than eight hours per day does not constitute a significant restriction on the plaintiff's ability to work." (citing *Shpargel v. Stage & Co.*, 914 F Supp 1468, 1474 (ED Mich 1996)).

**ARBITRATION UPHELD BASED ON WITNESS CREDIBILITY AND COMPANY WRONGDOING.**

*Paulstra CRC Corp. v. United Steel Workers of America, Local 49*, No. 1: 97-CV-830 (May 15, 1998). Judge Bell, noting the narrow scope of review for arbitration decisions, observed that the company injected the issue of "intent." Accordingly, the arbitrator addressed whether the company met its burden of proof with respect to intentional physical contact between the grievant and the supervisor. The court observed that the arbitrator had "found that the Company contrived and orchestrated the termination and caused witnesses to exaggerate and embellish what actually happened between Mr. Lynch [the employee] and Ms. Stanfield [the supervisor] in order to effectuate the Company's employment termination scheme." In closing, "[a]lthough it is apparent to this Court that the arbitrator embarked on his own brand of industrial justice, he did so in terms of evaluating credibility and evidence. Because the arbitrator's conclusion is based upon an arguable inference of company wrongdoing, [the] Court lacks the authority to overturn the arbitrator's decision." *See Mercy Memorial Hospital Corp. v. Hospital Employees' Division of Local 79*, 23 F3d 1080, 1083 (6th Cir.), *cert. denied*, 513 US 961 (1994).

(Continued on page 16)

## WESTERN DISTRICT THROWS OUT ADA CLAIMS AND ADDRESSES ARBITRATION AND FLSA

(Continued from page 15)

### SECTION 301 STATUTE OF LIMITATIONS NOT TOLLED BY PENDING NLRB ACTION.

*Glass, Molders, Pottery, Plastics and Allied Workers International Union (AFL-CIO, CLC) Local 421 v. A-CMI Michigan Casting Center*, No. 1:98-CV-20, 1998 WL 344229 \*1 (May 19, 1998). The court held that the plaintiff's claim was barred since it was filed more than six months after the claim accrued. Plaintiff filed its complaint on January 9, 1998 regarding a grievance filed on June 5, 1996. While employer's related ULP charge did not toll the accrual of a claim, plaintiff argued that it could not be expected to pursue §301 remedies while the defendant sought a ruling from the NLRB which could prevent the continuance of plaintiff's suit. Plaintiff relied on *Local 30, United Slate, Title and Composition Roofers v. NLRB*, 1 F3d 1419 (3rd Cir. 1993), which held that maintaining a suit after an inconsistent NLRB ruling is an unfair labor practice. The court stated that plaintiff's interpretation of the *Roofers* case was contrary to the policy in §10(b) "that labor disputes be resolved expeditiously and without delay." Defendant's motion for summary judgment was granted. ■



### The Feeling Funny Caption Winners!

"It looks like we're going to have to arbitrate your civil rights claim after all."

— ANDY MUDRYK

"But you said you understood that I could terminate our relationship at-will."

— CAREY DEWITT

"This is a civil case. They *can't* put you in prison, no matter what the jury said."

— SHELDON STARK

## BOOK REVIEW MICHIGAN PRACTICE: ALTERNATIVE DISPUTE RESOLUTION

Laurence D. Connor  
Dykema Gossett PLLC

For a practical guide to Michigan dispute resolution, I recommend a just-published book by West Publishing called *Michigan Practice: Alternative Dispute Resolution* (1998).

The authors are well known for their dispute resolution expertise well beyond the boundaries of their home state. Mary A. Bedikian is Regional Vice President for the American Arbitration Association in Michigan and has authored several publications on ADR. Pamela Chapman Enslin is the Chairperson of the American Bar Association's Section of Dispute Resolution. Judge Richard A. Enslin has served as Chief Judge of the Western District and is a nationally-recognized advocate of court-connected dispute resolution systems.

The book's treasure includes over 80 forms for various ADR agreement provisions, court pleadings and orders. These guide Michigan practitioners through the maze of ADR processes, and are useful in implementing the ill-defined mechanics for using the state's statutory arbitration procedures. The forms are contained on separate computer disks available with the publication.

The chapters are divided into general principles of ADR, including strategic considerations, negotiations and the art of drafting ADR agreements and sections dealing with specific topics such as domestic relations controversies, construction disputes, and contractual arbitration. The appendix includes sources for ADR providers, various arbitration rules, ADR statutes and the previously-mentioned forms. There is also a table of cases, statutes and court rules applicable to Michigan ADR.

The chapter on strategic considerations contains a good survey of the appropriate circumstances for using ADR. The most extensive chapter is on contractual arbitration and ranges from a discussion of the relationship between the Federal Arbitration Act and state law, to the enforcement of arbitration agreements and the conduct of arbitration proceedings. This section is a full resource and takes the practitioner from the drafting of the arbitration agreement through the hearing and challenge to or enforcement of the arbitrator's award. There is a discussion of arbitrating international disputes under Michigan and other laws.

While the general treatment of the principles of negotiations and mediation do not add anything particularly new to the literature, the work is comprehensive and it is nicely interspersed with practice pointers and references to authority not found in other texts. The discussion of "Michigan mediation" as opposed to "facilitative mediation," is somewhat confusing, but that may be due more to the subject matter than to the authors' analysis. The work also relies heavily on AAA forms and procedures, which is understandable in view of Ms. Bedikian's participation, as well as the fact that the AAA is the dispute resolution organization Michigan practitioners are most likely to encounter in arbitration. In that light, it is somewhat curious that the AAA is not listed in Appendix B, which contains a source for ADR providers. That one-page appendix is not as useful as the other references in the work, and perhaps will be expanded in future updates.

This publication will be very valuable to Michigan lawyers, or to anyone seeking information on the practice of ADR in Michigan and the authority supporting it. ■

# MICHIGAN COURT OF APPEALS UPDATE

Karl Brevitz, *Education Director*  
*Institute of Continuing Legal Education*

## Collateral Estoppel from Arbitration Sinks Later Civil Rights Suit

*Guy Cole v West Side Auto Employees Federal Credit Union* addresses whether an arbitrator's factual findings in an employee's just cause arbitration under a mandatory ADR policy in the employer's handbook can have collateral estoppel effect in the employee's subsequent employment discrimination suit. The Court of Appeals said yes as long as the employee's participation was voluntary.

In *Cole*, the employee handbook included a just cause standard for termination and designated arbitration as the sole, exclusive remedy for disputes. Cole was discharged as defendant's CEO in 1993 and pursuant to the handbook his claim of wrongful discharge was submitted to an arbitrator, who upheld the discharge. Cole then filed suit alleging age and handicap discrimination. The trial court granted summary disposition, ruling that Cole was bound to submit the discrimination claims to arbitration; that even if he was not so obligated he voluntarily did so, and finally that the doctrine of collateral estoppel applied to the factual determinations made by the arbitrator and barred relitigation of dispositive facts in the case in the subsequent employment discrimination suit.

Based on *Rushton v Meijer, Inc.* (225 Mich app 156)(1997) the Court of Appeals affirmed and ruled that while Cole was not obligated to submit his discrimination claims to arbitration, he did so voluntarily. The court distinguished *Rushton* noting that in *Rushton* the plaintiff refused to proceed to arbitration under the employer's mandatory ADR policy and filed a wrongful discharge/discrimination suit, while Cole had proceeded to arbitration under the mandatory ADR policy. The court construed this as a "voluntary" submission by Cole to arbitration and ruled that "a discharged employee who alleges that he was wrongly discharged and who voluntarily submits to an arbitration procedure is barred in a lawsuit filed *after* the arbitration decision from seeking a factual finding different from a factual finding in the arbitration decision" [emphasis in original]. The court also noted that the arbitrator's factual determinations in such circumstances would be binding in a subsequent employment discrimination suit even though the earlier arbitration involved a contractually based wrongful discharge claim.

**Voluntary?** The court's analysis of the "voluntary submission to arbitration," the linchpin of its opinion, merits some comment. The unspoken assumption is that policy considerations underlying *Rushton* preclude an employer from requiring arbitration of employment discrimination claims. The unspoken assumption is also that an arbitrator's determination of key facts in an arbitration required under employer policies do not have collateral estoppel effect in a lawsuit unless the employee voluntarily consented to the arbitration.

This may be a logical extension of *Rushton*, assuming *Rushton* was correctly decided. But *Rushton* is under review by a seven judge panel of the Court of Appeals to resolve the conflict between it and *Rembert v Ryan's Family Steak House* (226 Mich App 821).

The court's description of Cole's participation as "voluntary" is also debatable. As the court notes, even *Rushton* upheld the enforceability of mandatory arbitration of contractually based employment disputes including just cause dismissal (as opposed to statutorily based employment discrimination claims). Cole's options with respect to his contractual wrongful discharge claim were to either participate in the arbitration or to file suit and await the court's enforcement of the employer's ADR policy with respect to that claim. If "voluntariness" is the test to be applied in order for an arbitrator's factual findings in a wrongful discharge claim to have collateral estoppel effect in subsequent litigation, it is questionable whether that test is met when the arbitration occurs pursuant to an imposed ADR policy. The next question is, even if the employee's participation in a mandatory arbitration is not "voluntary," whether the arbitrator's findings will have collateral estoppel effect in a later lawsuit, or instead, as noted above, the policy of *Rushton* will preclude collateral estoppel.

**Lesson.** In light of *Cole*, plaintiff's counsel contemplating an employment discrimination suit should make sure the suit is filed *before* arbitration of a wrongful discharge claim under an ADR policy, and take any additional steps to indicate his client's participation is not "voluntary." To do otherwise risks the application of collateral estoppel in the suit. Counsel for employers should preserve any indicia of voluntary participation on the part of the employee and submit proposed findings of fact which will have the greatest potential collateral estoppel effect in any subsequent suit (bearing in mind the requirement that collateral estoppel will only operate with respect to facts which are "actually and necessarily determined" in an earlier proceeding). Counsel should also be mindful that collateral estoppel is a two-edged sword. Should an arbitration produce factual determinations favorable to the employee, nothing precludes plaintiff from seeking collateral estoppel effect in a later lawsuit (assuming the court's requirement of "voluntary submission to arbitration" is satisfied, but as noted above the *Cole* court seems to interpret any participation by claimant in an employer's required wrongful discharge arbitration as "voluntary"). Admittedly the opportunities for such use by an employee will be more limited, since factual findings by an arbitrator favorable to the employee increase the likelihood of the employee prevailing at arbitration and eliminating any need for a lawsuit. *No. 199614, Decided May 19, 1998. Fitzgerald, O'Connell and Whitbeck, JJ.*

## Current Receipt of Workers' Compensation Benefits Will Support Retaliatory Discharge Claim For Denial of Additional Benefits

In *Lamoria v Health Care et al.*, plaintiff Lamoria had been employed as a registered nurse by defendant Sun Valley Manor, Inc. and was fired while on medical leave for a work-related injury. Plaintiff filed suit alleging weight, age and handicap discrimination, and illegal retaliation for seeking workers' compensation ben-

(Continued on page 18)

## MICHIGAN COURT OF APPEALS UPDATE

(Continued from page 17)

efits. The trial court granted summary disposition for defendants but the Court of Appeals, in a lengthy opinion reversed, and reinstating plaintiff's claims.

The court noted that, absent the "reasonable time to heal" doctrine set forth in *Rymar v Michigan Bell Telephone Co.* (190 Mich App 504) (1991) (its disagreement with which the court expounds upon at some length), it would uphold dismissal of plaintiff's handicap discrimination claim because at the date of termination plaintiff was not physically able to perform the duties of her position. Because the "reasonable time to heal" doctrine permits temporarily disabled plaintiffs to show that they would be physically able to perform the duties within a reasonable time, however, the court reinstated the handicap discrimination claim. The court noted that a plaintiff temporarily disabled due to a work-related injury is not entitled to a longer "reasonable time to heal" than an employee handicapped for any other reason.

The court found that plaintiff was receiving workers' compensation benefits at the time of her discharge. It also noted that plaintiff's request that the employer's self-insured workers' compensation program pay for her knee replacement surgery had been denied, and that plaintiff had not filed any appeal or claim following the denial. The trial court ruled that because plaintiff had not filed such an appeal or claim relating to the denial, she failed to show that she was engaged in a protected activity which caused her discharge, and that a claim based on an employer's anticipation of a future claim (Lamoria's anticipated claim for the knee replacement surgery) did not satisfy the requirements of the statute. The Court of Appeals rejected the trial court's characterization of the case as one involving the employer's anticipation of a future claim, holding that "the discharge of an employee who is receiving workers' compensation benefits due to a particular on the job injury, in retaliation for employee having sought . . . additional benefits based on the injury constitutes a retaliatory discharge in violation of the WDCA . . . [I]t is immaterial whether the employee challenged the denial of the employee's request for further benefits." (emphasis supplied) *No. 199795, decided July 10, 1998. Fitzgerald, O'Connell and Whitbeck, JJ.*

### Public Contracts Do Not Make Organization "Primarily Funded" For FOIA Purposes

*State Defender Union Employees v Legal Aid and Defender Association of Detroit* held that FOIA does not apply to a nonprofit private corporation that is primarily funded by government contracts. Plaintiff sought to apply the FOIA to a private entity which received most of its revenue from public contracts. Plaintiff's request to defendant, a private non-profit corporation, that it produce its financial reports was denied. The FOIA lawsuit by plaintiff sought to force disclosure of the information under the FOIA turned on whether the defendant was a "body . . . which is primarily funded by or through state or local authority" and specifically on the meaning of the word "funded." Evidence at trial disclosed that defendant received the majority of its revenue from governmental entities in exchange for rendering professional services to indigent clients but that that did not make it subject to FOIA. *No. 199075, decided June 23, 1998. Young, Jr., Neff, and O'Connell. ■*

## RESPECTFULLY QUOTED: FROM THE SUPREME COURT

**Hardly "Infallible" But Final.** Last year, in *Clinton v. Jones*, 137 L.Ed.2d 945, 966, 969 (1997), the Supreme Court in permitting Paula Jones' civil litigation against the President to proceed made two findings that Monica, Starr, *et al* have proven to be unfounded: (1) "As for the case at hand, if properly managed by the district court, it appears to us highly unlikely to occupy any substantial amount of petitioner's [*i.e.*, the President's] time" and (2) "we think the district court may have given undue weight to the concern that a trial might generate unrelated civil actions that could conceivably hamper the President in conducting the duties of his office." As Justice Robert Jackson once said of the Court: "We are not final because we are infallible, but infallible only because we are final." The *Jones* decision ranks up there with Justice Oliver Wendell Holmes's memorable line in *Buck v. Bell*, 274 U.S. 200, 201-202 (1927), the forced sterilization case: "Three generation of imbeciles are enough." Speaking of mental acuity, attorney/author Vincent Bugliosi accused the Court of insanity for its *Jones* decision in his recent book, *No Island of Sanity*, published before Monica became a household name.

**That Was Then, This Is Now.** "Today's opinion gives the lie to those cynics who claim that changes in this Court's jurisprudence are attributable to changes in the Court's membership. It proves that the changes are attributable to nothing but the passage of time (not much time, at that), plus application of the ancient maxim, 'That was then, this is now.'" *County of Sacramento v. Lewis*, 524 U.S. \_\_ (1998). This is how Justice Scalia started his unjoined concurring opinion(!!!), wherein he also attacked Justice Souter's majority opinion for its "atavistic methodology" in ruling that a police officer did not violate the constitution by pursuing a high speed chase which led to a criminal's death. And I wonder why Justice Scalia did not garner a majority for his views.

**Close to Home?** In dissenting opinions in two sexual harassment cases, Justice Clarence Thomas, joined only by Justice Scalia, blasted the majority for liberally construing Title VII of the 1964 Civil Rights Act in favor of the plaintiffs. *Burlington Industries, Inc. v. Ellereth*, 524 U.S. \_\_ (1998) and *Faragher v. City of Boca Raton*, 524 U.S. \_\_ (1998). Justice Thomas, formerly EEOC Chairperson, asserted that the Court "manufactures a rule" (later noting its "whole-cloth creation") which will only generate "more and more litigation." (What is wrong with that?) He emphasized: "Sexual harassment is not a free-standing federal tort."

John G. Adam

# LITIGATOR'S LESSONS: THE IMPORTANCE OF WITNESS LISTS AND CLIENT ATTENDANCE AT SETTLEMENT CONFERENCES

Joseph R. Furton, Jr.

*Keller, Thoma, Schwarze, Schwarze, DuBay & Katz, P.C.*

Recent federal and state cases highlight the importance of witness lists and emphasize the power of a trial court to enter default when a party fails to attend a settlement conference.

## SIXTH CIRCUIT PUTS TEETH INTO RULE 26 EXPERT DISCLOSURE REQUIREMENTS

The Sixth Circuit addressed the FRCP expert witness disclosure requirements for the first time in *Perdigo v UNUM Life Insurance Company*, Case No. 97-5493 (May 28, 1998). The plaintiff was a physician and a former medical examiner who had been accused of drugging and molesting a teenage boy. When the police attempted to apprehend him, the doctor (according to police) drew a gun and aimed it at an officer. The officer shot the doctor-plaintiff. At trial, the plaintiff wished to offer his own expert opinion regarding the nature of the entry wounds. He had previously testified on the subject in many cases and was undoubtedly qualified to do so. The district court excluded the testimony, holding that his failure to file an expert witness disclosure statement pertinent to F.R.C.P. 26(a)(2)(A) barred the testimony. The Sixth Circuit affirmed, relying primarily on the seemingly non-discretionary language of F.R.C.P. 26(a)(2)(A). "A party shall disclose to other parties the identity of any person who may be used at trial to present [expert] evidence." The court found plaintiff's argument that he was a fact witness, and thus not an expert witness, disingenuous. It reasoned that the district court allowed plaintiff to testify to facts, but properly precluded him from offering his expert opinion regarding his own entry wounds.

## PRECLUDING UNLISTED WITNESS TESTIMONY AT TRIAL

A litigator's lesson on witness lists in state court can be found in *Farm Bureau Insurance v Asker*, Mich Ct of Appeals Case No. 200483 (June 2, 1998), where the court held that it was not an abuse of discretion for the circuit court to preclude the testimony of witnesses not listed on the plaintiff's witness list. The catch: the plaintiff had discovered the witness after the witness list deadlines and discovery. The reasoning: plaintiff failed to bring a motion to amend the witness list at any time, and thereby prevented the defendant from conducting a discovery deposition.

## COURT DID NOT ABUSE DISCRETION BY PRECLUDING ADMISSION OF VIDEOTAPE OR ADMITTING EVIDENCE OF INSURANCE PAYMENTS

In *Lake v Bross*, Mich Ct of Appeals Case No. 198801 (April 21, 1998), the court ruled on two issues of interest. First, the court upheld the Genesee Circuit Court's ruling prohibiting the admission of a surveillance tape of the plaintiff that had not been disclosed prior to trial. The video tape had been recorded one month prior to trial. The trial court's discovery order required parties to give prompt notice of any additional witnesses. The court reasoned that the videotape could not be authenticated without a witness, and the defense had not given prompt notice of any witness with the ability to authenticate the tape. Thus, it was properly excluded.

Additionally, the trial court admitted evidence that the plaintiff was receiving insurance benefits. The defendant's expert witness had examined plaintiff on behalf of her no-fault insurance carrier. It was his opinion that the plaintiff's condition did not coincide with her complaints. Plaintiff's attorney elicited from the plaintiff that she had continued to receive no-fault insurance benefits despite the doctor's evaluation. The defendant argued that MRE 411 prohibits the admission of evidence of insurance to the jury. The Court of Appeals disagreed. It held that, while MRE 411 generally prohibits the inclusion of evidence of insurance coverage, in this case, it was proper because the rule specifically allows the evidence's admission to show bias or prejudice of a witness. "Plaintiff's condition was the central issue at trial. Therefore, this evidence was relevant to the bias of Dr. Nalepa as an expert witness, and to his credibility regarding his evaluation of Plaintiff." The court also noted that Michigan courts construe the definition of bias liberally and are reluctant to preclude testimony that affects credibility.

## DEFAULT IS PROPER SANCTION FOR FAILURE TO ATTEND SETTLEMENT CONFERENCE

In *Vanderploeg v Parisian*, Mich Ct of Appeals Case No. 196555 (June 5, 1998), the defendant was a doctor sued for malpractice who had moved to Virginia. He failed to attend two consecutive settlement conferences and the circuit court entered a default judgment against him for \$450,000.

The Court of Appeals upheld the default because MCR 2.504(B) gives the court inherent authority to enter an order of default, and noted that it was especially appropriate because defendant twice failed to attend the settlement conference.

Finally, the court dismissed defendant's argument that a default cannot be entered until the plaintiff proves the causation of damages. The court held that "the very essence of the default that it relieves the plaintiff of the necessity of proving the allegations in the complaint." ■

# DEVELOPMENTS AT THE NLRB AS CHAIRMAN GOULD DEPARTS

George M. Mesrey  
Clark Hill, P.L.C.

Things are relatively quiet at the National Labor Relations Board as Chairman Gould departed on August 27, 1998. However, the Board has issued a number of noteworthy decisions during the last three months, one of which overruled longstanding precedent.

## A. Bargaining Issues

1. *Whitecap, Inc.*, 325 NLRB No. 220 (July 24, 1998). Duty to bargain/regressive bargaining proposals.

## B. NLRB Jurisdiction

1. *Enrichment Services Program, Inc.*, 325 NLRB No. 154 (May 20, 1998). Exempt political subdivisions under §2(2) of the Act/**precedent overruled**.
2. *Service Master Aviation Services*, 325 NLRB No. 151 (May 15, 1998). Common carrier subject to jurisdiction of the Railway Labor Act.

## C. Deferral and Contract Bar

1. *DePaul Adult Care Communities, Inc.*, 325 NLRB No. 132 (April 28, 1998). Contract bar issues.
2. *Tri-Pak Machinery, Inc.*, 325 NLRB No. 119 (April 23, 1998). Application of *Collyer* deferral doctrine.

## D. Statutory Definitions

1. *AgriGeneral L.P.*, 325 NLRB No. 181 (June 30, 1998). Definition of agricultural laborer under §2(3) of the Act.
2. *Madison Square Garden*, 325 NLRB No. 180 (June 30, 1998). Definition of guard under §9(b)(3) of the Act.

## E. Election Issues

1. *San Diego Gas and Electric*, 325 NLRB No. 218 (July 21, 1998). Standards for directing a mail ballot election.
2. *Georgia-Pacific Corporation*, 325 NLRB No. 165 (June 20, 1998). Objectionable conduct/employer campaign statements.
3. *River Paris Maintenance, Inc.*, 325 NLRB No. 153 (May 19, 1998). Objectionable conduct/paid attendance at a company sponsored meal two days before the election.
4. *Osram Sylvania*, 325 NLRB No. 147 (May 14, 1998). Interpretation of markings on a ballot.
5. *J.R.P.S. Ltd., Inc.*, 325 NLRB No. 179 (June 30, 1998). Objectionable conduct/ union payments to observers.

## F. Duty of Fair Representation

1. *Auto Workers Locals #909*, 325 NLRB No. 164 (June 10, 1998). Union obligation to provide bargaining unit employees with information on grievance settlements.

## G. Statute of Limitations

1. *Eye Weather - Sole Proprietorship*, 325 NLRB No. 183 (June 30, 1998). §10(b) issues in the context of succession.

## H. Remedies

1. *Roma One Enterprises*, 325 NLRB No. 161 (June 8, 1998). Unconditional offers of reinstatement.

## I. Construction Industry

1. *Glenfalls Building and Construction Trades Council (Indeck Energy)*, 325 NLRB No. 204 (July 16, 1998). Interpretation of construction proviso to §8(e).
2. *Trabajadores de Meulles Local ILA 1740*, 325 NLRB No. 207 (July 15, 1998). Jurisdictional dispute regarding operation of heavy machinery.

## J. Discrimination

1. *Grand Rapids Press*, 325 NLRB No. 169 (June 25, 1998). §8(a)(3)/Failure to hire employees on strike with another company.
2. *Erwin Industries, Inc.*, 325 NLRB No. 149 (May 19, 1998). §8(a)(3)/burden of proof under *Wright Line*.

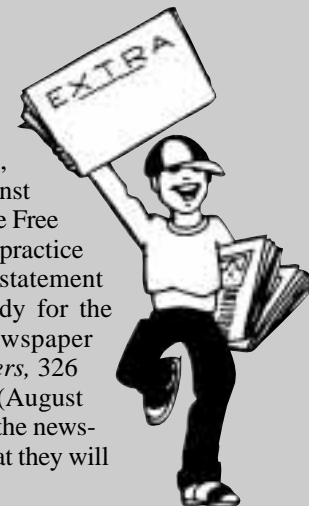
## K. Practice Before the Board

1. *Patterson-Stevens, Inc.* 325 NLRB No. 200 (July 9, 1998). Reprimand of counsel for misconduct before the Board.
2. *Ethics Security Corp.*, 325 NLRB No. 143 (May 15, 1998). Use of audiotapes in Board proceedings.

## L. Supervisory Status

1. *Rite Aid Corp.*, 325 NLRB No. 134 (April 30, 1998). Supervisory status of pharmacy managers over pharmacy technicians. ■

**Editors' note:** As we go to press, the National Labor Relations Board released its decisions in the Detroit Newspapers' cases, finding that the strike against the DNA, the News and the Free Press was an unfair labor practice strike and directing reinstatement and a make whole remedy for the strikers from the six newspaper unions. *Detroit Newspapers*, 326 NLRB Nos. 64 and 65 (August 27, 1998). The DNA and the newspapers have announced that they will appeal.



## MERC UPDATE

Douglas V. Wilcox

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

### CITY ILLEGALLY IMPLEMENTED WORKRULES WITHOUT BARGAINING.

In *City of Ecorse -and- International Assn of Firefighters, Local 1990, AFL-CIO*, MERC Case No. C96 K-297, the Commission adopted in part the decision and recommended order of ALJ Lynch, finding the city broke its promise by unilaterally implementing workrules and regulations without notice and discussion with the union. However, the Commission reversed the ALJ's conclusion that the city engaged in direct dealing with bargaining unit members regarding those rules and regulations.

The ALJ ruled that the city did not honor its promise to the union. The rules and regulations were printed in May, and were presented to the mayor and city council for their approval in June. However, the union was given no prior notice of the rules, and received them when they were made available to all employees in October. The ALJ also concluded the city's action in seeking employee input regarding the rules, while at the same time rejecting the union's request to meet, constituted an attempt to bypass the union in violation of Section 10(1)(a) and (e) of the Act.

The Commission also found the city's reliance on *Pontiac Police Dep't*, 1997 MERC Lab Op 201 and *Pontiac Schools*, 1994 MERC Lab Op 366, was misplaced. Unlike the present case, neither of those cases involved a promise outside the collective bargaining agreement.

Finally, the Commission found no evidence to support the ALJ's conclusion that the city engaged in direct dealing with bargaining unit members. The ALJ relied on a memo posted by the city seeking employee participation in the workrules. However, there was no evidence that such a committee was ever formed or that employees ever provided actual input.

### COUNTY DID NOT VIOLATE THE ACT BY CHANGING THE OFFICE THAT ADMINISTERS THE RETIREMENT SYSTEM.

In *County of Washtenaw (Prosecutor's Office) -and- Washtenaw County Assistant Prosecutor's Association*, MERC Case No. C97 B-49, the Commission, receiving no exceptions, adopted ALJ Kurtz's recommended decision and order dismissing the union's claim that the county violated PERA Section 10(1)(e) by unilaterally transferring the administration of the Washtenaw County Employees Retirement System from the office of the county clerk to that of the county administrator.

The ALJ found that retirement benefits, including the composition and responsibilities of the policymaking board that administered the retirement program, are mandatory subjects of bargaining. However, the change in the office of the county that administers the retirement system is not bargainable because it is a "purely mechanical or ministerial function," and therefore not a mandatory subject under PERA. *Detroit v AFSCME*, 1981 MERC Lab Op at 315. That is, the moving of the retirement administration from one county employee to another simply had no direct effect on benefits in the granting or denial of claims. Therefore, PERA was not violated.

### EMPLOYER FAILED TO PROVIDE UNION WITH OPPORTUNITY TO BARGAIN OVER CHANGES IN THE PENSION SYSTEM.

In *City of Oak Park (Public Safety Department) -and- Police Officers Assn of Michigan (POAM)*, MERC Case No. C97 E-105, the Commission, receiving no exceptions, adopted ALJ Lynch's recommended decision and order, finding the employer guilty of committing an unfair labor practice by changing working conditions related to employee pension benefits for bargaining unit members.

The ALJ found the employer violated its bargaining duty by failing to give the union adequate notice and opportunity to bargain with respect to changes in retirement benefits. The ALJ rejected the employer's claim that the union waived its right to bargain by failing to make a bargaining demand despite notice of the proposed ordinance by the employer. The union president had reason to believe the ordinance did not apply to union members. Moreover, the change took place in a matter of weeks, with little time to pursue the matter. Sufficient advance notice and opportunity to bargain was not provided to the union regarding the change in the pension system. See *Oak Park Schools Bd of Ed*, 1995 MERC Lab Op 648, 651, *et al.* The ALJ also rejected the employer's claim that this was a purely contractual dispute to be resolved through the grievance procedure. That argument failed because the provisions in the contract pertaining to pensions did not cover the forfeiture of pension benefits. As the Commission stated in *City of Riverview*, 1979 MERC Lab Op 853, 856, when an employer institutes a written policy where none had existed in the past, this constitutes a unilateral change in working conditions. ■

## NLRB, LELS AND MERC EVENTS SCHEDULED

The Bernard Gottfried Memorial Labor Law Symposium will be held on Thursday, October 22, 1998 at the McGregor Memorial Conference Center on the Wayne State University campus. The Symposium is co-sponsored by Wayne State University Law School, the National Labor Relations Board's Region Seven, and the State Bar of Michigan Labor and Employment Law Section.

This year's program includes a variety of presentations by Michigan practitioners and featured speaker NLRB Member Wilma B. Liebman. The Symposium is named for Bernard Gottfried (1925-1992) who served as NLRB Region Seven Director.

The program will run from 8:15 a.m. until 2:00 p.m. and includes continental breakfast and lunch. For registration and program information contact Irma Cabello at (313) 577-3984.

The Labor and Employment Law Section's Mid-Winter dinner and education program will be held on Friday evening and Saturday morning, January 29 and 30, 1999, at the Ypsilanti Marriott at Eagle Crest.

The 1999 Public Sector Labor Law Conference, co-sponsored by the Michigan Employment Relations Commission and the State Bar of Michigan Labor and Employment Law Section, has been set for May 13 and 14 at the Kellogg Center on the Michigan State University campus.

Watch your mail for details and registration information on the LELS dinner and program and the public Sector Labor Law Conference.

# LABOR DECISIONS ISSUED BY A DIVIDED MICHIGAN SUPREME COURT

David A. Rhem

*Varnum, Riddering, Schmidt & Howlett, LLP*

## WPA Statute Of Limitations Triggered By Employee Resignation

In a 4-3 decision, the Michigan Supreme Court held that the statute of limitations for a Whistleblowers' Protection Act (WPA) claim runs from the employee's resignation for purposes of a constructive discharge claim, not from the time of the alleged retaliation. *Jacobson v Parada*, 457 Mich 318 (1998). The WPA provides that a civil action must begin "within 90 days after the occurrence of the alleged violation of this act." The employer argued that an alleged retaliation constitutes the "occurrence" of the alleged violation of the WPA, even though the employee resigns at a later date. The court, however, held that constructive discharge occurs when "a reasonable person in the employee's place would feel compelled to resign" and cannot be determined "until the employee has, in fact, left the employment."

## Jury Trials Available Under the WPA

In *Anzaldua v Band*, 578 NW2d 306 (1998), the Court ruled that plaintiffs are entitled to a jury trial for WPA claims. It was significant that the WPA provides for "actual damages." The court also noted strong similarities to *Lorillard v Pons*, 434 US 575, 98 S Ct 866 (1978), which found a right to a jury trial under the ADEA. In addition, the Court noted that jury trials are available under the Elliott-Larsen Civil Rights Act and its predecessor.

## No "Double-Dipping" Of Attorneys' Fees For Prevailing Plaintiffs

A plaintiff who received attorney fees under the Handicappers' Civil Rights Act (HCRA) was not entitled to a second award of attorney fees under Michigan's mediation court rule. *McAuley v General Motors Corp*, 457 Mich 513 (1998). After a successful HCRA action, including the recovery of attorneys' fees, the plaintiff requested mediation sanctions. Reversing the court of appeals, the Supreme Court ruled that if a prevailing party has already recovered statutory attorneys' fees, then there are no more "actual costs" for which reimbursement is appropriate.

## Survivor Receives Workers' Compensation Death Benefits In Proximate Cause Case

The Court ruled in *Hagerman v Gencorp Automotive*, 457 Mich 720 (1998), that neither preexisting medical circumstances nor "aggravating medical consequences" sufficiently broke the chain of causation to defeat a survivor's claim for workers' compensation death benefits. The decedent injured his back while at work and underwent medical treatment, which included drinking great quantities of water. However, the decedent suffered from high blood pressure. The diuretics he took, combined with the large influx of fluids, drastically dissipated his sodium levels and resulted in death. The Workers' Disability Compensation Act requires that "when death is not immediate, the survivor seeking death benefits must show that a work-related injury was the 'proximate cause' of the death." The court held that since the decedent's ingestion of excessive fluids resulted directly from the decedent's compliance with

the law and with medical advice, the death was "sufficiently traceable to the work-related injury" to trigger the award of benefits.

## No "Handicap" When Mediation Controls The Condition

Rejecting the EEOC's ADA guidelines, the Michigan Supreme Court in *Chmielewski v Xermac, Inc*, 457 Mich 593 (1998), ruled 5-2 that a person whose medical condition is controlled by medication does not have a "handicap" under the Handicappers Civil Rights Act (HCRA).

## Accommodation Duty Does Not Require Transfer To An Available Position

The court in *Rourk v Oakwood Hospital Corp*, No. 104997, 1998 Mich LEXIS 1358, ruled 5-2 that the employer's duty to accommodate under the HCRA does not include a requirement that handicapped employees be transferred to other available positions.

## "No Contract" Handbook Disclaimer Defeats "Legitimate Expectations" Claim

On rehearing in *Lytle v Malady*, No. 102515, the court vacated an earlier opinion and ruled that a *Toussaint* "legitimate expectations" claim cannot arise when the employee handbook is not a contract. The employee handbook stated that employees would only be discharged for "proper cause or reason." However, the handbook also stated that it was not "intended to establish, and should not be interpreted to constitute any contract" with the employer. Resolving an issue left open in *Rood v General Dynamics*, 444 Mich 107 (1993), the court ruled the disclaimer prevented the creation of "legitimate expectations." The court's new decision is consistent with its ruling in *Heurtebise v Reliable Business Computers Inc*, 452 Mich 405 (1996).

## Derogatory Remarks About Pregnancy Constitute Sexual Harassment

In *Koester v City of Novi*, No. 105508, the court ruled 4-3 that although pregnancy alone is not a "handicap" under the HCRA, comments and conduct related to pregnancy can constitute sexual harassment, and sexual discrimination, under the Elliott-Larsen Civil Rights Act. ■

## JUSTICE LEWIS F. POWELL, Jr. (1907-1998)

Justice Powell was a voice of moderation. As a Justice from 1972 to 1987, Justice Powell was the swing vote on many important and divisive constitutional issues. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), he was the key vote for ruling that race can be a factor in affirmative action programs. He voted with the majority in *Roe v. Wade*, 438 U.S. 265 (1973), decided shortly after his appointment.

You can listen to Justice Powell announce his *Bakke* opinion from the bench, and hear President Nixon's 1971 speech announcing the Powell nomination, on the Web at OYEZ OYEZ OYEZ, which contains a multimedia database about the United States Supreme Court. <http://court.it-services.nwu.edu/oyez/> *Lewis F. Powell Jr.* (1994) is an outstanding biography by University of Virginia law professor John J. Jeffries Jr.

JGA



## THE JOY OF LABOR LAW

*To WARN or Not to WARN.* A recent Sixth Circuit decision should have paraphrased Shakespeare: "It is better to have WARNED employees than never to have WARNED at all and be sued." A WARN notice must be sent to all "affected employees," including laid off employees who have a reasonable expectation of recall or the employer violates the Worker Adjustment and Retraining Notification Act, 29 U.S.C. 2102- 2109 (WARN Act). *Kildea v. Electro-Wire Products*, 144 F.3d 400 (6th Cir. May 13, 1998). The court ruled that laid off employees who had a history of cyclical layoffs had a reasonable expectation of recall although they were laid off six months before closing. They should have been WARNED!

*COBRA Strikes.* Speaking of notices, the Sixth Circuit ruled that a separate COBRA notice must go to a covered spouse of a participant/employee because the spouse is a beneficiary. *McDowell v. Krawchison*, 125 F.3d 954 (6th Cir. 1997). Relying on the plain meaning of COBRA, 29 U.S.C. 1161-1168, which requires notice to any "qualified beneficiary," the court implicitly rejected the common law view that a spouse is chattel.

A lesson a la Cochran: If in doubt you must send out!

*Rumpole of the NLRB.* Although not a labor and employment lawyer (or a Section member, a licensed American attorney, or even a real person), "Old Bailey Hack" Horace Rumpole has much to offer. Created by barrister/author John Mortimer, Rumpole is an irreverent English criminal defense barrister known for his brilliant and sometimes, shall we say, creative trial tactics on behalf of various "villians," both the wrongly and rightly accused. (Upon receiving fees, Rumpole is fond of saying "Crime pays.") There is a web site devoted to him: <http://www.cs.umbc.edu/~schott/rumpole>. Labor lawyers can learn from Rumpole on how to try, for example, wrongful discharge cases. Indeed, Rumpole's governing principle is followed by many management attorneys: "Never plead guilty."

*New "Creative" ULPs.* Creative attorneys can use a new tactic to generate legal work. In *ITT Automotive*, 324 NLRB No. 101, 157 LRRM 1126 (1997), a management attorney prepared for an NLRB hearing by illegally interrogating an employee about union activity, setting into action a whole series of NLRB hearings, briefs, decisions and, of course, fees. During the trial preparation, the attorney asked the employee "whether any employees who wore 'no' buttons actually supported the union and whether any employees who wore 'yes' buttons were actually against the union" and questioned as to "why employees thought they needed a union at ITT and what had gone wrong."

Similarly, at an arbitration hearing a management attorney "prevented" a union member "from participating in the arbitration by ordering him to leave" because the union member – who had "participated in the investigation and preparation of the" discharged employee's case – was told by his supervisor he could not use his lunch break to attend the hearing. The employee was thrown out even though employees "are permitted to leave the plant during their lunch break if they check out," which the discriminatee had done. *Cadbury Beverages*, 324 NLRB No. 185, 157 LRRM 1077 (1997). To make matters worse, the employer fired the employee for insubordination. This, of course, generated a ULP charge, complaint, hearing, briefs, an adverse decision, and of course, more fees. I call this the "ULP in perpetuity doctrine." Rumpole might say "ULPs pay."

*New "Creative" Forms of Employee Protest.* According to one arbitrator, an employer had just cause to fire an employee who protested denial of overtime by urinating on the floor in the employees' breakroom. *American Mail-Well Envelope*, 110 LA 342 (1998). The arbitrator rejected the union's claim that discharge was too severe a penalty, noting that urinating on the floor is "anti-social behavior." The NLRB has yet to address the issue so we do not know whether breakroom urination is protected under the NLRA if done in a concerted fashion.

Likewise, an employee's protest against obtaining a social security number may be unprotected. The belief that the "Social Security System is an unbiblical program" is not a sincere religious belief under Title VII of the Civil Rights Act of 1964. As a result, the discharge of the plaintiff because she "failed to obtain a social security number" was not illegal. *EEOC v. Allendale Nursing Centre*, 996 F. Supp. 712, 713 (W. D. Mich. 1998).

While urinating on the breakroom floor in protest of the social security system is probably unprotected under existing labor law, a prudent employer will WARN employees that such conduct likely is unprotected, and could even lead to the loss of COBRA rights. The lesson for prudent employees: obey now, grieve later, and stick to the traditional ways of indicating that you're pissed off.

*Goodbye Chairman Gould.* After four years as NLRB Chairman, William B. Gould IV left the friendly environs of Washington, D.C. to return to Stanford University as professor of labor law. If anyone is interested, or listening, I know an attorney who could fill the vacancy. Wouldn't NLRB opinions be more interesting under the sign of the man in the barrel?

John G. Adam



## INSIDE *LAWNOTES*

- Erwin Ellman discusses the current state of the *functus officio* doctrine in labor arbitration.
- Dan Tukul reviews differing authority on how an individual's mitigatable condition should be evaluated under ADA and MHCRA, and the Michigan Supreme Court's recent decision on the issue.
- Mike Blum illuminates the mysteries of secondary boycotts and common situs picketing.
- Shel Stark writes on affirmative action, Carl Ver Beek takes Stark to task for his last column commenting on the Due Process Protocol for arbitration of civil rights disputes, and Stark responds.
- Information on upcoming events and LELS business: the Bernard Gottfried Memorial labor Law Symposium on October 22 in Detroit; the 1999 LELS Mid-Winter dinner and education program on January 29 and 30 in Ypsilanti; and the 1999 Public Sector Labor Law Conference on May 13 and 14 in East Lansing.
- Labor and employment law 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, MERC; the Joy of Labor Law; funny (?) cartoon captions; and more.
- Authors John T. Below, Karl Brevitz, Michael R., Blum, Laurence D. Connor, Erwin B. Ellmann, Gary Fealk, Joseph R. Furton, Jr., Scott G. Hornsby, Russell S. Linden, Valerie L. MacFarlane, Timothy O. McMahon, George M. Mesrey, David A. Rhem, William C. Schaub, Jr., Sheldon J. Stark, Daniel B. Tukul, Carl E. Ver Beek, Douglas V. Wilcox and more.

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