

LABOR AND EMPLOYMENT LAWNOTES

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VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS

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A. Introduction

The EEOC issued its *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* ("Guidance") on June 18, 1999. The Guidance addresses issues raised by the recent Supreme Court decisions in *Burlington Industries v Ellerth*, 524 U.S. 742 (1998), and *Faragher v City of Boca Raton*, 524 U.S. 775 (1998). In these decisions the Court clarified employer liability for supervisor harassment and provided an affirmative defense in cases where there has been no tangible job detriment. The Court specifically held that where there has been a tangible job detriment, the employer is strictly liable for a supervisor's conduct. If there has been no such detriment, the employer can avoid liability by affirmatively proving that it exercised reasonable care to prevent, correct and promptly remedy sexually harassing behavior and that the plaintiff unreasonably failed to take advantage of preventative, corrective opportunities. *Ellerth*, 524 U.S. at 765 and *Faragher*, 524 U.S. at 807. The Court stated that, ordinarily, proof of the existence of an effective anti-harassment policy and grievance mechanism will suffice to prove the first element and proof that the plaintiff unreasonably failed to use the procedure will suffice to prove the second element. *Ellerth* 524 U.S. at 765, and *Faragher* 524 U.S. at 807-808.

Unfortunately, the Court left many questions unanswered, including the definitions of the terms "supervisor" and "tangible employment action." This article will describe the Commission's position on these critical issues as well as our suggestions on appropriate policy and complaint procedures, our views on reasonable bases for a failure to complain and the application of the decisions to cases where the harasser is the alter ego of the corporation. The article will also discuss recent Sixth Circuit law interpreting the Supreme Court decisions.

B. Application of the Vicarious Liability Holding

In his dissent in *Ellerth*, Justice Thomas opined that the new standards would make proof standards for sex harassment different from proof standards for other forms of harassment. *Id.* at 766-767. There was nothing in the language of the majority opinions that would suggest that the rulings are limited to sex harassment. In fact the Commission believes, and many courts have already held, that the Supreme Court decisions apply to cases involving all forms of harassment². *Guidance* at 1,3; *Hafford v Seidner*, 167 F. 3d 1074, 1080 (6th Cir. 1999) (religion and race); *Allen v Michigan Dept. of Corrections*, 165 F. 3d 411 (6th Cir. 1999) (race).

The *Ellerth* and *Faragher* decisions arose in the context of supervisor harassment and the Court did not address whether the affirmative defense would also be applicable in co-worker or third party harassment cases. An argument could be made that employers should have the same burden of demonstrating reasonable care in co-worker harassment situations. However, the Commission Guidance states that our longstanding policy of co-worker harassment remains in effect. An employer is liable if they knew or should have known about the misconduct unless it proves that it took immediate and appropriate action. *Guidance* at 2-3; 29 C.F.R. §1604.11(d) *Kauffman v Allied Signal, Inc.* 970 F. 2d 178 (6th Cir. 1991).

1. Definition of Supervisor

The Supreme Court did not specifically define the term "supervisor" in ruling that employers are strictly liable for harassment that results in a tangible job detriment. The Guidance defines a supervisor as any individual who has the authority to ". . . undertake or recommend tangible employment decisions effecting the employee, or" has ". . . authority to direct the employee's daily work activities. *Guidance* at 5. It should be emphasized that the harassing individual need not have the final say in employment decisions. It is sufficient if they make recommendations. Additionally, individuals who direct work on a daily basis are also considered supervisors, as they have the ability to impact on the employee's workload. Temporary supervisors, and individuals with apparent authority are also covered, as are supervisors who are outside of the victim's chain of command. *Guidance* at 6-7; *Ellerth* at 524 U.S. at 760; *Llampallas v Mini-Circuit Lab, Inc.*, 163 F. 3d 1236 (11th Cir. 1998).

2. Definition of Tangible Employment Action

In its decisions the Court explained its rationale for imposing strict liability on employers where the harassment results in a tangible employment action. The Court noted that vicarious liability is appropriate because these actions are often an official act of the corporation that is documented in official company records and they may be subject to review and may require formal approval through internal processes. *Ellerth*, 524 U.S. at 762;. *Guidance* at 8. Examples of tangible employment actions include hiring, firing, promotion, demotion, undesirable reassignment, significant changes in benefits, compensation decisions and work assignments. *Guidance* at 8-9; *Crady v Liberty National Bank & Trust of Ind.*, 993 F. 2d 132 (7th Cir. 1993), *quoted in Ellerth*, 524 U.S. at 759.

It should be emphasized that strict liability rule applies whether the victim submits and gains the benefit or rejects the advances and suffers a detriment. *Guidance* at 10. The Guidance further provides that the plaintiff must link the adverse job action to the harassment. Of course, there will be a strong presumption of a link if the harasser or a person or entity highly influenced by the harasser made the adverse decision. *Guidance* at 10-11; *Shager v Upjohn Co*, 913 F. 2d 298 (7th Cir. 1990).

(Continued on page 2)

CONTENTS

| | |
|----------------------------------------------------------------------------------------------------------------|----|
| Vicarious Employer Liability For Unlawful Harassment By Supervisors | 1 |
| Fair Credit Reporting Act And Sexual Harassment Investigations | 3 |
| Pre-Employment Screenings, Employee Investigations, And The Fair Credit Reporting Act | 5 |
| Somehow Your Story Don't Ring True | 9 |
| Should The NLRB Allow Pretrial Discovery Or Admit Polygraph Results? | 12 |
| NLRB Practice And Procedure | 13 |
| Supreme Court So Far "Immune" To Labor Issues | 14 |
| Sixth Circuit Re-Examines Hostile Environment Claims And Addresses Other Title VII, FLSA And NLRA Issues | 14 |
| Eastern District Update | 16 |
| Internet Update | 16 |
| Defendants Have Another Strong Quarter In The Western District | 17 |
| Michigan Court Of Appeals Update | 18 |
| Michigan Supreme Court Update | 19 |
| MERC Update | 19 |
| Show Trial In Memphis: King Family Conspiracy Lawsuit | 21 |
| NLRB Continues Torrid Pace | 22 |
| The Joy Of Labor Law | 23 |

STATEMENT OF EDITORIAL POLICY

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VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS

(Continued from page 1)

C. Affirmative Defense

The employer must prove *both* elements of the defense to prevail: that it acted reasonably to prevent and correct unlawful harassment and that the employee unreasonably failed to complain. If the employee complained and the reasonable response did not stop the harassment, the employer is still liable. It is also liable for the harassment preceding the complaint. *Guidance* at 13-14. The standard in *Ellerth* and *Faragher* is not a mere negligence standard that would absolve the employer of liability in such circumstances, it is a more stringent standard. *Guidance* at 14. Practitioners may wonder why an employer who has acted reasonably in response to a harassment complaint should be liable for harassment, absent negligence on its part. The *Guidance* explains that the affirmative defense must be narrowly construed because it is made available to employers in harassment cases where there would be no defense to unlawful conduct by supervisors in other contexts, e.g., an age based decision to layoff. *Guidance* at 14. In any event, even if the affirmative defense evidence does not allow the employer to avoid liability, it will serve to limit damages.

1. Employer's Duty to Exercise Reasonable Care

The Court suggested that proof of an effective grievance mechanism and harassment policy would ordinarily suffice to establish the first prong of the defense. However, there are no safe harbors. While a well crafted grievance policy will help the employer's position, a "paper" policy that is not administered effectively in general or in the individual's particular case will not be sufficient to avoid liability. *Guidance* at 15. The *Guidance* provides specific suggestions concerning appropriate policy and complaint procedures and describes the minimal elements of such a policy. These elements include protection against retaliation, assurance of confidentiality to the extent possible, and a clear explanation of the prohibited conduct.³ The policy must further provide for a prompt, thorough investigation and state that the employer will take prompt remedial action when it finds that harassment occurred. *Guidance* at 15-28. The *Guidance* also describes the elements of an effective investigation process and includes examples of appropriate questions to ask witnesses and parties in the investigation. *Guidance* at 21-24. The *Guidance* then lists examples of appropriate remedial actions and contains a special section addressed to small businesses. *Guidance* at 25-28.

This author strongly believes that training is a critical element of any anti-harassment policy. Distribution of a "paper" policy with a signature requirement will do nothing to convince likely harassers to refrain from the conduct, nor will it do much to persuade a jury of corporate good faith. *Kolstad v American Dental Association*, 119 S. Ct. 2118 (1999).

2. Employees Duty to Exercise Reasonable Care.

The employer has the burden to prove that the plaintiff failed to take advantage of any preventative or corrective opportunities provided by the employer. *Faragher* at 808-809, *Ellerth* at 765. The Court emphasized that the victim of harassment has a duty to use reasonable means to avoid or minimize the damage suffered by the harassment. *Faragher* at 806. The most frequently cited evidence of an employee's lack of due care is the failure to complain

about the harassment to appropriate personnel. This is not surprising as there are many reasons why victims do not complain about harassment. In fact, many studies have shown that filing a formal complaint is a response rarely used by victims of harassment. They tend to rely more heavily on other coping mechanisms. Patricia A. Frazier, *Overview of Sexual Harassment From The Behavioral Perspective*, in publication of ABA National Institute on Sex Harassment (1998), 7-26 citing (Gruber; Bjorn 1982, 1986), (Schneider 1987), (Cochran & Frazier 1992). The Guidance describes a variety of reasonable bases for failure to complain, or to otherwise use a grievance mechanism. These justifications include a reasonable fear of retaliation, obstacles to complaints such as an inaccessible personnel manager, or a reasonable perception that the complaint process is ineffective. *Guidance* at 30-32.

In that regard, many employers keep the disciplinary action taken against the harasser confidential, merely advising the victim that appropriate action has been taken. While such a policy may help avoid litigation by the harasser, it has obvious down sides. Thus, if the disciplinary action is not immediately apparent (e.g., denial of a bonus), the victim could reasonably believe that nothing was really done in response to her complaints. If she so advises other women in the workplace it would be reasonable for the victim and others to assume the grievance mechanism is a sham and thereafter decline to use it.

3. Harassment by Alter Ego of Employer

The Guidance contains a brief statement regarding liability when the harasser is the alter ego of the employer. The Guidance also lists the positions that automatically impute liability to the employer. *Guidance* at 32-33. This author suggests that in cases of harassment by an alter ego of the corporation, one-on-one training by a sex harassment expert may be necessary to assure that harassment does not occur in the future.

D. Conclusion

The Supreme Court decisions in *Faragher* and *Ellerth* went quite far in clarifying the rights and responsibilities of employers and employees in dealing with harassment issues. It is clear that if it hopes to avoid liability, an employer must take prophylactic measures in advance of any complaint and after receiving a complaint promptly take measures to fully remedy and prevent harassment from occurring in the future. Employees have a countervailing duty to cooperate in investigations and to use those mechanisms offered to them to avoid further harm from the harassment. The Supreme Court left many practical issues unresolved in making its broad ruling. The recent EEOC Guidance attempts to address these practical concerns and it includes extensive case law citations and practical suggestions for meeting those responsibilities.

— END NOTES —

¹Adele Rapport is the Regional Attorney for the Detroit District Office of the EEOC. The views stated in this article are her own and do not constitute EEOC policy or guidance.

²The rule announced in the Supreme court cases applies to harassment based on race, color, national origin, religion protected activity, age and disability as well as sex. Sex based harassment is actionable whether or not of a sexual nature. *Guidance* at 3.

³The policy must make clear that prohibitions against harassment apply to employers and third parties. *Id.* ■

FAIR CREDIT REPORTING ACT AND SEXUAL HARASSMENT INVESTIGATIONS

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Who would have thought that revisions to the Fair Credit Reporting Act (FCRA)¹ would impede the investigation of sexual harassment complaints? The FCRA was amended in 1996 to address the use of consumer reports and investigatory consumer reports in the employment context.

A "consumer report" is any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected, in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for, among other purposes, employment.² An "investigative consumer report" is a consumer report or a portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer or with other with whom the consumer is acquainted or who may have knowledge concerning any such item of information.³

The term "employment purposes" as used in the FCRA means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.⁴ Under the FCRA, a "consumer reporting agency" is any person or firm which, for monetary fees, dues or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.⁵

A consumer report may be used for employment purposes if the consumer (an applicant or employee) has given written permission for the report to be obtained. Once an employer has obtained permission, the employer must certify to the consumer reporting agency the permissible purposes for which the report is being obtained and certify that the report will not be used for any other purposes.⁶ If an employer intends to use an investigative consumer report, the FCRA requires that the employer disclose this to the applicant or employee.

Additionally, if an employer considers taking adverse action as a result of information in a consumer report, the employer has certain reporting responsibilities. "Adverse action" includes all employment actions affecting the individual that can be considered to have a "negative impact," including the denial of employment or promotion.⁷ If an employer intends to take adverse action based, at least in part, on information contained in the consumer report, the employer is required to notify the applicant or employee and give him/her a copy of the report.⁸

The FCRA also requires that "pre-adverse action notice" be given to the applicant or employee before adverse action is taken. The Federal Trade Commission (FTC) attorneys are opining that a five-day period is reasonable, absent unusual circumstances, between the time of providing the applicant or employee with a pre-

(Continued on page 4)

FAIR CREDIT REPORTING ACT AND SEXUAL HARASSMENT INVESTIGATIONS

(Continued from page 3)

adverse action notice and the employer taking the adverse action. Also, when the adverse action is taken an "adverse action notice" must be given.

Interpretation and enforcement of the FCRA is assigned to the FTC. While FTC has been precluded by Congress from issuing regulations interpreting the amendments to the FCRA, the FTC legal staff issues non-binding advisory opinions. Copies of these opinions are available on the FTC web site at www.ftc.gov/os/statutes/fcra/index.htm.

There are two letters that are of particular concern regarding the investigation of sexual harassment and other types of work place harassment complaints, written by Christopher N. Keller on April 5, 1999, and by David Medine on August 31, 1999.

Mr. Keller responded to an inquiry from attorney Judi A. Vail. Ms. Vail inquired whether the FCRA would apply to sexual harassment investigations. Mr. Keller indicated that if harassment, as a result of the investigation by some person or entity other than the employer, is found to have occurred, and appropriate corrective or disciplinary action is to be taken, the investigation would be covered by the FCRA.

Mr. Keller went on to analyze the definitions of "consumer reporting agency," "consumer report," and "investigative consumer report." He determined that a harassment investigation report is most likely an investigative consumer report and that the individual or entity preparing the report is most likely a consumer reporting agency.

The Keller letter does not discuss whether a law firm or an individual lawyer would fall within the definition of consumer reporting agency. David Medine, in a response to Ms. Susan R. Meisinger of the Society of Human Resource Management, partially addressed this issue. Ms. Meisinger wrote FTC Chairperson Pitofsky regarding practical problems in applying the FCRA to reports made to employers by third parties hired to investigate allegations of sexual harassment and other work place misconduct, referring to the Keller letter. In response, Mr. Medine wrote, in part:

We appreciate and are sympathetic to the practical problems that exist in applying the FCRA to investigations by third parties of workplace misconduct, enumerated in your June 23 letter. Of course, when Congress enacted its FCRA reforms in 1996, it could not have foreseen the two 1998 Supreme Court cases referenced in your letter. Prior opinion letters by our staff addressed some of the problems you note, and sought to help employers comply with the FCRA where it applies to reports they obtain from third parties. . . . Thus, we pointed out that an employee's consent to procurement of a consumer report, . . . can be routinely obtained at the start of employment, thereby relieving the employer of the awkward prospect of having to ask a suspected wrongdoer for permission to allow a third party to provide an investigative (or other) consumer report to the employer. . . . Employers seeking to obtain reports on employees can meet the disclosure requirements . . . in a similar fashion. . . . another way for an employer to comply with these FCRA requirements without alerting a suspected wrongdoer is to ask all current employees to sign a consent form, and provide them any required notice. . . . To assist an employer who will be required . . . to provide a copy of a report to an employee prior to adverse action, . . . an investigative agency may draft its report to the employer to minimize risks atten-

dant to such disclosure, most importantly by not naming the parties that provide negative information regarding the employee.

In a footnote, Mr. Medine re-emphasized that FCRA requirements do not apply to investigations that employers conduct for themselves through their own personnel. Also, he went on to state that "the FCRA would not apply where the employer uses a third party that does not 'regularly engage' in preparing such reports and does not fall under the definition of 'consumer reporting agency' set forth in Section 603(f)."

Later, in a September 15, 1999 opinion letter written by William Haynes, the FTC took the position that an attorney or law firm that researches criminal records of job applicants for its clients is a consumer reporting agency under the FCRA. Mr. Haynes indicated that an attorney who checks criminal records for an employer engages in activities that appear to meet the consumer reporting agency definition "so long as the records checks are a 'regular' course of action on the part of the attorney directly or indirectly charges for this service." In a footnote, Mr. Haynes states that an attorney who assists a client by accompanying the client's employees to a courthouse, and shows the employees how to research court records, may be exempt from coverage as the actual search is done by the client's employees, not the attorney.

The unsettled issue is whether a law firm that, as part of its practice, assists employers in investigating sexual harassment and other types of misconduct is a consumer reporting agency under the FCRA. If, in fact, the FCRA does apply, it will be very difficult to preserve the attorney-client privilege and to conduct a confidential investigation to comply with the Supreme Court's recent decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

I believe that the FCRA must be modified so that attorneys are free to assist employers in investigations as we have traditionally done. Alternatively, a court determination must be sought to establish that the FCRA does not apply to an investigating attorney or law firm. There currently is a bill in the Senate seeking to make modifications to the FCRA, but it does not address this specific issue. Concerns that individuals and firms have regarding this issue should be directed to Clarke Brinckerhoff of the FCT legal staff, Division of Financial Practices, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, D.C. 20580

Mr. Brinckerhoff is the individual designated by the FTC to evaluate this issue. Although some of the FTC legal staff have expressed surprise that there hasn't been a greater outcry, concern is starting to increase among various members of the House and Senate, as well as Equal Employment Opportunity Commission representatives. I believe that the EEOC is concerned that FCRA restrictions on an employer trying to investigate and remedy sexual harassment and other types of harassment in the work place will have a stultifying affect. Complying with FCRA requirements could lead to premature disclosure of witnesses during an investigation, subjecting those individuals to retaliatory conduct by the alleged harasser. I suggest that every individual and firm concerned about this issue contact Mr. Brinckerhoff, as well as their U.S. Senators and Representatives, regarding the unwarranted impact of the FCRA on work place misconduct investigations.

— END NOTES —

¹15 USC §1681-1681(u)

²15 USC §1681a(d)(1)

³15 USC §1681a(e)

⁴15 USC §1681a(h)

⁵15 USC §1681a(f)

⁶15 USC §1681(b)(1)(A)

⁷15 USC §1681a(k)(1)(B)(ii)

⁸15 USC §1681b(b)(3) ■

PRE-EMPLOYMENT SCREENINGS, EMPLOYEE INVESTIGATIONS, AND THE FAIR CREDIT REPORTING ACT

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Congress amended the Fair Credit Reporting Act (FCRA), 15 USC 1681-1681u, with the Consumer Credit Reporting Reform Act of 1996.¹ Changes to the FCRA require an employer to follow procedures in situations that have nothing to do with "credit reports" as one typically thinks of them. The FCRA is implicated anytime an employer pays a fee to a third party to conduct pre-employment screenings or to investigate employees; for example, when an employer's agent (i) screens job candidates for the theft and drug use, (ii) interviews candidates' references over the telephone, (iii) hires a forensic accountant to investigate a theft of company funds, or (iv) hires a private investigator to probe the background of a manager accused of sexually harassing an employee. Many employers rely on outside experts, such as investigators, headhunters, and outside counsel, to obtain information on prospective or current employees. Most would be surprised to find that the FCRA applies to such screenings and investigations when a fee is paid to the third party, which the FCRA calls "consumer reporting agency" (CRA). Interpretations of the FCRA by the Federal Trade Commission's (FTC's) legal staff have employers and attorneys concerned that investigations of employee sexual harassment, drug problems, theft, and so on, may be hindered or compromised.² In many cases, reports cannot be redacted to protect the confidentiality of sources.³ Prompt investigations are required by other federal laws, such as civil rights acts; yet the FCRA's requirements of advance notice, consent and giving copies of unredacted reports to the very employees who are the target of the investigations can make compliance with these laws difficult. How can an employer steer through these seemingly conflicting requirements and meet its need to hire the best employees it can? How can an attorney giving employment law advice or assisting in compliance planning protect his or her client?

All employers are covered. No employer is exempt from the FCRA; an employer with a single employee is covered. For example, *"a homeowner who is considering hiring an individual to perform services for the homeowner is indeed required to comply with the FCRA when obtaining a 'consumer report' on that individual (which includes either a credit report or criminal background check) . . . like any other employer."*⁴

THE ACT'S BROAD DEFINITIONS TRIGGER ITS APPLICATION.

Because of its broad definitions, the FCRA governs an employer's actions in areas beyond what one would normally think of as credit background checks on potential employees. A "consumer" includes any individual, including a job applicant or employee.

The definition of "consumer report." A "consumer report" includes:

. . . any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit

*capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . [among other things] employment purposes."*⁵

An employer who utilizes a consumer report has the legal obligation to notify an employee, to provide copies of the report, and to inform the employee of his or her legal rights to contest the report's findings. The term "employment purposes" is also broad and covers the hiring, promotion, reassignment, and retention of employees.⁶

The definition of an "investigative consumer report." Any consumer report that involves, even in part, information about a consumer's "character, general reputation, personal characteristics, or mode of living . . . obtained through **personal interviews** with neighbors, friends, or associates . . . or with other with whom he is acquainted or who may have knowledge concerning any such items of information" become an "**investigative** consumer report" (emphasis added).⁷ such a report gives a consumer additional rights,⁸ discussed below.

The definition of "consumer reporting agency." A CRA is "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of **assembling or evaluating** consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties [such as employers]." Thus, any time an employer pays a third party for a personnel-related function, the FCRA may govern both the third party as a CRA and the employer.¹⁰ "Assembling and evaluating" involves more than the mere receipt and retransmission of information. In the opinion of the FTC legal staff, however, anything more than the mere receipt and transmission of information is enough to trigger the FCRA's provisions; simply reformatting information and deleting redundant information is included in the definition of "assembling and evaluating." For example, a CRA includes a business that uses a computer program to merge consumer information from the three main credit repositories — TransUnion, Equifax, and Experian — and then merely purges the duplicate information in order to produce a final consumer report.¹¹ *If an intermediary contributes to (or takes any action that determines) the content of the information conveyed to an employer, we believe it is 'assembling or evaluating' the information and thus qualifies as a CRA.*¹² As regards "regularly," a single incident of "assembling and evaluating" consumer information and then sending it to a third party does not constitute "regularly" engaging, and will not make a person a CRA. *See, Hodge v Texaco, Inc.* (drug rehabilitation counselor not a CRA when he recommended a testing laboratory for a second confirmatory drug test on a Texaco employee, forwarded the specimen, and received the results of the second drug test, because the FCRA exempts one whose activities might fall under the FCRA *on a casual, one-time basis*).¹³

Are government agencies CRAs? Typically, they are not. Court decisions have held that the FBI is not a consumer reporting agency. *See, Ricci v Key Bancshares of Maine, Inc.,¹⁴ and Ollestad v Kelly.¹⁵* The opinions of the FTC legal staff state the same conclusion: *"In general, information that is obtained by an employer directly from a federal, state or county record repository is not a 'consumer report' because the repository (such as a courthouse or a state law enforcement agency) is not normally a 'consumer reporting agency' and is itself not covered by the FCRA."*¹⁶

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PRE-EMPLOYMENT SCREENINGS, EMPLOYEE INVESTIGATIONS, AND THE FAIR CREDIT REPORTING ACT

(Continued from page 5)

Are private firms that collect public government records CRAs? The use of private firms requires compliance with the act. A private firm that merely lists the criminal convictions of job candidates is a CRA under the act.¹⁷

Are employment agencies and headhunters CRAs? Employment agencies and headhunters are partially exempt from the FCRA.¹⁸ Excluded from the definition of investigative consumer report (but not from the definition of consumer report) are communications made to an employer that would otherwise be an investigative consumer report, if it is made for the purposes of hiring, promotion, or reassignment, and if it is made by someone who regularly performs such work.¹⁹

Are attorneys CRAs? For an attorney to be a CRA he or she must regularly engage in the business of finishing to third parties consumer credit information that he or she has assembled or evaluated.²⁰ Thus, if an attorney were merely to look at, place in an envelope, and forward to a client any published information he or she found on a consumer without editing, evaluating, or otherwise changing the content of the material, he or she would not be acting as a CRA.²¹ In *Ditty v CheckRite, Ltd, Inc*, the makers of dishonored checks brought suit against a collection agency, its law firm, and a law firm partner.²² The court held that the law firm was not a CRA under FCRA, because “[t]here is no evidence that the law firm was in the business of assembling or evaluating consumer credit information. Rather, . . . the firm simply notified CheckRite that a particular account had been settled. Merely furnishing information about a particular debt does not draw . . . [the law firm] . . . within the definition of a ‘consumer reporting agency.’”²³ Nor does acting “merely as a conduit for debt-related information” make a law firm a CRA.²⁴ In contrast, a business or an attorney whose agents go to courthouses and collect all relevant criminal record information on individuals and then format this information into a report that is sent to a customer does “assemble” consumer information and, in deciding which court files are relevant, probably “evaluates” such information, and is, therefore, a CRA.²⁵ An attorney would not be a CRA if he or she were to merely look at and report on published information, or simply guide his or her client in how to investigate the facts without actually writing a report on the facts for the client. Thus, if an attorney merely directs a client as to how to the client should itself conduct an investigation, neither the attorney’s nor the client’s actions would be required to comply with the FCRA.²⁶

THREE STEPS AN EMPLOYER MUST FOLLOW TO MEET ITS OBLIGATIONS UNDER THE FCRA

Step #1: An employer must get written permission from the consumer before ordering a report.

Consumer report: Before an employer asks a CRA to get a consumer report or to prepare one, it must notify the consumer that it may ask for a report and get his or her written permission. Specifically, an employer may not get a consumer report unless:

- (i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and (ii) the

consumer has authorized in writing (which authorization may be made on the document referred to in clause (8)0 the procurement of the report by that person.²⁷

Therefore, the written permission may not be part of an employment application or employee handbook. In addition, an employer must certify to a CRA that it has taken these steps.²⁸ There are also special procedures that allow the trucking industry to deal with applications for employment by mail, telephone, and computer.²⁹

Investigative consumer report: If the consumer report will involve, even in small part, information about the consumer’s “character, general reputation, personal characteristics, or mode of living . . . obtained through personal interviews with neighbors, friends, or associates,”³⁰ then in addition to the rights that a consumer has with respect to a “consumer report,” an employer must within three days of asking the consumer’s permission, give him or her (i) written advance notice of the type of information it wants to obtain, (ii) the FTC’s summary of his or her rights as a consumer,³¹ and (iii) a statement that he or she may request “a complete and accurate disclosure of the nature and scope of the investigation requested.” Anytime an employer requests a CRA to interview a consumer’s references about his or her character traits, honesty, and habits, such as possible drug use, it will need to comply with these additional requirements.³² Then, upon the consumer’s written affirmative reply to the above disclosure, an employer must provide a full description of the nature and scope of the investigation it is requesting within five calendar days of the later of either the date of the consumer’s reply or the date of an employer’s request for the report.³³

Step #2: Before taking adverse action, such as denying a job position, promotion, or reassignment, an employer must give the consumer a pre-adverse action notice.

After an employer has a CRA’s report, but before taking adverse action based in whole or in part on the report, an employer must give the consumer (i) a pre-adverse action disclosure statement, stating that before any adverse action can be taken against him or her a copy of the report and a summary of rights under the law must be provided to him or her, (ii) a copy of the consumer report, and (iii) the FTC’s summary of rights.³⁴ “Adverse action” includes not being selected for a job or being denied a promotion or reassignment.³⁵ (Since 1998, the trucking industry has not needed to provide pre-adverse action disclosure statements.³⁶)

Step #3: After taking adverse action, an employer must give the consumer a post-adverse action notice.

After an employer decides to take adverse action based on the report, then, within a reasonable period of time, it must, in written, electronic, or oral form, (i) tell the consumer of the adverse action; (ii) give him or her the CRA’s name, address and phone number; (iii) tell him or her that the CRA simply supplied the report and cannot give the reasons for the adverse decision; (iv) tell him or her that he or she can get a free copy of the report from the CRA within the next sixty days; and (v) tell him or her that he or she has a right to dispute with the CRA the accuracy or completeness of the report.³⁷

EMPLOYMENT SITUATIONS IMPLICATING FCRA Checking a job applicant’s references.

In general, anytime a third party checks a job applicant’s references on behalf of an employer, such information will likely come under the definition of an investigative consumer report. The FTC

legal staff considers that the following information in a consumer report, even if volunteered, turns the consumer report into an "investigative" consumer report: (i) a rating of the consumer's prior job performance, (ii) disciplinary actions or termination for cause, or (iii) opinions about whether the consumer had a drug habit.³⁸ Mere "fact-checking questions" such as dates of employment, titles and salary would not constitute an investigative consumer report. The FCRA does not distinguish between internal company records and records outside of an employer's offices, so that interviews of other company employees by an outside third party also constitute investigative consumer reports.

When performed by an employee of the employer. Where an employer has one of its own employees, such as a human resources specialist or a hiring manager, perform the investigating and interviewing of neighbors, previous supervisors, or acquaintances, then the information gathered is not under the definition of a consumer report, because an employer is not a CRA, and the FCRA is not implicated.³⁹ It is only when an employer uses a third party and pays money to this third party to handle the background check on a job applicant that the FCRA is triggered.

When performed by an employment agency. There is a special exemption for reference checks if performed by employment agencies or headhunters.⁴⁰ However, the consumer's written or oral permission is still required. Within five business days of the consumer's request, an employment agency or headhunter must disclose "the nature and substance of all the information in the consumer's file" except that the sources of the information may be kept confidential.⁴¹

Giving references about a former or current employee.

While many Michigan employers operate on a principle of responding to questions only with "yes, he or she worked here and here are the dates of employment," this approach is, arguably, too conservative. Employers giving references should not be fearful of running afoul of the FCRA. Excluded from the definition of consumer report are reports "containing information solely as to transactions or experiences between the consumer and the person making the report";⁴² An employer who reports its own evaluations regarding its own experiences about a customer's buying habits, or about a current or former employee's work performance, character, and habits is not furnishing a consumer report and is not a CRA. *See, DiGianni v Stern's* (retail department stores which furnish consumer information to CRAs are not themselves CRAs).⁴³ In addition, to be a CRA, an employer must (i) regularly engage in gathering or evaluating information, (ii) for fees, (iii) and for the purpose of distributing this information to third parties, (iv) by means of interstate commerce.⁴⁴

Even if an employer provides false information about a current or former employee, it is protected from defamation lawsuits.

*Except as provided in section 616 and 617 of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to consumer reporting agency . . . except as to false information furnished with malice or willful intent to injure such consumer.*⁴⁵

A recent Michigan law, 1996 PA 90, effective February 27, 1996, provides Michigan employers with immunity from civil liability from defamation for good faith disclosures about a current or former employee's job performance.⁴⁶

Performing drug tests on job applicants or on current employees.

In general. Drug tests and past and current drug usage may be within the purview of the FCRA.⁴⁷ Illegal drug usage certainly goes toward a prospective employer's assessment of a job applicant's reputation, personal character, and mode of living, or toward a current employee's fitness for a promotion or reassignment.

When an employer hires a drug testing laboratory. Excluded from the definition of a consumer report, however, is "any report containing information solely as to the transactions or experiences between the consumer and the person making the report"⁴⁸ Therefore, when an employer hires a drug testing laboratory to perform a test on a consumer, and the laboratory reports the results of its own testing directly to the employer, its report is not a consumer report, because the laboratory is reporting its own experience and application of scientific testing regarding the testing of the urine, blood, or hair sample.

When an employer hires a CRA or other intermediary to perform or report on a drug test. When a CRA reports the results of a test, such report falls within the definition of a consumer report. When a drug counselor or some other intermediary reports such information to an employer, whether or not the information is a consumer report depends upon whether the intermediary has "assembled or evaluated" the information, in which case the FCRA applies, or whether the intermediary has only acted as a passive collector of the sample or transmitter of the information, in which case the FCRA does not apply.⁴⁹

An outside investigator is hired to assist an employer to investigate the sexual harassment of current employees.

The specific situation of an outside investigator (including outside legal counsel) being hired to assist an employer in a sexual harassment investigation of current employees was addressed in a recent FTC legal staff letter.⁵⁰ The information gathered in a sexual harassment investigation will go beyond a "consumer report" to become an "investigative consumer report," because the investigation will include information about employees character, general reputation, and personal characteristics obtained from interviews with fellow employees and associates. If an employer conducts the investigation using its own employees as investigators, then the FCRA is not implicated, because, as stated above, the information assembled and gathered is not under the definition of a consumer report.⁵¹

Protecting the confidentiality of sources.

Protecting the confidentiality of sources for an investigative consumer report may be important in order not only to obtain candid opinions in the first place but also to protect the sources from possible harassment or even physical danger in some situations. The FCRA requires that the full report be disclosed.⁵² It is, however, possible for an employer to protect these sources by requesting that a CRA provide it with a report that does not specifically identify the sources for the information. The FCRA's only requirement is that the full report be disclosed.⁵³

Legitimate purpose in requesting a consumer report.

An employer needs a legitimate purpose under the FCRA to request a consumer report, including using the information "for employment purposes" or for another "legitimate business need" as long as that need is "in connection with a business transaction that is initiated by the consumer."⁵⁴

(Continued on page 8)

PRE-EMPLOYMENT SCREENINGS, EMPLOYEE INVESTIGATIONS, AND THE FAIR CREDIT REPORTING ACT

(Continued from page 7)

PENALTIES.

Damages for violation of the FCRA include (i) the consumer's actual damages for negligent violations or actual damages of up to \$1,000 for willful violations, (ii) punitive damages for "willful" violations,⁵⁵ (iii) costs, and (iv) the consumer's attorney fees.⁵⁶ As a practical matter, an employer's biggest exposure for violation of the FCRA in most cases is going to be the payment of the plaintiff's "reasonable attorney fees." There is also no precise upper limit on punitive damages. While "[p]unitive damages are permitted even without malice or evil motive, . . . they must be realistic rather than fanciful."⁵⁷ Jurisdiction is proper in federal court, and lawsuits may be brought by the consumer or the FTC.⁵⁸ The defendant may win attorney fees if a court determines that the lawsuit was brought in bad faith or for purposes of harassment.⁵⁹

Attorneys can be liable under the act for actual and punitive damages and for the plaintiff's reasonable attorney fees.⁶⁰ Requesting a report from a CRA in knowing violation of the act and under false pretenses, such as misstating the real purpose for the request or misstating the intended use of the consumer report, subjects the requestor to criminal penalties.⁶¹

— END NOTES —

¹Public Law 104-208, 110 Stat., 3009-426 (Sept 30, 1996).

²FTC staff opinions are persuasive authority, and function as a replacement for regulations. In a staff attorney letter, the FTC noted that it "does not have the authority to issue substantive regulations implementing the amended FCRA," and instead of issuing "staff opinions" to assist in the interpretation of the act. Letter from Thomas Kane, FTC staff attorney, to Michael Cast (Oct 27, 1997) p.3. This and other staff attorney letters have a standard disclaimer at the end, stating that "[t]he views set forth in this opinion are those of the staff, and are not binding on the Commission." *Id.* Nevertheless, while not binding, the opinions would be persuasive authority in court. Staff letters are available on the World Wide Web at www.ftc.gov/os/statutes/fcra/.

³FCRA 604(b)(3)(A); 15 USC 1681b(b)(3)(A); letter from William Haynes, FTC staff attorney, to Douglas Hahn (July 8, 1998).

⁴Letter from Ronald Isaac, FTC staff attorney, to Herman Allison (Feb 23, 1998) p.2.

⁵FCRA 603(d)(1); 15 USC 1681a(d)(1) (emphasis added).

⁶FCRA 603(h); 15 USC 1681a(h).

⁷FCRA 603(e); 15 USC 1681a(e).

⁸Primarily at FCRA 606; 15 USC 1681d.

⁹FCRA 603(f); 15 USC 1681a(f) (emphasis added).

¹⁰Also see R. Seep, *What Constitutes [a] "Consumer Reporting Agency" within [the] Meaning of 15 USC § 1681A(F)*, 101 ALR Fed 751 (1991).

¹¹Letter from Thomas Kane, FTC staff attorney, to Michael Cast (October 27, 1997) p.1.

¹²Letter from William Haynes, FTC staff attorney, to David Islinger (June 9, 1998) p. 2.

¹³975 F2d 1093, 1096 (CA5, 1992).

¹⁴768 F2d 456, 466 (CA1, 1985).

¹⁵573 F2d 1109, 1111 (CA9, 1978).

¹⁶Letter from William Haynes, FTC staff attorney, to Richard Hauxwell (June 12, 1998) at p. 2. Concur: "[A] state agency that is providing information that is generally available to the public should not be considered a 'consumer reporting agency' (CRA) under the FCRA, and the communication of that data by such an agency to an employer or other party should not be considered a 'consumer report.'" Letter from Clarke Brinckerhoff, FTC staff attorney, to Gail Goetze (June 9, 1998) p.1 (opinion in the context of hospitals requesting criminal background checks on employees within two working days of their hiring in accordance with Missouri law).

¹⁷Letter from Mr. Brinckerhoff to Steven Slyter (June 12, 1998) (responses to questions #3 and #4) pp. 3-4.

¹⁸FCRA 603 (o) ("excluded communications"); 15 USC 1681a(o).

¹⁹... that is made to a prospective employer for the purpose of (a) procuring an employee for the employer; or (B) procuring an opportunity for a natural person to work for the employer;" *Id.* Arguably, "procuring" encompasses more than initial hiring. This language also seems to cover independent contractors and contracts with outside sales representatives.

²⁰FCRA 603(f); 15 USC 1681a(f).

²¹Letter from Mr. Brinckerhoff, FTC staff attorney, to Stacy Lee (June 26, 1998) p.1. (a business that simply receives medical records and attending physician statements for insurance underwriting purposes, places them in envelopes, and mails them to insurers for their evaluation does not become a CRA, because the business's action "is entirely mechanical and does not in any way determine the content of the material sent to the client").

²²973 F Supp 1320 (CD Utah, 1997).

²³*Id.* at 1333 (citations omitted) (the law firm was handling over 9,000 dishonored checks for CheckRite, which made up over one-third of the firm's business).

²⁴*Id.*

²⁵Letter from William Haynes, FTC staff attorney, to Richard LeBlanc (June 9, 1998) pp. 1-2.

²⁶Attorneys need to be aware that, in general, trial preparation is not a legitimate purpose under FCRA 604(a); 15 USC 1681b(a) for requesting a CRA to supply a consumer report. See *Duncan v Handmaker*, 149 F3d 424, 427 (CA6, 1997). However, an attorney may request a consumer report to collect a debt owed to a client. See *Allen v Kirkland & Ellis*, 1992 WEST-LAW 206285 (ND Ill 1992). See note 60, *infra*.

²⁷FCRA 604(b)(2)(A); 15 USC 1681b(b)(2)(A).

²⁸FCRA 604(b)(1)(A); 15 USC 1681b(b)(1)(A).

²⁹FCRA 604(b)(2)(B), (C); 15 USC 1681b(b)(2)(B), (C).

³⁰FCRA 603(e); 15 USC 1681a(e).

³¹A *Summary of Your Rights Under the Fair Credit Reporting Act*, which is available from a CRA. It is also found at 16 CFR Part 601, Appendix A. This prescribed summary of rights may be downloaded from the FTC's site on the World Wide Web at www.ftc.gov/bcp/online/-edcams/fcra/summary.htm. The summary describes the consumer's rights to (i) access his or her file, (ii) dispute the accuracy of the information in the file, (iii) correct or delete inaccurate information, (iv) prevent the release of outdated information, (v) consent before information is released, and (vi) sue violators.

³²Letter of Thomas Kane, FTC staff attorney, to Carolann Hinkle (July 9, 1998) pp. 1-2 (interpreting FCRA 603(d)(2)(A); 15 USC 1681a(d)(2)(A)). See also letter of William Haynes, FTC staff attorney to John Beaudette (June 9, 1998) p.3.

³³FCRA 606(b); 15 USC 1681d(b).

³⁴FCRA 604(b); 15 USC 1681b(b) (stating the consumer's rights).

³⁵FCRA 603(k)(1)(B)(ii); 15 USC 1681a(k)(1)(B)(ii) (defined as "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee."

³⁶For applicants for jobs and for employees in the trucking industry, no pre-adverse action disclosure is necessary; instead, within three days after an employer makes an adverse decision, it must provide a written, electronic, or just an oral statement including the name of the CRA and that the consumer may get a copy of the report from the CRA. FCRA 604(b)(3)(A); 15 USC 1681b(b)(3)(A) (part of Public Law 105-347 (Nov 2, 1998)).

³⁷FCRA 615(a); 15 USC 1681m(a). See letter of Clarke Brinckerhoff, FTC staff attorney, to Eric Weisberg (June 27, 1997) (summarizes obligations of employers taking adverse action under the FCRA).

³⁸Letter of Thomas Kane, FTC staff attorney, to Carolann Hinkle (July 9, 1998) p.2 (interpreting FCRA 604(b)(3); 15 USC 1681b(b)(3)).

³⁹FCRA 603(d), (e) & (f); 15 USC 1681a(d), (e) & (f).

⁴⁰FCRA 603(o) ("excluded communications"); 15 USC 1681a(o). Such communications must be for the purpose of "procuring an employee" and made by a person who regularly does such work. Disclosure still requires the consumer's consent. See note 19, *supra*.

⁴¹FCRA 603(o)(5)(C)(i); 15 USC 1681a(o)(5)(C)(i). See letter of William Haynes, FTC Staff Attorney, to Douglas Hahn (July 8 1998) p.2 (a CRA may provide employer with a report that does not identify sources).

⁴²FCRA 603(d)(2)(A); 15 USC 1681a(D)(2)(A).

⁴³26 F3D 346, 348 (CA2, 1994) (and cases cited herein).

⁴⁴This four-point test is described in *Todd v Associated Credit Bureau Services, Inc.*, 451 F Supp 447 (ED PA, 1977) (store and collection agency are not CRAs).

⁴⁵FCRA 610(e); 15 USC 1681h(e). Sections 616 and 617 (15 USC 1681n, 1681o) deal with penalties for willful and negligent violations of the FCRA. See, *infra*. This sub-section has been interpreted as not creating a separate cause of action where the information is not part of a consumer report. See, *Melendez v Citibank*, 705 F Supp 67, 69 (DC PR, 1988).

⁴⁶MCLA 423.452. Before this statute, Michigan employers had a qualified privilege to make reference statements as long as they were made without knowing of their falsity or without a reckless disregard for their truth. See, *Dalton v Herbruck Egg Sales Corp.*, 164 Mich App 543; 417 NW2d 496 (1987) (statement that former employee was not reliable did not constitute slander).

⁴⁷*Hodge, supra*, 975 F2d at 1095 (citing *Peller v Retail Credit Co.*, 359 F Supp 1235 (ND Ga 1973) (marijuana use a consumer report if released to prospective employers)).

⁴⁸FCRA 603(d)(2)(A)(i); 15 USC 1681a(d)(2)(A)(i).

⁴⁹See letter of William Haynes, FTC staff attorney, to David Islinger (June 9, 1998) pp. 1-2.

⁵⁰See letter of Christopher Keller, FTC Staff Attorney, to Judi Vail (Apr 5, 1999).

⁵¹FCRA 603(d)(2)(A), (e) & (f); 15 USC 1681a(d)(2)(A), (e) & (f).

⁵²FCRA 604(b)(3)(A), 609(a); 15 USC 1681b(b)(3)(A), 1681g(a).

⁵³See letter of Mr. Haynes, FTC staff attorney, to Mr. Hahn (July 8, 1998), p. 2 (suggesting this solution to protect the confidentiality of sources).

⁵⁴FCRA 604(a), (b); 15 USC 1681b(a), (b). See, *Russell v Shelter Financial Services*, 604 F Supp 201, 202-203 (WD MO, 1984) (acquiring consumer report to determine whether former employee had embezzled funds was not a permissible purpose).

⁵⁵"Willfulness" under the FCRA means "knowingly and intentionally committing an act in conscious disregard for the rights of others;" it does not require a showing of maliciousness. *Philbin v Trans Union Corp.*, 101 F3d 957, 970 (CA 3, 1996).

⁵⁶FCRA 616, 617; 15 USC 1681n, 1681o.

⁵⁷*Pinner v Schmidt*, 805 F2d 1258, 1263, 1265 (CA 5, 1986) (remittitur to \$25,000 where \$100,000 in punitive damages plus \$100,000 in compensatory damages excessive where plaintiff showed no actual damages and where CRA's violation was in overstating an overdue account's balance by \$49,50).

⁵⁸FCRA 618; 15 USC 1681p.

⁵⁹FCRA 616, 617; 15 USC 1681n, 1681o.

⁶⁰See, *Bakker v McKinnon*, 152 F3d 1007 (CA 8, 1998) (\$500 actual and \$5,000 punitive damages for each of three plaintiffs because of attorney's willful violation of the FCRA in ordering credit reports on opposing party in dental malpractice action and on his two adult daughters, despite attorney's alleged purpose of seeking information concerning defendant's ability to satisfy a judgment and defendant's alleged efforts to transfer assets).

⁶¹FCRA 619; 15 USC 1681q. See discussion in *Duncan v Handmaker*, 149 F3d 424, 427 (CA6, 1997) at 426. ■

SOMEHOW YOUR STORY DON'T RING TRUE

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"Impeachment," writes Professor Thomas A. Mauet, "is the most dramatic trial technique in the lawyer's arsenal." It can have a "devastating effect," he writes. "Jurors appreciate effective impeachment. They enjoy seeing a witness get 'caught' changing his story." Mauet, *Trial Techniques* (5th ed., 2000), at 273.

Not only jurors appreciate effective impeachment. So does Ray Charles. He provides these enduring examples, transcribed by me from "I've Got News For You" on *Ray Charles-Genius + Soul = Jazz* (Impulse! Records, 1961) (omitting some of the "wells," "ohs," "oos" and a few of the "baby, baby, baby" and "oh little girl" lines, which sound a lot better than they look in print):

You said before we met,
That your life was awful tame.
Well, I took you to a night club,
And the whole band knew your name.

Well, baby, I've got news for you.
Oh, somehow your story don't ring true.
Well, I've got news for you.

You phoned me you'd be late,
Cause you took the wrong express.
And then you walked in, smilin'
With your lipstick all a mess.

Oh let me say it to you little mama,
I've got news for you.
Your story don't ring true, little girl,
I've got news for you.

That's impeachment: I've got news for you, witness, somehow your story don't ring true.

The mechanics of impeachment are simple. First, recommit the witness to the testimony you're about to impeach. Set the stage for contrasting it with the witness' earlier inconsistent statement. Second, validate the impeaching statement: show it's reliable because it was made closer in time to significant events and under circumstances that enhance its credibility. Third, impeach: confront the witness with the inconsistent statement and have the witness admit making it.

While the mechanics are simple, more is required to be effective. The cross-examiner must have the right style — voice inflection, attitude and body language, etc. — to communicate the right note of disapproval and dignified triumph. Also, of course, it's critical that the content of the impeachment is such that it will have the desired effect: to discredit the testimony and the witness. I learned this latter point years ago, waiting in a courtroom to argue a motion. I watched a *pro se* defendant in an armed robbery trial cross-examine the complaining witness. The defendant had the impeachment mechanics down, and lots of style, but something was missing. It went something like this:

Q. Now Mr. O'Brien, you just testified that when I robbed you, I was wearing a dark blue shirt and khaki-colored pants, right?

A. Yes.

Q. Mr. O'Brien, you testified at the preliminary examination in my case, didn't you.

A. Yes.

Q. And that was last December, only about a month after you say I robbed you, isn't that right?

A. Yes.

Q. And at that preliminary examination, you testified under oath and you were sworn to tell the truth, and you did tell the truth then, right?

A. Yes.

Q. And you testified at that preliminary examination — and I'm reading from page 43 of the official transcript, see that — that when I robbed you I was wearing "a dark blue shirt and *tan* pants." You testified like that, didn't you?

A. I guess so.

Q. So, you testified under oath months ago that I was wearing *tan* pants when I robbed you and you come in here today and say I was wearing *khaki-colored pants*! Were you lying then or are you lying now? Which is it?

A. [Looking to the judge for help] I, uh... ..

JUDGE. Okay, Mr. Smith, you made your point.



"Were you lyin' then or are you lyin' now?"

The mechanics were good: recommit, validate, impeach. The attitude was pretty good, too, although the phrasing of some questions left something to be desired. The content just wasn't there, however. If the jurors reacted like me, they left this exchange with an indelible image of defendant Smith robbing witness O'Brien at gunpoint while wearing a dark blue shirt and tan or khaki-colored pants.

Building on Smith's lesson, I recently effectively impeached a witness with his prior inconsistent statement. At least my client thought it was effective. He gave me the highest compliment a client can give a lawyer, next to paying the bill on time. He said of my cross-examination: "Hey, that was just like on TV." Afterwards, we analyzed the impeachment. Here is what I did, how, and why.

It was in an NLRB trial, with high stakes. If we proved the company threatened, interrogated, and bargained in bad faith as charged, and the union's strike was caused in part by these unfair labor practices, the company would be directed to reinstate the 1,100 workers who ended their three-month strike with an unconditional offer to return to work. The company also would be liable for millions of dollars in back pay.

(Continued on page 10)

SOMEHOW YOUR STORY DON'T RING TRUE

(Continued from page 9)

One of the forty-odd “affirmative defenses” blamed everything on the union. The company’s theory was that the union was intent on striking from the beginning and only went through the motions at bargaining. Bull. Anyway, I was to cross-examine the company’s top officer. Let’s call him Mr. Bull.

The union had a letter Mr. Bull wrote on the eve of contract expiration. He wrote to bargaining unit employees, trying to persuade them to ratify the company’s “last, best, final” offer instead of striking. He wrote: “Both the union and the company negotiators worked hard to reach a fair and equitable agreement.” I liked that. Mr. Bull’s contemporaneous tribute contradicted the company’s surface bargaining defense. We could have gotten the letter in as an admission under FRE 801(d)(2), but I thought I could do some good with it on cross.

First, I established that while he rarely was at the table, Mr. Bull monitored negotiations and kept in close touch with his bargaining team. Being the big boss, Mr. Bull was only too happy to confirm his extensive knowledge of what occurred at the table. What I wanted, of course, was to show that Mr. Bull’s opinion about the union negotiators’ hard work was informed.

Next, I gave Mr. Bull the opportunity to commit to the content of his letter — without, of course, calling his attention to the letter.

Q. You would agree that before the strike “both the union and the company negotiators worked hard to reach a fair and equitable agreement,” wouldn’t you?

I used the exact phrase in Mr. Bull’s letter, to foreclose later quibbling. There was little risk for me in this question. If Mr. Bull agreed, I’d show him the letter, and have both his testimony and the letter undermining the company’s defense. If he disagreed, on to impeachment. Watching Mr. Bull, I could see that he was trying to figure out the right answer — and that he wasn’t prepared on his letter. He displayed no recognition that I was using his words. Finally, the wheels stopped turning inside Mr. Bull’s head. He’d figured out, so he thought, that I wanted an affirmative answer. Mr. Bull didn’t get to be the big boss by agreeing with union lawyers.

A. I would agree that the *company* tried very hard to get an agreement.

His tone displayed satisfaction at side-stepping my question. *Not good enough, Mr. Bull. Let’s try again.*

Q. Wouldn’t you *also* agree that the *union* negotiators “worked hard to reach a fair and equitable agreement?”

I delivered my question with mild surprise in my voice, communicating: *Huh, I didn’t get the answer I was expecting.* Mr. Bull’s brain went back into high gear. *Ah-ha, the union lawyer doesn’t like my answer. I must be on the right track. Here’s more of the same.*

A. Not necessarily.

I then communicated total surprise, kind of like in *Casablanca*: *I’m shocked, shocked, Mr. Bull, that you’re not agreeing with me.*

Q. Uh, that’s not true? That statement is not true?

Now Mr. Bull knows he’s on the right track. *The union lawyer really doesn’t like my answer, so let’s push the knife in a little deeper.* With a wry smile:

A. I’m not sure I would agree with that statement, no.

Well, Mr. Bull, let’s give you one last chance to do the right thing. And let me take this opportunity to use a little polite sarcasm.

Q. You’re not sure? You’re the only one who can be sure about this. So, let me ask you again and see if I can get a definitive answer from you, if possible. Would you agree that as of the strike, it was your viewpoint that the *union* negotiators “worked hard to reach a fair and equitable agreement?”

Sarcasm, eh, thinks Mr. Bull. Well, let’s put the knife all the way into the smart-ass union lawyer.

A. No. I’m not sure I would agree with that.

Enough, already. Impeachment time.

Q. Mr. Bull, I’m handing you a letter that’s been marked as union exhibit 3 for identification. Please read it. Let me know when you’re done reading it and you’re ready for another question, okay?

A. Okay, I’ve read it.

Now for a little validation.

Q. That’s your signature on the letter, isn’t it?

A. Yes.

Q. It’s on company stationery, isn’t it?

A. Yes.

Q. You had this letter distributed to all 1,100 bargaining unit members, didn’t you.

A. Yes, I did.

Q. Read the date at the top, right there [pointing].

A. September 30, 1997.

Q. The collective bargaining agreement expired at midnight September 30, 1997, didn’t it?

A. Yes.

Q. You also sent this letter to the union?

A. I would imagine I did.

Q. You also sent it to supervision and management, another 200 or so people?

A. Yes.

Q. You had this letter distributed to these 1,300 or so employees and the union on September 30, 1997, didn't you?

A. Yes.

And, now, Mr. Bull, I've got news for you. Somehow your story don't ring true.

Q. And you wrote in the second paragraph of that letter — follow along with me while I read the words I'm pointing to — that "Both the *union* and the company negotiators have worked hard to reach a fair and equitable agreement." I read that correctly, didn't I?



"Somehow your story don't ring true."

A. Yes.

Q. And that was your viewpoint on September 30, 1997, wasn't it?

A. Yes, I guess so.

Just like on TV. By admitting his earlier statement, and its truth, Mr. Bull undermined his testimony and credibility as well as the company's defense.

Actually, my last question may have been that one-question-too-many that imprudently gives the witness an opportunity to explain. I went with my instinct, despite the possibility that Mr. Bull would say something like: *"Well, no, that really wasn't my viewpoint. I thought the union negotiators were obstructive and bargaining in bad faith from the very beginning. I thought the union was interested in a strike, not a fair and equitable contract. But I felt that if I was frank about this in my letter, it would defeat its purpose, to get the employees to seriously consider that the company proposal was a fair offer, despite the union's efforts to torpedo negotiations. So, I used some public relations, praising all the negotiators, so that the union's bad faith would not become a barrier to the employees' consideration of the company offer. So, to answer your question, that language does not really reflect my viewpoint or do justice to the union's bad faith bargaining."*

If Mr. Bull gave such an explanation, however, he'd be admitting that he lied in writing to 1,300 people to serve the company's self-interest. Then I'd have a few more questions. As that armed robber might argue, were you lying then or are you lying now, which is it? Anyway, Mr. Bull saved me further efforts — and vindicated my instinct — by admitting the truth of his earlier statement.

The letter also went into evidence. The use of a document enhances the impact of testimonial impeachment. Ray Charles knows this, too.

You wore a diamond watch.
Claimed it was from Uncle Joe.
When I looked at the inscription,
It said "Love from Daddy-O."

Baby, I wanna say I've got news for you.
If you think that jive will do, let me tell you,
I've got news for you. ■

LABOR AND EMPLOYMENT LAW SECTION DISTINGUISHED SERVICE AWARD NOMINATIONS



The State Bar of Michigan Labor and Employment Law Section presents its Distinguished Service Award to recognize individuals who have made outstanding contributions to the practice of labor and/or employment law. Award recipients are recognized at the Section's mid-winter meetings. Each recipient may designate a \$1,000 scholarship at a Michigan law school.

The Award is presented to individuals who:

1. have made major contributions to the practice of labor and/or employment law;
2. reflect the highest ethical principles;
3. have advanced the development of labor and/or employment law;
4. have a long-established commitment to excellence; and
5. are recognized and respected by all constituencies in the Section.

Nominations should be submitted to LELS Distinguished Service Award c/o David E. Khorey at Varnum, Riddering, Schmidt & Howlett LLP, Bridgewater Place, P.O. Box 352, Grand Rapids, Michigan 49501-0352, Fax: (616) 336-7000, E-mail: dekhorey@vrsh.com.

Nominations should address the five award criteria. Nominations for 2001 must be received by June 1, 2000.

SHOULD THE NLRB ALLOW PRETRIAL DISCOVERY OR ADMIT POLYGRAPH RESULTS?

Theodore R. Opperwall
Kienbaum Opperwall Hardy & Pelton, P.L.C.

One of the topics of the 1999 Bernard Gottfried Memorial Labor Law Symposium at Wayne State University Law School involved recurring litigation issues. Following a presentation by NLRB attorney Ellen B. Rosenthal regarding the “black letter law” governing these topics, John G. Adam of Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C. (presenting the labor perspective) and I (presenting the management perspective) debated these issues, including: (1) whether the NLRB should permit limited pre-trial discovery and (2) whether the results of polygraph tests should be admissible in NLRB proceedings. In the hope that this may spur further debate, here are some of my thoughts on these two topics.

DISCOVERY IN NLRB PROCEEDINGS

The Federal Rules of Civil Procedure have provided broad pre-trial discovery since 1938, and other kinds of employment litigation (both administrative and judicial) routinely provide for some form of pre-trial discovery. Yet the NLRB continues to follow a practice drawn from the Jencks Act, 18 U.S.C. §3500, which requires the production of witness affidavits (typically the sole pertinent pre-trial materials generated by the NLRB) only upon the respondent’s request *following* direct examination of the witness. The Jencks rule was designed to afford minimal due process in criminal proceedings brought by the U.S. government — not in civil or administrative proceedings — and has more to do with cross-examination than discovery. Nonetheless, the NLRB adopted it *in toto* several decades ago and has resisted efforts to change this internally declared practice. Under this practice, NLRB trials are necessarily and repeatedly interrupted following direct examination of witnesses to permit the respondent to review, for the first time, NLRB-prepared affidavits (or other adopted statements). The affidavits often are difficult and time-consuming to read (many are hand-written) and digest, disrupting the flow of the trial. Additionally, the process raises issues of fairness to the respondent. NLRB trials can be reminiscent of the “trial by ambush” that characterized federal practice before the 1938 discovery rules.

The NLRB has even extended the Jencks rule to shield affidavits in the possession of third parties, quashing subpoenas directing third parties to turn over affidavits earlier than the government would be required to under the Jencks Act. See *H.B. Zachry Co.*, 310 NLRB 1037 (1994). Does this extend the Jencks rationale too far? Nevertheless, the NLRB has recognized that otherwise non-disclosable materials (such as witness affidavits) may be producible under the discovery rules in concurrent employment litigation brought in state or federal court by an employer, union, or employee. *Maritz, Inc.* 274 NLRB 200 (1985). See generally *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983).

Several years ago, in an effort to eliminate delays during trial, the NLRB conducted a short-term experiment by which the Jencks practice was modified to permit disclosure of affidavits of expected witnesses the day before the hearing. This was thought to give the respondent time to review the affidavits, but not so much time as to jeopardize the NLRB’s purpose underlying the non-disclosure rule (i.e., to protect employees who participate in NLRB investigations). While the experiment seemed salutary, it came to an end and has not been pursued further under the current NLRB regime.

Of course, there is understandable concern about broadly applying litigation-style discovery rules to NLRB proceedings, such as permitting depositions of parties and witnesses. While broad discovery would bring NLRB practice more closely into line with practice in other forums, this writer’s view is that a wholesale opening of NLRB proceedings to such broad discovery may be unnecessary to achieve the objectives of saving time and educating parties regarding the merits of claims and defenses (with the natural impact on settlement). In other words, permitting deposition discovery might add too much in the way of effort, cost, and potential for abuse. Intermediate and limited forms of disclosure, however — even something so minimal as producing affidavits and exhibits a week before trial — could have a beneficial impact on the efficiency of and settlement rates for NLRB trials. How much more effective would a settlement discussion be if, a week before trial, the key pieces of evidence were on the table?

The subject of pre-trial discovery in NLRB proceedings has been hotly debated for decades, and likely will not be resolved in the near future. Respondents understandably would like to see broader discovery, charging parties may prefer less, and NLRB attorneys (who typically have little exposure to litigation-style discovery under state and federal court rules) probably prefer the *status quo*. Another experiment like that of several years ago might be fruitful, but this writer recommends that disclosure of witness affidavits and exhibits be made a week prior to the trial date and that a formal settlement conference conducted by a non-trial ALJ be held between the disclosure date and the trial date, to maximize the possibility of resolving the case. Procedures like that have seen notable success in other forums.

POLYGRAPH TESTS

Whether polygraph test results and related expert testimony should be admissible evidence is indeed controversial in litigation generally, as well as in the NLRB. The issue does not have a predictable labor or management alignment. Whether a polygraph test (presumably of an exculpatory nature) is deemed advantageous by a party naturally will depend on who is accused of what — e.g., an employee accused of a criminal act leading to a firing; an employer charged with bribery or some other misdeed, etc.

Historically, the courts have shown a severe hostility to admitting the results of polygraph tests based on the rationale of *Frye v. United States*, 293 F. 1013 (App. D.C. 1923). Under the so-called *Frye* standard, evidence of a scientific nature was rejected unless it had achieved a “general acceptance” within the scientific community. Naturally, over time, the degree of “general acceptance” of a particular type of scientific evidence would evolve, though polygraph tests have long engendered a high degree of skepticism because they usually “intrude” into a core issue that is thought to be the fact-finder’s special province.

NLRB PRACTICE AND PROCEDURE

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

The ground shifted several years ago with the Supreme Court's decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which clarified that Federal Rule of Evidence 702 superseded the *Frye* standard and that scientific evidence may be admissible based on the trial judge's consideration of four factors: (1) whether it has been tested by means of scientific methodology; (2) whether the testing technique has been subjected to peer review and publication; (3) whether an error rate exists and is determinable; and (4) whether the scientific technique has been generally accepted by the scientific community. Under the *Daubert* standard, the trial judge is to act as a "reliability gatekeeper" and apply these factors in a flexible manner — a point just reemphasized by the Supreme Court in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

Under the *Daubert* standard, state and federal courts have reached varying outcomes on the admissibility of polygraph tests. Some jurisdictions have created special notice and procedural requirements with regard to these tests. Significantly, in 1991 (two years before *Daubert*) the Military Rules of Evidence were amended to make polygraph test results and opinions *per se* inadmissible in military justice proceedings. In *United States v. Scheffer*, 523 U.S. 303 (1998), a Supreme Court majority upheld this *per se* rule as constitutional on the ground that there is no consensus that polygraph evidence is reliable, permitting a blanket exclusionary rule in military cases. The dissent vehemently argued the opposing view, i.e., that polygraph evidence is generally perceived as 90% reliable, putting it in the same ballpark as other areas of scientific evidence such as handwriting and fingerprint identification, and likely well ahead of eyewitness identification. The majority and dissenting opinions in *Scheffer* provide an excellent discussion of the competing perspectives and studies on this emotionally — charged issue.

The NLRB has had little exposure to polygraph evidence. Prior to *Daubert*, the NLRB affirmed two ALJ decisions which involved polygraph evidence. See *Big G Corp.*, 223 NLRB 1379 (1976) (polygraph showed suspicion of theft by retail employee) and *J.C. Penney Co.*, 172 NLRB 1279 (1968), *enforced*, 416 F.2d 702 (7th Cir. 1969) (polygraph corroborated decision-maker's testimony that he lacked knowledge of discharged employee's union activity). In neither of these cases, however, was the polygraph admissibility issue squarely and meaningfully presented to the Board.

Should there be a *per se* rule disallowing polygraph evidence, as in military justice proceedings? Or should such evidence, in light of the *Daubert* standard, be subject to the same type of FRE 702 analysis that would apply to other scientific evidence such as handwriting and fingerprint identification? Does polygraph evidence improperly take away from the designated fact-finder (an ALJ in NLRB proceedings or a jury in civil proceedings) the task of deciding a core issue, or perhaps the ultimate issue? Or is all expert evidence vulnerable to that accusation? As explained during the Gottfried Symposium, this writer does not advocate the willy-nilly admissibility of polygraph evidence, but would also resist a *per se* rule that precluded such evidence in NLRB proceedings regardless of the issue or focus. Like other forms of evidence, in an appropriate case and through appropriate procedures, polygraph evidence could well play a proper role. ■

The Bernard Gottfried Memorial Labor Law Symposium was held on October 21, 1999, at Wayne State University Law School. This year's program featured Board Member Peter Hurtgen who regaled us with his experiences as a new Board Member learning the ropes in Washington, D.C. Member Hurtgen's comments were witty and pointed out the difficulties that political appointees face when they receive appointments that require that they immediately begin deciding difficult and often controversial issues. Member Hurtgen also spoke of some of the current issues that are pending before the Board.

The Gottfried program this year also featured labor law Professor Robert McCormick from Michigan State University, Detroit College of Law who spoke to us on "Arbitration of employment disputes: managing the inevitable revolution." Professor McCormick was followed by two separate panel discussions, the first, dealing with "Privileged communication, bargaining strategy and witness statements." This panel featured NLRB Trial Attorney Ellen Rosenthal who gave an overview of the law in this area. She was joined by management attorney Theodore Opperwall and union attorney John G. Adam, who presented respectively management and labors views on this subject. The duo of Opperwall and Adam did their presentation in a point, counter point fashion, which was a first for the Gottfried Symposium and, I believe, was truly enjoyed by the audience.

Our second panel presentation involved "The changing employment relationship-temporary employment agencies, leased employees, independent contractors—who is the employer?" This subject is very much a current issue for labor practioners, has been the subject of several recent Board cases and as Member Hurtgen pointed out, is presently in front of the Board in the form of the *Greenhoot* issue which is being revisited by the Board. *Greenhoot, Inc.*, 205 NLRB 250 (1973) This panel featured Board trial attorney Dennis Boren who was joined by management attorney David Masud and union attorney Reginald Turner.

This years Symposium was, I believe, a resounding success not only in terms of the excellent presentations made by all of the speakers, but also because we were again able to present a scholarship to a deserving law student. The scholarship winner was Jerome Goldberg who is a third year student at Wayne State University Law School. Your continued support of this Symposium makes possible the awarding of these scholarships and the valuable educational presentations that are given by our speakers. I would also like to acknowledge the generous support the Symposium has received from the Labor and Employment Law Section which again this year sponsored law students to attend the Symposium.

Region seven's Local Practice and Procedure Committee met on September 15, 1999, at the law offices of Varnum, Riddering, Schmidt and Howlett in Grand Rapids. Our agenda included a variety of topics beginning with my remarks about the status of operations in region 7 and how we compare to other regional offices in terms of our casehandling activities. I specifically commented on the region's litigation, settlement and appeals reversal rates in addition to current intake statistics and our 10(j) program. While this subject occupied much of the discussion, we also managed to discuss briefly the issue of whether the Board's practice of allowing elections to take place when up to 10% of the voters will be

(Continued on page 14)

NLRB PRACTICE AND PROCEDURE

(Continued from page 13)

challenged is advisable. There was general recognition of the fact that this is the only way the Board will achieve quick elections when there are only a few disputed voters. There was also concern, however, that when these challenged voters are alleged to be supervisors and/or agents of the employer, it may raise serious problems that will tie the election results up for years in post election litigation. We also discussed the recent Sixth Circuit Court of Appeals decision in *NLRB vs. Detroit Newspapers*, electronic citation: 1999 FED app 0265P [6th Cir]. In this case, the Sixth Circuit reversed a district court judge who had ruled that an administrative law judge could decide the issue of privilege with respect to documents that were subpoenaed by Counsel for the General Counsel in conjunction with ongoing litigation. The district court judge concluded that the administrative law judge could make an *in camera* inspection of the documents and decide the privilege issue. The Sixth Circuit reversing concluded that, "Congress specifically reserved to the federal courts the authority to provide for the enforcement of subpoenas. [And] the District Court, not the administrative law judge, must determine whether any privileges protect the documents from production. The district court does not have the discretion to delegate [this] responsibility to an [administrative law] judge". The Court acknowledged that this is a matter of first impression in this circuit and the General Counsel has asked for an *en banc* re-hearing of this matter.

The next meeting of region seven's Local Practice and Procedure Committee will be at the end of January 2000, in conjunction with the mid-winter meeting of the Labor and Employment Law Section. If you have any questions or issues you would like this Committee to address, please contact me or any Committee member. ■

SUPREME COURT SO FAR "IMMUNE" TO LABOR ISSUES

While it is still early in the 1999-2000 term, the Supreme Court has not been impressed with labor-related issues. According to *United States Law Week*, the Supreme Court has granted *certiorari* in 27 cases thus far. Only two cases are labor-related. Both arise out of the same decision of the Eleventh Circuit and address states' 11th Amendment immunity in suits under the Age Discrimination in Employment Act. See, *Kimel v. Florida Board of Regents*, S. Ct. No. 98-791; *United States v. Florida Board of Regents*, S. Ct. No. 98-796.

If the past is any indication, the Court will likely grant *certiorari* in another 70 cases. In choosing those additional cases, the Court has several labor-related issues from which to choose, including the statute of limitations for ERISA breach of fiduciary duty claims, *prima facie* case and evidence requirements in Title VII actions, and compelled arbitration of wage and hour claims. If you want the Court to consider other issues, there is plenty of time left. Petition early, and petition often.

William E. Altman
Vercruysse Metz & Murray

SIXTH CIRCUIT RE-EXAMINES HOSTILE ENVIRONMENT CLAIMS AND ADDRESSES OTHER TITLE VII, FLSA AND NLRA ISSUES

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

From August, 1999 through November, 1999, the Sixth Circuit published approximately 22 cases dealing with a wide variety of labor and employment issues. The full text of Sixth Circuit decisions published after June, 1999, are available on the Internet at: "<http://pacer.ca6.uscourts.gov>". For older cases visit: "<http://www.law.emory.edu/6circuit/>".

EMPLOYER LIABILITY FOR RACIAL HARASSMENT EXPANDED

In *Jackson v. Quanex Corp.*, Docket No. 98-1515 (August 31, 1999), the Sixth Circuit dramatically expanded the class of potential plaintiffs in hostile work environment harassment cases. This decision now allows employees to support their claims through rumors of discrimination against *other* employees. The plaintiff claimed she overheard two supervisors discussing their desire to discharge minority employees and the idea of placing stars on their helmets for each minority fired. Later, plaintiff learned of racial slurs made in the presence of her African-American co-workers. In 1992 and 1993, plaintiff personally experienced racial slurs and claimed she regularly witnessed racially-charged graffiti in the women's restroom.

When plaintiff's case went to trial in March 1998, she testified about, and attempted to introduce testimony from, other Quanex employees regarding discriminatory conduct they experienced. The trial judge limited plaintiff's evidence to discrimination that she personally experienced. The trial judge ultimately entered judgment in favor of the company.

On appeal, the Sixth Circuit held that the trial court erred in limiting plaintiff's evidence and adopting an "extremely narrow view" of workplace harassment - "one in which every single member of a protected class would have to suffer a series of affronts both explicitly racial and personal in nature before she could claim the existence of a racially hostile work environment." The court held that "such a myopic view of harassment" is unacceptable, particularly in light of the Supreme Court's directive that courts are to consider "all of the circumstances" in determining whether a hostile work environment exists." The court held that, in light of the evidence plaintiff presented, the trial court should not have dismissed incidents that did not directly affect plaintiff or that did not carry explicit racial overtones.

COURT CLARIFIES STANDARD FOR ANALYZING HOSTILE WORK ENVIRONMENT CLAIMS

In *Williams v. General Motors Corp.*, 187 F.3d 553 (August 5, 1999), the Sixth Circuit reversed the district court's finding of summary judgment in favor of the employer on plaintiff's hostile work environment sexual harassment claim. The court stated that under current law a plaintiff must demonstrate that (1) the conduct alleged is objectively severe and pervasive enough to create a hostile or abusive work environment and, (2) she subjectively perceived the environment to be hostile or abusive and that it has altered her working conditions. See *Harris v. Forklift Systems*, 510 U. S. 17 (1993). The Sixth Circuit held that the district court misapplied this test by requiring the Plaintiff to show that she felt physically threatened and that she experienced a tangible productivity decline as a result of the harassment. Rather, the court stated that the *Harris* test is met when an employee shows a subjective feeling that her work environment was abusive — feeling physically threatened is not a requirement. Further, an employee need only show that harassment made it more difficult to do the job, a tangible productivity decline is not required.

TITLE VII - ADVERSE EMPLOYMENT ACTION

Upholding a district court grant of summary judgment to the defendant, the Sixth Circuit held that an African-American Assistant U. S. Attorney did not state a prima facie case of race discrimination because she had not alleged adverse employment action. The court held that plaintiff's mid-range performance evaluation of "fully successful" did not constitute an unlawful employment action under Title VII. The Sixth Circuit stated: "If every low evaluation or other action by an employer that makes an employee unhappy or resentful were considered an adverse action, Title VII would be triggered by supervisor criticism or even facial expressions indicating displeasure. Paranoia in the workplace would replace the prima facie case as the basis for a Title VII cause of action." *Primes v. Reno*, 80 FEP Cases 1345 BNA (1999).

E-MAILING POLICY CHANGES CONSTITUTES REASONABLE NOTIFICATION

In a case applying Michigan law, the Sixth Circuit found that by sending employees two e-mails notifying them that they are at-will employees and by publishing a copy of the revised policy manual on its intra-net system, the employer satisfied its burden of reasonably notifying the affected employees of the change in policy. As a result, the court affirmed the district court's dismissal of plaintiff's just cause breach of employment contract claim. In the alternative, the court held that even if the policy change was ineffective, there was no provision in the previous employment manual that created any promise of just-cause employment. *Highstone v. Westin Engineering, Inc.*, 187 F.3d 548 (1999).

GROOMING POLICY GIVES RISE TO DISPARATE TREATMENT CLAIM

In *Hollins v. Atlantic Co.*, 188 F.3d 652 (1999), the Sixth Circuit reversed a district court finding of summary judgment dismissing the plaintiff's Title VII disparate treatment claim. Plaintiff had alleged race discrimination based on the employer's

application of its grooming policy. The court held that the plaintiff presented sufficient evidence that the policy was pretext for discrimination. The employer repeatedly reprimanded an African-American woman for violating the policy which required women to wear a "neat and well groomed hairstyle." Plaintiff claimed that her hairstyles were neat and well groomed and presented no safety risk. However, the employer admonished her not to wear "eye catching" hair styles and cautioned her that when she wanted to change her hairstyle, she needed to get pre-approval. Plaintiff presented affidavit evidence that white women who wore identical hairstyles were not reprimanded. Also, a company representative testified that the company's unwritten "no eye catching hairstyles" policy was formulated on account of, and applied specifically to, the plaintiff.

FLSA - TIP POOLS

The Sixth Circuit recently ruled that a restaurant violated the FLSA by improperly including salad preparers in wait staff tip pools. The court based its decision on the fact that the salad preparers abstained from any direct contact with diners, worked entirely outside the view of restaurant patrons, and solely performed duties traditionally classified as food preparation or kitchen support work. *Myers v. Copper Cellar Corp.*, 8 WH Cases 2d (BNA) 975 (1999).

NLRA - SUPERVISORS; EXEMPTION FOR POLITICAL SUBDIVISION

In *Integrated Health Services of Michigan v. Teamsters Local 332*, 162 LRRM (BNA) 2273 (1999), the Sixth Circuit vacated the NLRB's finding that staff nurses were not supervisors and were thus excluded from coverage by the NLRA. The court found that the NLRB failed to meet its burden of proving that the staff nurses did not responsibly direct other nurses as asserted by the employer. Likewise, in *Kentucky River Community Care, Inc. v. NLRB*, 162 LRRM (BNA) 2449 (1999), the court held that nurses who regularly serve as the highest ranking employee of the facility, who have the authority to seek additional employees in the event of a staffing shortage, and who write up uncooperative employees, were supervisors under the NLRA. Also, in *Kentucky River Community Care*, the court upheld the NLRB's holding that a state statute permitting removal of the directors of a mental health facility, where the ensuing vacancy is filled by a vote of board members, does not make the facility a political subdivision and thus exempt from the coverage of the NLRA.

NLRA - BOARD ERRED IN REFUSING TO HOLD AN EVIDENTIARY HEARING

In *NLRB v. Gormac*, 162 LRRM (BNA) 2156 (1999), the court held that the NLRB erred in failing to grant the employer an evidentiary hearing on its objections to an election. The employer sought to set aside the election, alleging that the union used deception and misrepresentation while conducting a pre-election poll. The court held that when a prima facie showing of coercion is made by an employer, the Board is required to hold an evidentiary hearing. ■

EASTERN DISTRICT UPDATE

Jeffrey A. Steele
Brady Hathaway Brady & Bretz

Unequivocal Refusal To Arbitrate Commences Six Month Limitations Period

Local 43, Nat'l Ass'n of Broadcast Employees and Technicians v. Post-Newsweek Stations, (Docket No. 98-cv-74518, *dec'd* 9/30/99). Judge Friedman ruled that the six-month limitations period for a union's claim to compel arbitration commences when the employer takes an unequivocal position that it will not arbitrate. According to Judge Friedman's ruling, the limitations period began when the "employer made crystal clear at the commencement of the arbitration hearing ... that it absolutely objected to the arbitration on the grounds that the arbitrator lacked jurisdiction to decide the dispute." Summary judgment was proper because the union filed its suit to compel arbitration more than six months after the commencement of the hearing.

Good Faith Reliance On Attorney's Advice Nullifies WARN Act Liability

Kildea v. Electro Wire Products, 60 F. Supp.2d 710 (ED MI, 1999). Judge Gadola ruled that the employer was entitled to a complete reduction in damages where its violation of the Worker Adjustment and Retraining Act's notice requirements resulted from good faith reliance on its attorney's advice. The plaintiffs were indefinitely laid off in 1989, but believed they would eventually be recalled. When the employer decided in January 1990 to close the plant where the laid-off employees had worked, the employer retained an attorney to advise on how to comply with its WARN Act obligations. Based on the attorney's incorrect advice that the employer must only notify "active" employees, the employer did not notify the plaintiffs because they were laid off and inactive. Judge Gadola ruled that the plaintiffs should have been notified under the WARN Act. However, because the employer "subjectively intended to comply with the provisions of the WARN Act, and made an objectively reasonable, good faith effort to do so," Judge Gadola exercised his discretion to "completely" reduce the damages.

Substantial Contacts With Michigan Nullifies Choice Of Law Clause

Howting-Robinson Assocs., Inc. v. Bryan Custom Plastics, (1999 WL 728349 (ED MI, 1999)) Judge Taylor refused to honor the Ohio choice of law provision in an employment contract because Michigan had a more "substantial relationship" to the dispute. Although the employer is an Ohio corporation, the contract at issue was executed, negotiated and performed in Michigan. Under these circumstances, and particularly where "the Michigan Legislature intended for its citizens to receive greater protections in the collection of their sales commissions...", the Michigan Sales Representative Act applied and permitted the plaintiff to pursue exemplary damages and attorneys fees.

Derogatory Comments Insufficient To Sustain Hostile Environment Claim

Kirjas v. Henderson (Docket No. 98-CV-72756 *dec'd* 8/25/99). The plaintiff, who was born in Egypt to Yugoslavian parents, quit his job and filed a hostile environment claim. Plaintiff alleged that his supervisor often claimed that the plaintiff spoke and wrote like a foreigner, called him stupid and suggested that the plaintiff "should go back where [he] came from if [he] cannot speak 'normal.'" Judge Friedman ruled that although the comments, if made, "clearly indicate [the supervisor]'s lack of intelligence, sensitivity, and interpersonal skills" they could not sustain a hostile environment claim absent an allegation that the comments were so frequent that they interfered with the plaintiff's work performance.

Representation Of Total Disability Does Not Prevent ADA Claim

Gilhuly v. Consolidated Rail Corp. (Docket No. 95-CV-75171 *dec'd* 9/21/99). Judge Woods ruled that the plaintiff's representations to the Railroad Retirement Board that she was totally disabled does not prevent her from arguing that she is capable of performing her job. Judge Woods reasoned that the representation to the Board did not rule out the possibility that she could have performed her job with a reasonable accommodation because the representation to the Board was based on the employer's alleged refusal to grant the accommodation the employee requested. ■

INTERNET UPDATE

Scott G. Hornby
Esordi, Hornby & Sawicki, P.L.L.C.

This column focuses on a relatively new and somewhat unique webpage: <http://www.scheduleearth.com>. The mission statement touts the site as "the most comprehensive source of personal and professional development" on the Internet.

The website is quite a comprehensive source covering an array of industries and topics, including business, computers and technology, legal, human resources and others. Further, users can join discussion groups on various topics, link to related webpages, register for events, make travel plans, on-line shop, and even check the local weather.

Perhaps one of the website's most useful features is the ability to locate an event, seminar or otherwise, anywhere in the world by simply searching a general topic, date, city, state and even country. Users unable to locate a chosen topic can seek assistance through "ask the expert" feature, and Schedule Earth will research the issue and provide a timely response, usually within a 24 hour period.

Web surfers with little time to actively surf the Internet, who further seek a one-stop-source for professional, and even personal information, and assistance, will find [scheduleearth.com](http://www.scheduleearth.com) a good fit.

DEFENDANTS HAVE ANOTHER STRONG QUARTER IN THE WESTERN DISTRICT

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

Wetter v. Munson Home Health and Munson Home Care, Case No. 1:98-CF-807 (October 4, 1999). Judge Robert Holmes Bell granted summary judgment in favor of defendant because defendant's reprimanding of plaintiffs, two forty year-old nurses, for violating record keeping regulations, was not an "adverse employment action" and consequently, plaintiffs failed to present a prima facie case of age discrimination, retaliation or intentional infliction of emotional distress. While the reprimand could be the basis for future corrective action, it was not a tangible employment action which, as defined under law, must involve some change in salary, work hours or responsibility. Even if plaintiffs proved an adverse action, it was not because of age, but rather because accurate medical records are important.

Schwartz v. Berrien Springs-Oronoko Police Department, Case No. 1:98-CV-88 (August 5, 1999). Judge Wendell A. Miles granted summary judgment in favor of defendants and dismissed plaintiffs' sexual harassment claims because a supervisor is not individually liable and the police department, which never employed 15 or more persons, was not an "employer" under Title VII.

While courts may integrate multiple entities that have (1) inter-related operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership, this does not apply to municipal entities. Rather, courts presume governmental entities designated as separate and distinct under state law should not be integrated under Title VII, unless there is evidence the entity was structured to evade federal employment discrimination law or the public entities are closely interrelated with respect to control of fundamental aspects of the employment relationship. While the village and township fund the police department, a separate commission administered it. The court also dismissed the ECLRA and intentional infliction of emotional distress claims as time-barred.

Geerts v. II Stanley Co., Inc., Case No. 1:98-CV-696 (September 14, 1999). Judge Robert Holmes Bell granted summary judgment and dismissed the action because the defendants proved a nondiscriminatory reason for paying plaintiff less than her male co-worker. While the Equal Pay Act prohibits wage discrimination on the basis of sex for work that requires equal skill, effort, and responsibility, different pay for equal work is acceptable if based on a (1) seniority system, (2) merit system, (3) system that measures earnings by quantity or quality of production, or (4) differential based on any factor other than sex. Defendant based the pay difference on different hiring circumstances, salary requests, salary history, education, training and experience. Even though plaintiff argued her co-worker's education and experience were no better than hers, the court was not concerned with the actual qualifications, but whether the factor given was bona fide, not discriminatorily applied and does not have a discriminatory effect.

Pena v. City of Holland, Case No. 1:98-CV-410 (September 7, 1999). Judge Hugh W. Brennehan, Jr. granted defendant's motion for summary disposition because plaintiff had no direct evidence of age or national origin discrimination and was not qualified for the promotion as required when relying on circumstantial evidence according to the *McDonnell-Douglas* framework. The

court also dismissed plaintiff's claims for retaliation because he offered no evidence interviewers even considered his hostile work environment complaint nor any evidence to dispute the selected candidate's qualifications. Plaintiff also alleged the retaliation violated his First Amendment rights. While allegations that a firefighter lifted up the shirt of a rape victim would be protected as a matter of public concern, plaintiff only offered to support such allegations if the City considered hiring his son. Despite the disputed facts about the allegation and plaintiff's personal interest, plaintiff failed to present evidence that absent the protected conduct he would have received the promotion.

Ott v. Zadia Jackson and the City of Kalamazoo, Case No. 4:98-CV-125 (June 8, 1999). Judge Robert Holmes Bell granted a defendant's motion for summary disposition on 42 U.S.C. § 1983 and "deprivation of Constitutional Property Rights" claims, respectively. With respect to the § 1983 claim based on alleged defamation by City officials, the court reminded plaintiff (and others) that a § 1983 claim does not in and of itself provide a substantive right, but "merely provides a method for vindicating Federal rights." (quoting in part *Albright v. Oliver*, 510 U.S. 266, 271 (1994)). The court stated plaintiff based his constitutional (§ 1983) claim on the theory that certain defamatory statements were made based on plaintiff's race, African-American, and that his reputation was damaged as a result — impacting some "liberty" interest. Quoting *Siegert v. Gilley*, 500 U.S. 226 (1991), the court dismissed the claim and stated that "[d]efamation by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation. . . . [S]o long as . . . damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a [§ 1983] action." *Id.* at 233-34.

With respect to plaintiff's second federal claim regarding the separation agreement between plaintiff and the City, the court stated that the right to benefits under the agreement was not the subject of constitutional protection. The plaintiff also alleged that the City was liable for the acts of members of the City Commission, however, the court closed the door on the claim as well, stating "Municipal liability for the actions of employees [in this case — City commission members] may not be based on a theory of respondent superior." (quoting *Berry v. City of Detroit*, 25 F3d 1342, 1345 (6th Cir. 1994) (further citations omitted)). The court also dismissed the pendant state claims without prejudice.

Moore v. Penn Corp., Case No. 4:98-CV-170 (October 1999). Judge Wendell A. Miles granted summary judgment in this "hybrid" fair representation and breach of union contract case. With respect to the Company's motion challenging plaintiff's wrongful discharge, intentional infliction of emotional distress, and gender bias claims, the court ruled that (1) plaintiff committed a sufficient number of unexcused absences/infractions under the union contract and, thus, the wrongful discharge claim was subject to dismissal; (2) the conduct of the company was not sufficiently extreme, outrageous, or reckless to establish liability for the emotional distress claim ("mere insults, indignities, threats, annoyances, petty oppressions or other trivialities") are not actionable. See *Linebaugh v. Sheraton Michigan Corp.*, 198 Mich App 335 (1983); and (3) the plaintiff's gender bias claim was dismissed as untimely, because she failed to include the company in her initial EEOC charge, advanced against the union only. With respect to the union's motion, the court stated, *inter alia*, the plaintiff failed to allege facts sufficient to support the claim for a breach of duty of fair representation. The court dismissed the other claims against the union based on preemption under §301 and the §301 six month limitations period, as plaintiff failed to file her action against the union until one and one-half years after the union's final action on her grievance. ■

MICHIGAN COURT OF APPEALS UPDATE

Rosemary Schikora
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Two recent employment decisions deserve particular attention by both the plaintiff and defense bars. *Grow v W.A. Thomas Co.*, 236 Mich App 696 (1999) is significant insofar as the Court found that the after-acquired evidence rule does not limit recovery for non-economic damages. *Edelberg v Leco Corp.*, 236 Mich App 177 (1999) affirmed the dismissal of plaintiff's claim that he was wrongfully discharged in violation of public policy, for refusing to sign a "last chance agreement" he contended would have constituted an impermissible waiver of his rights to workers' compensation and unemployment benefits.

Antidote For Emotional Distress

In *Grow v. W. A. Thomas Co.*, plaintiff complained that she was constructively discharged as a result of the hostile environment sexual harassment she suffered at the hands of a male supervisor. The trial court dismissed her constructive discharge claim, leaving only her claim for emotional distress.

The case mediated for \$125,000, which plaintiff accepted and defendants' rejected. At trial, Grow testified about her emotional distress, including a suicide attempt and various physical ailments. She also testified, without objection, that she felt compelled to quit her job. Her treating therapist, a social worker, rendered expert testimony that Grow exhibited symptoms of post-traumatic stress disorder. The jury returned a verdict in plaintiff's favor of \$80,555 on her emotional distress claim. The trial court awarded her attorney fees and costs of \$43,376.66, as well as mediation sanctions of \$37,827.50, for a total judgment of \$192,684.

Defendants raised and lost a number of issues on appeal, primarily dealing with jury instructions and the qualifications of the therapist to testify as an expert. The most significant issue, however, was whether the after-acquired evidence rule applied to plaintiff's damage claim for emotional distress.

The Court noted that in 1995 the U.S. Supreme Court resolved a split among the circuits regarding whether the employer's discovery of evidence of the employee's wrongdoing (e.g., resume fraud), acquired only after the employee was illegally terminated, could bar recovery by the employee. In *McKennon v Nashville Banner Publishing Co.*, 513 US 352 (1995), the Court unanimously held that while such after-acquired evidence did not bar all relief, it operated to *limit* the recovery available for discharge in violation of the ADEA. Michigan courts have applied the rule to actions brought under the Elliott Larsen Civil Rights Act. *Smith v Union Twp (On Rehearing)*, 227 Mich App 358 (1998) (failure to hire); *Horn v Dept of Corrections*, 216 Mich App 58 (1996) (wrongful termination); *Wright v Restaurant Concept Management, Inc.*, 210 Mich App 105 (1995) (sexual harassment).

In *McKennon*, the Court held that where the after-acquired rule applies, front pay and reinstatement are barred, and back pay stops as of the date that the employee's misconduct is discovered. The Court rationalized that neither reinstatement nor front pay is appropriate because it would be "both inequitable and pointless to

order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." *Id.* at 361. Although back pay may still be appropriate, the calculation of back pay should end the date the misconduct was discovered. *Id.* at 362.

Noting that no Michigan decision had yet decided whether the rule barred or limited recovery for non-economic damages, *Grow* cited, without much discussion, a Fourth Circuit decision where the court assumed that both compensatory and punitive damages are available, notwithstanding the after-acquired evidence rule. *Russell v Microdyne Corp.*, 65 F3d 1229 (CA 4, 1995).

Concluding that the rule is "equitable in nature" and that emotional distress damages are not as easily quantified as economic damages, *Grow* distinguished the case before it from the usual after-acquired evidence case which involves a termination, "to ensure that an employee does not benefit from the employee's own misconduct or misrepresentation." *Grow* found no error in the trial court's refusal to give defendants' requested after-acquired evidence instruction. "In a case involving an allegation of emotional distress damages, however, the situation is much different." 236 Mich App at 710. Citing a pre-*McKennon* decision based on Ohio law, *Grow* stated: "[W]here a plaintiff seeks emotional distress damages, 'the injury is to one's person and plaintiff is entitled to be free of that injury regardless of her status as a dischargeable employee.'" *Id.* (citing *Baab v AMR Services, Corp.*, 811 F Supp 1246, 1262 (ND Ohio, 1993)) (emphasis added). The court found that a claim for emotional distress damages should be treated differently from one for purely economic damages with respect to the after acquired evidence rule. 236 Mich App at 711.

Comment: *Grow* is remarkable in that plaintiff proceeded to trial on nothing but an emotional distress claim, her constructive discharge claim having been dismissed, yet walked away with a judgment of almost \$200,000. Defendants' success in persuading the court that plaintiff should not be double compensated by an award of both attorney fees and costs, as well as mediation sanctions, may well have been a hollow victory in that the Court of Appeals, while it agreed, remanded for determination of appellate costs requested by plaintiff.

You Snooze You Lose

In *Edelberg v Leco Corp.*, plaintiff was an at-will employee. He was suspended pending discharge for sleeping and loafing on the job. The employer offered to "commute" his discharge to a suspension, if he would agree to sign a "last chance agreement" waiving all claims. When he refused, he was discharged. He filed a wrongful discharge action, claiming his discharge violated public policy.

The trial court found that plaintiff was an at-will employee, meaning that either he or his employer could terminate his employment at any time for any reason, or for no reason. *Suchodolski v Michigan Consolidated Gas Co.*, 412 Mich 692 (1982). The court noted, however, that *Suchodolski* recognized three situations where the discharge so contravenes public policy as to be actionable, even though the employee is at-will: when the employee is discharged (1) in violation of an explicit legislative statement prohibiting discharge of employees who act in accordance with a statutory right

or duty, (2) for the failure or refusal to violate the law in the course of employment, and (3) for exercising a right conferred by a well established legislative enactment. *Id.* at 695-96.

Edelberg claimed that his termination fell within the third exception. He contended that by signing the proffered last chance agreement, he would impermissibly waive his rights to future unemployment or workers' compensation benefits. The Court of Appeals disagreed. The Court acknowledged that while both MCL §418.815 and §421.31 contain anti-waiver provisions, "they do not grant specific rights to individuals; rather, they serve to invalidate agreements that purport to limit the rights of individuals." 236 Mich App at 181. The Court concluded that a statute that does not directly confer rights on a plaintiff is insufficient to satisfy the third prong of the public policy exception. *Id.*

Significantly, the Court refused to expand *Suchodolski* by creating a fourth public policy exception. The Court declined to find, as plaintiff urged, that an employer's intention to contravene public policy in discharging an employee constitutes a new exception. The court found that language plaintiff relied on from *Garavaglia v Centra, Inc.*, 211 Mich App 625 (1995), which suggested that this is the case, was simply dictum.

Comment: The public policy exceptions articulated in *Suchodolski* are frequently used to circumvent the apparent absolute bar posed by the at-will doctrine. *Edelberg* should caution counsel to examine the language of the exceptions carefully and ascertain whether plaintiff's claim of wrongful discharge actually satisfies any of the exceptions. ■

MICHIGAN SUPREME COURT UPDATE

David A. Rhem

Varnum, Riddering, Schmidt & Howlett, LLP

No Double-Dipping on Attorneys' Fees Under the PWDORA

Following its earlier decision under the Elliott-Larsen Civil Rights Act, the court issued a per curiam opinion in *Rafferty v. Markovitz*, No. 112535 (10/26/99) holding that prevailing parties in disability discrimination cases arising under the now Persons With Disabilities Civil Rights Act (PWDORA) cannot recover mediation sanctions and statutory attorneys' fees in the same case. The court determines that when a prevailing party has received attorneys' fees under the statute, it has no remaining "actual costs" for which compensation could be claimed under the mediation court rule. In its decision, the court "repudiate[d] the dicta" in *McCauley v General Motors Corp.*, 457 Mich 513 (1998), which left open the possibility that double attorneys' fees could be recovered where the attorney fee provision of a court rule and a statute served independent purposes. As a result, *Howard v Canteen Corp.*, 192 Mich App 427 (1991), has now been expressly overruled.

MERC UPDATE

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Since the previous issue of *Lawnotes*, the Michigan Employment Relations Commission has issued 15 decisions and orders in a variety of cases. A brief summary of some of those cases follows. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations' website at www.cis.state.mi.us/ber.

DISCRIMINATION

Ingham County Bd of Commissioners and Ingham County Sheriff, MERC Case No. C97 K-236 (April 16, 1999). The ALJ held that the employers violated PERA by discriminating against an employee who filed a grievance under the contract. The grievant was disciplined for allegedly making personal phone calls at work. The grievant claimed her discipline constituted disparate treatment. In response, the employers imposed additional discipline upon the grievant for falsely accusing the employers of disciplining her more severely than other employees because she was a female. The ALJ, relying on *MERC v Reeths-Puffer School District*, 391 Mich 253 (1974), concluded that the grievant had a right to allege disparate treatment without threats of repercussions. According to the ALJ, the employers' attempt to muzzle the grievant's defense of her grievance had a chilling effect on bargaining unit members who may consider filing a grievance and violated the Act. (No exceptions).

Wayne County (Sheriff's Department), MERC Case No. C96 E-95 (September 20, 1999). The ALJ held that the county did not violate PERA by conducting an investigation of the local union president concerning his outside employment while on workers' compensation. The county presented sufficient proofs to conclude that the investigation was warranted and unrelated to union activity. (No exceptions).

CONTRACT REPUDIATION

Ingham County Bd of Commissioners and Ingham County Sheriff, MERC Case No. C98 F-129 (September 29, 1999). The ALJ found that the employers violated PERA by unilaterally modifying and refusing to follow contractual procedures for filling vacancies in the detective bureau. The employers repudiated the parties' agreement by effectively rewriting it and rotating employees for up to three years rather than filling the vacancies properly. *See, e.g., Central Michigan Univ.*, 1997 MERC Lab Op 501. After exceptions had been filed, the parties resolved the matter by stipulating to dismiss the exceptions and eliminating the requirement that the employers post a notice of their violations of the Act.

South Lake Schools, MERC Case No. C98 K-223 (August 4, 1999). The Commission affirmed the ALJ and dismissed the union's claim that the district repudiated the parties' collective bargaining agreement by unilaterally changing health care plans. The ALJ found no repudiation of the contract because the parties had a bona fide dispute regarding whether the proposed new insurance plan was "comparable" to the current MESSA plan. The Commission concluded there was nothing in the record to support that the district ever implemented a change in health insurance benefits.

(Continued on page 20)

MERC UPDATE

(Continued from page 19)

UNIT CLARIFICATION — REFUSAL TO BARGAIN ISSUES

City of Kalamazoo, MERC Case No. C98 I-202 (September 30, 1999). The ALJ dismissed the Association's unfair labor practice charge claiming the city interfered with the administration of the union by reclassifying positions and assigning historical union work to nonunion personnel and/or by refusing to place clerical and technical positions in the bargaining unit. The ALJ indicated that generally such claims are resolved by filing a unit clarification petition, although there is precedent for resolving such claims as a refusal to bargain under Section 10(1)(e) of PERA. *See, City of Saginaw (Inspection Division)*, 1995 MERC Lab Op 538. According to the judge, the union offered no evidence of the duties and responsibilities of the positions at issue to permit a determination to be made regarding whether they shared a sufficient community of interest with the current bargaining unit positions. (No exceptions).

City of Lansing (Police Department), MERC Case Nos. C98 F-130, CU98 F-24, and UC98 F-31 (September 1, 1999). The FOP, which represents a unit of emergency dispatch non-supervisory employees, filed a petition seeking to add five new dispatch positions to its bargaining unit. The FOP also filed an unfair labor practice charge alleging that the city and the firefighters union, which represents firefighters and dispatchers, entered into an agreement allowing employees represented by the firefighters union to perform work which had previously been exclusively performed by FOP members. These charges arose when the city integrated its police and fire dispatch operations. The Commission, affirming the ALJ, concluded that the dispatch work at issue had never been exclusively performed by either unit. As such, the change in work assignments was a matter of management prerogative. *Citing Charlotte School District*, 1996 MERC Lab Op 193. MERC also found no evidence of a divergence of interest between the dispatchers at issue and the firefighters union and thus dismissed the unit clarification petition.

Northeast Michigan Community Mental Health District Board, MERC Case No. UC98 I-37 (September 29, 1999). The union, which represented residential training workers and activity therapists, filed a petition seeking to add the positions of community service worker and supported independence program worker to the bargaining unit. The union argued the positions were no longer casual in nature and should be part of the bargaining unit. The Commission held that the positions at issue had not been substantially altered since their creation. That is, the disputed positions have always worked on a regular full-time and part-time basis. Moreover, because the positions have been historically excluded from the unit, MERC concluded that they form a residual unit and can be accreted to the bargaining unit only by filing a proper election petition. *See, Jackson Public Schools*, 1997 MERC Lab Op 290.

City of Fenton, MERC Case No. UC98 A-3 (May 19, 1999). The City sought to remove six positions (police chief, fire chief, assessor, treasurer, director of public works and building and zone administrator) from a bargaining unit consisting of full-time administrative and supervisory personnel, claiming them to be executives. The Commission, citing *City of East Detroit*, 1986 MERC Lab Op 552, excluded the police and fire chief positions as executives because they are the highest ranking officials in their departments. The assessor and treasurer positions were similarly excluded from the unit because of the statutory nature of their functions and

the high level of responsibilities they assume. *See, Sterling Heights*, 1986 MERC Lab Op 763. Finally, the positions of director of public works and building and zone administrator were not excluded from the unit because they did not possess the wide-ranging authority and discretion to formulate policy on an employer-wide basis, and did not have direct access to the city's governing body.

OBJECTIONS TO ELECTION

Iosco County Medical Care Facility, MERC Case No. C97 L-271 (August 6, 1999). The ALJ found that the employer interfered with the election and discharged an employee because of her union activity. On exceptions, the Commission reversed the ALJ. The Commission found that the employer was not obligated to provide a wage increase in order to maintain the status quo because there was not an established pattern of wage increases consistent enough to amount to a settled practice. Furthermore, the Commission concluded that the employer's pre-election statements did not constitute a refusal to bargain by the employer, rather, they were an accurate statement of the law. MERC also held that the employer's suggestion that "if the union prevailed, layoffs may be required" did not rise to the level of objectionable conduct when read as a whole. Finally, the Commission found no evidence to support that the employee's discharge was based on union activity.

DUTY OF FAIR REPRESENTATION

Police Officers Labor Council, MERC Case No. CU97 F-25 (May 18, 1999). The Commission affirmed the ALJ's finding that the union breached its duty of fair representation toward one of its members, a probationary corrections officer. Two days before the member's probationary period was due to expire, the employer required her to sign a letter of understanding which extended her probationary period for six months. The member was advised that she had been rude to a citizen a few months ago, that there were problems with her time clock tapes and that she had released a prisoner early. None of those issues were previously brought to the member's attention. The member subsequently contacted the union steward and asked him to file a grievance. The member said she suspected the employer issued the letter in retaliation for her vocal opposition to the city's wage proposal. The next day, the member contacted the union's field representative, again asking that the union file a grievance. The union said there was nothing it could do for her. The Commission held that the union violated the duty of fair representation because the union did not object to the letter of understanding, make any attempt to modify its terms, verify the allegations which gave rise to the letter in the first place, or seek the member's side of the story. *Citing Service Employees International Union, Local 579 v Evans*, 229 NLRB 692; 95 LRRM 1156 (1977).

Amalgamated Transit Union, Local 1564, MERC Case No. CU98 J-52 (April 15, 1999). A union member, who was terminated by her employer, sued the union for allegedly failing to process her grievance to arbitration. The member allegedly assaulted a job applicant because of a previous personal problem she had with the applicant. Pursuant to the union's policy, the executive board made a recommendation to the membership not to process the member's grievance to arbitration. The member was provided the opportunity to address both the executive board and the membership regarding her discharge. The membership voted not to process the member's grievance to arbitration. The ALJ concluded that under these circumstances, the union did not breach its duty of fair representation. (No exceptions.) ■

SHOW TRIAL IN MEMPHIS: KING FAMILY CONSPIRACY LAWSUIT

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As we approach the year 2000, we read articles about the "greatest" athlete, inventor, businessman or leader of the century. Few people had as much impact as Dr. Martin Luther King, Jr. Although assassinated at age 39 while in Memphis trying to help striking sanitation workers, he left a great legacy. In protesting the Vietnam War, Dr. King condemned the United States in strong terms, telling us he was "greatly disappointed in America." But he also reminded us: "There can be no great disappointment where there is no great love."

It is with great disappointment that I speak critically of Dr. King's family for their misuse of the legal system. Using a wrongful death lawsuit, the family seeks to perpetuate falsehoods about Dr. King's 1968 assassination by James Earl Ray and to make false and inflammatory allegations of governmental involvement in the murder. But they should not be immune from criticism when they spread misinformation and undermine Dr. King's legacy.

On December 9, 1999, basking in a Memphis jury's \$100 award, the widow and son of Dr. Martin Luther King Jr. declared that the "verdict" in their wrongful death action proved there was a conspiracy of Oliver Stone-proportions that killed Dr. King. The "unknown co-conspirators" include the local, state and federal government (FBI, CIA, LBJ, etc.). The only "defendant" was 73 year old Lloyd Jowers. To make it easier for everybody, the defense lawyer admitted there was a conspiracy but that his client was a "small clog." According to the *New York Times*' December 10 front page article, the trial was a mockery of justice, noting that it included "testimony" from a 1993 "mock trial," other unsworn testimony, and "expert" testimony from a state judge (who had been removed from an earlier case involving James Earl Ray's attempt at retrial). *Www.nytimes.com*. The state judge, who apparently owns lots of guns, testified that James Earl Ray's gun could not have fired the fatal bullet.

The King family's wrongful death lawsuit alleged that the defendant and other "unknown persons living and dead acted in concert by having the rifle with James Earl Ray's fingerprints on it placed the sidewalk outside the rooming house" before or immediately after Dr. King was shot. The lawsuit alleged that the "illegal conspiracy" "included the killing of Dr. King and the coverup of that murder and the framing of another - James Earl Ray - for the murder of Dr. King." The lawsuit alleged that defendant Jowers "turned the rifle over to Raul or another person who took it away." Other than the defendant, the only other person identified is dead, aside from the "man known as 'Raul.'" To make matters even worse, the King family was represented by the lawyer (one Dr. Pepper) who had represented self-confessed assassin James Earl Ray! Pepper wrote a book about the assassination. You can read the complaint and a summary of the "trial" at Court TV's web site. *Www.courtvtv.com*.

As for the "finding" of a conspiracy, the jury was only asked: "Do you also find that others, including governmental agencies, were parties to the conspiracy as alleged by the Plaintiffs?" The jury answered "yes." Some finding! Which agencies? How about some names, dates and other details? You can read the transcript on the King Center's web site, which has special section "NEW! King Assassination Conspiracy Trial Transcript." *Www.thekingcenter.com*.

This was a show trial. It is troubling that our legal system was manipulated in such an obvious way. By all accounts the suit was collusive. The defendant had no real stake in its outcome. The apparent purpose was to "prove" a conspiracy of unnamed persons, with no one present to discredit the King family's theory. The "verdict" will be used by some to perpetuate falsehoods and undermine historical truth. It permanently damages the credibility of the King family.

Dexter King said it was not about the money, pointing out that the family only asked for a \$100 from the jury. But when people say it is not about the money, it is usually about the money. This "verdict" will be used, it is my bet, to justify or promote a new Oliver Stone movie. The web magazine *Slate* published a March 15, 1997 article revealing that the King family "signed a contract with Oliver Stone, who plans a movie about the assassination." *Slate* reports the family plans other efforts at cashing in on Dr. King's life, including lawsuits over reprints of "I Have Dream speech." *Content is King: Dexter King is a King of the 90's*, *Www.slate.com/Assessment/97-03-15/Assessment.asp*. After the movie deal was signed, the King family filed the 1998 state lawsuit against Jowers, thirty years after the assassination. Now that is a conspiracy!

If you want the facts, don't expect it from this show trial. Instead, read attorney/author Gerald Posner's great 1998 book, *Killing The Dream: James Earl Ray and the Assassination of Martin Luther King Jr.* or visit Posner's excellent web site, *Www.posner.com*. Posner's December 13, 1999 *Washington Post* article points out that the "Memphis trial was not about seeking the truth but a ploy to obtain a judicial sanction for a convoluted conspiracy theory embraced by the King family." *Www.washingtonpost.com*. Posner called the trial a "cynical scheme to give some official sanction to the discredited theory... it means little for history." As Dr. King used to preach, "The truth will set you free." It is sad and disappointing that a great man's family has championed the false allegations of the assassin and his lawyer.

Finally, if you want to learn more about Dr. King's life and accomplishments, check out Stanford University's Martin Luther King web site. *Www.stanford.edu/group/King/* Let us focus on his achievements and not the falsehoods perpetuated about his assassination by James Earl Ray's lawyer and Dr. King's son. Dr. King's legacy, tragically ended in Memphis in 1968 by James Earl Ray, should not be overshadowed by the Memphis show trial in 1999. ■



It is official. Leonard Page is the new General Counsel of the National Labor Relations Board. He was sworn in on November 29, 1999. Like his predecessor, Fred Feinstein, Leonard is a recess appointment by President Clinton. The General Counsel's position is one of great responsibility and power and we know the new GC will do a great job. Regarding the influence of Leonard's status as a *Lawnnotes* author on his appointment, let's just say he was never appointed GC before his *Lawnnotes* appearance.

NLRB CONTINUES TORRID PACE

George M. Mesrey and Jack VanHoorelbeke
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President Clinton recently announced the recess appointment of Detroit attorney Leonard Page as the General Counsel of the National Labor Relations Board. Page, a longtime attorney with the UAW, joins the Agency at a time when the Board is issuing a record number of decisions. The New GC will have a lot of reading to do as the Board continues to issue decisions at a torrid pace. Because well over 100 decisions were issued the last three months, we have selected 20.

EMPLOYER INTERFERENCE

1. Siemens Energy & Automation, 328 NLRB No. 164. Board determined that the employer did not unlawfully refuse to reinstate an employee after a strike and it lawfully suspended and subsequently discharged the employee for engaging in serious strike misconduct (i.e., throwing roofing tacks on the roadway at a vehicular entrance to the plant during the strike, and kicking at cars that pass through the picket line).

2. Nouveau Elevator Industries, Inc., 329 NLRB No. 11. Board held that the employer unlawfully interrogated employees about not voting for the existing union in elections for three separate bargaining units where a competing unit subsequently won.

3. Wire Products Mfg. Corp., 329 NLRB No. 23. Board found that the employer violated Section 8(a)(1) by encouraging employees to join Machinists Local 200 for the purpose of voting against a proposed collective bargaining agreement at a contract ratification meeting and then revoking their union membership after voting.

PROTECTED CONCERTED ACTIVITY

4. Dearborn Big Boy No. 3, Inc., 328 NLRB No. 92. Employer violated Section 8(a)(1) by discharging an employee who told other employees that the employer engaged in racially discriminatory hiring practices.

5. Piqua Steel Co., 329 NLRB No. 67. Dismissed complaint alleging employer violated Section 8(a)(1) by threatening to discharge and discharging the employee because of his protected concerted refusal to operate a crane he believed to be unsafe.

6. Bethany Medical Center, 328 NLRB No. 161. Employees were engaged in protective concerted activity when they walked off of their job for two hours in protest of conditions of employment.

ACCESS TO EMPLOYER PREMISES

7. Sandusky Mall Company, 329 NLRB No. 62. Employer violated Section 8(a)(1) by refusing to permit non-employee representatives of the carpenters union to distribute area standards handbills in its shopping mall while permitting access for other commercial, civic and charitable purposes; and by summoning police.

UNIT CLARIFICATION PETITIONS

8. John P. Scripps Newspaper Corp. d/b/a The Sun, 329 NLRB No. 74. Board set forth a new test to be applied in unit clarification proceedings which focuses on the work performed by the unit and the employees subject to the petition.

ELECTION OBJECTIONS

9. Randell Warehouse of Arizona, 328 NLRB No. 153. Overruled *Pepsi Cola Bottling Co.*, 289 NLRB 736 (1988), and held that union photographing or videotaping of employees engaged in protected activities during an election campaign, without more, does not interfere with employees' free choice.

10. Teamsters Local 299, 328 NLRB No. 178. Dismissed a complaint alleging that the union interfered with an election by photographing and/or videotaping employees who were entering and leaving Overnight's facility before, during and after the polling periods.

11. Mariner Post-Acute Network, 329 NLRB No. 14.

Set aside an election on the basis of an employer's letter to employees that suggested they might lose their jobs in the event of a strike. The Board explained that the employer's letter failed to adequately explain the consequences of an economic strike and the rights of economic strikers under *Laidlaw Corp.*

12. Tinius Olsen Testing Machine Company, 329 NLRB No. 37. Overruled the union's objection alleging that the employer violated *Kalin Construction Co.*, 321 NLRB 649 (1996), by distributing employee paychecks containing raises retroactive on the morning of election in an attempt to sway the election.

REMEDIES/BARGAINING ORDERS

13. State Materials, Inc., 328 NLRB No. 184. Issued a *Gissel* bargaining order based on conduct that was so outrageous and pervasive that a bargaining order might be justified even without inquiry into majority status on the basis of cards or otherwise.

SUPERVISORY TAINT/REPRESENTATION PETITION

14. Energy Systems & Service, 328 NLRB No. 125. Employer's installation crew leaders are statutory supervisors and dismissed the representation petition because their involvement in the organizing effort was so extensive and pervasive as to the validity of the union's showing of interest.

AGREEMENT NOT TO ORGANIZE

15. Lexington Health Care Group, LLC d/b/a Lexington House, 328 NLRB No. 124. Petition was barred by the union's express agreement not to organize the employees encompassed by the petition.

PERMANENT REPLACEMENTS

16. Thoreson-McCosh, Inc., 329 NLRB No. 63. Reaffirmed *Wahl Clipper Corporation* and held that six challenged former strikers were ineligible to vote because they were permanently replaced economic strikers who had not been reinstated within twelve months after commencement of the strike.

PROCEDURES IN ULP CASES

17. Westside Painting, Inc., 328 NLRB No. 110. Under §102.30 of its Rules and Regulations, witnesses in its unfair labor practices may not testify by telephone.

PREEMPTION

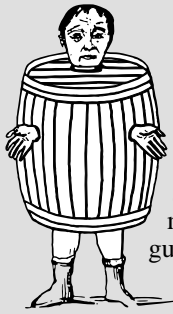
18. Albertson's/Max Food Warehouse, 329 NLRB No. 44. Overruled *City Markets, Inc.*, 266 NLRB 1020 (1983), and held that the Act preempts the union-security deauthorization procedures under Colorado law since the state statute places greater restraints on the right to file deauthorization positions.

SECTION 10(B):STATUTE OF LIMITATIONS

19. Ross Stores, Inc., 329 NLRB No. 59. Overruled *Nippondenso Mfg. U.S.A.*, 299 NLRB 545 (1990) and found that a sufficient factual relationship exist between a timely-filed Section 8(a)(3) discharge allegation in the original charge and two untimely-filed Section 8(a)(1) allegations in an amended charge.

SECTION 502 OF THE LMRA

20. TNS, Inc., 329 NLRB No. 61. Work stoppage was protected by Section 502 of the LMRA and thus, the employer was not entitled to permanently replace the employees who had walked off the job. ■



THE JOY OF LABOR LAW

NLRB Member Hurtgen: The Great Dissenter. Since his November 1997 appointment to the NLRB, former management attorney (and 1999 Gottfried Symposium guest speaker) Peter J. Hurtgen has earned the title, "the Great Dissenter." He has 123 dissenting (in whole or part) opinions out of 532 decisions since his first in March 1998, according to my Westlaw research. Hurtgen was confirmed by the Senate in 1997, along with union attorneys Wilma Liebman and Sarah Fox and management attorney J. Robert Brame, III. These appointments, a so-called "Great Compromise," led to a large number of dissenting opinions and a large increase in decisions over the past two years. Member Brame has issued 78 dissenting opinions in 429 cases. Far behind is Liebman with 32 dissents in 582 decisions. Does anyone have the time or energy to read all these decisions? Do NLRB members get paid by the word (with extra for dissents)?

Senate: Our House of Lords. Speaking of the Senate and Great Compromises, a new book points out that the Great Compromise of 1787 that led to the Constitution was not so "great," as far as the undemocratic nature of the Senate is concerned. The book, by F. Lee & B. Oppenheimer, *Sizing Up the Senate: The Unequal Consequences of Equal Representation*, (1999), points out: "With a few brief exceptions, the Senate has progressively become more malapportioned, and therefore less representative." Indeed, about 17% of the population is able to elect a Senate majority. Throw in the filibuster and you can see how a Jesse or Strom can raise havoc. This has led one scholar to state that the "Senate is beginning to look like the pre-reform British House of Lords." Now even the British are getting rid of the House of Lords, at least in part. We are likely, however, to be stuck *in perpetuity* with our own House of Lords because of Article V ("No State, without its consent, shall be deprived of its equal Suffrage in the Senate").

This is one reason labor law reform is a Herculean task, as shown by the Senate's defeat of the bill prohibiting permanent replacements. Although the bill passed the House, and the President was ready to sign it, the necessary 60 votes — not just 51 — to end a filibuster could not be obtained. Remember, people don't vote, states do.

Posner on Impeachment. Seventh Circuit Chief Judge Richard Posner has done it again. He doesn't hold back in his excellent new book, *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* (1999). Judge Posner — in Vincent Bugliosi fashion — takes to task the President, the Senate, the House, Ken Starr, the legal profession, the media, the law professors, and Chief Justice Rehnquist. While I admit finding fault with this group is not a hard task, the book does it in an objective and a judicious way. Some examples:

The Chief Justice's "yellow stripe robe": "The most solemn form of American trial was thus presided over by the highest judge in the land *dressed in a funny custom*. Maybe (though I doubt greatly doubt it) the Chief Justice was signaling what he thought of the proceeding." (At 168)

The Court's decision in *Clinton v. Jones*: "The Failure of Legal Reasoning." (At 217) "The Justices' lack of realism and their inability to differentiate among the types of lawsuits to which a President might be subjected are the most disturbing feature of the decision." (At 225) "At the very least, the Court could have instructed the district judge to manage the litigation in a manner designed to minimize embarrassment to the President . . . and could have reminded the judge that the soft spot in Paula Jones' suit was the question of injury and that the judge could decide that question first before subjecting the President to the indignity of being deposed." (At 228)

The President's lawyers: "Hence Clinton's lawyers had no inhibitions about making statements in the trial that, as intelligent people, they could not have believed." (At 245) "The lawyers' defense of the President against the charge of perjury was grounded in quibbling, hairsplitting equivocation, brazen denial of the obvious, truncated quotations out of context, and mischaracterization of the law." (At 242)

The President: "President Clinton's extraordinary behavior — an explosive mixture of lust and mendacity." (At 5) "It is clear beyond a reasonable doubt" that President Clinton "obstructed justice" by "perjuring himself" in the Jones deposition and before the "grand jury" and in responses to the House Judiciary Committee; "tampering with witnesses," and "suborning perjury." (At 54)

It is clear that the President was lucky Judge Posner was not the independent counsel. Only time will tell whether the Justice Department or Bill Gates will be lucky that Judge Posner was appointed to mediate a settlement in the Microsoft case. In a recent article in the online magazine, *Slate*, owned by Microsoft, Judge Posner was correctly called a "human Pentium processor," www.slate.com, having written 30 books and literally hundreds of law review and other articles. Talk about the prolific writer. Check out his biography at the University of Chicago School of Law, where he is a senior lecturer: www.law.uchicago.edu/Posner/

Chief Justice Sings Dixie. In addition to his funny robe, the Chief Justice's selection of songs to sing (yes, he tries to sing as well) at the Fourth Judicial conference in Virginia raised objections among the National Bar Association. The Chief Justice's rendition of *Dixie*, in the cradle of the old confederacy, raised protests from the African American lawyers group which finds the song offensive. At least the Chief Justice did not put the confederate flag on the sleeves of his robe!

Entomological Origin of "Scab." In a virtual treatise on the origin and meaning of "scab," an appellation that dates back to at least 1777, the Eleventh Circuit dismissed a libel suit against the pilot's union arising out of the 1989 Eastern Airlines labor dispute. *Dunn v. Air Line Pilots Association*, 162 LRRM 2577 (11th Cir. 1999). The court ruled that publication of a "scab list" was not defamatory because it was factually true, citing Supreme Court precedent on point. In dissent, Judge Tjoflao opined that calling someone a scab is a threat of harm. 162 LRRM at 2588. Right out of the pages of the Right to Work Committee, and in a *non sequitur* of gross proportions, he proceeds to equate name calling with violence, citing examples of violence from other strikes! This is judicial notice based on other people's conduct. It reminds me of a local state court judge who granted an employer's request for an injunction based on the proposition that strikes are violent. So much for evidence in the record.

John G. Adam



INSIDE LAWNOTES

- *Lawnnotes* is now Y2K compliant.
- Two looks at the Fair Credit Reporting Act. Todd Grant and John Cook review what employers need to know about the FRCA. Stan Moore focuses on the FRCA's application to law firms performing sexual harassment investigations for clients.
- EEOC Regional Attorney Adele Rapport addresses vicarious employer liability for unlawful harassment by supervisors.
- Stuart Israel writes about impeachment by prior inconsistent statements and Ray Charles.
- Ted Opperwall examines NLRB policies on pretrial discovery and the admissibility of polygraph evidence.
- Information on upcoming events and LELS business: Distinguished Service Award nominations for 2001; the LELS-ICLE-FMCS 25th annual labor and employment law seminar on March 29 and 30 in Troy; the 2000 LELS-MERC public sector labor law conference on June 6 and 7 in East Lansing; and more.
- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC; the Joy of Labor Law; websites to visit; and more.
- Authors John G. Adam; William E. Altman; John T. Below; John A. Cook; Gary S. Fealk; Todd W. Grant; Jack Van Hoorelbeke; Scott G. Hornby; Stuart M. Israel; Danielle N. Mammel; George M. Mesrey; Stanley C. Moore, III; Theodore R. Opperwall; Adele Rapport; David A. Rhem; William C. Schaub, Jr.; Rosemary Schikora; Jeffrey A. Steele; Douglas V. Wilcox and more.

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