



HOW TO INTERVIEW FORMER CORPORATE EMPLOYEES WITHOUT RISKING DISQUALIFICATION OR SANCTIONS

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One of the most litigated, contentious, and murky areas of professional conduct concerns efforts by attorneys to communicate with a party who *may* be represented in the matter by another lawyer. Motions on this issue reveal much hair splitting and argument concerning whether an employee had managerial responsibilities, was within a litigation control group, was exposed to privileged information, was an agent of the employer, or could bind the employer by his or her statements. Recent cases and ethics opinions show a trend toward allowing attorneys greater freedom to conduct *ex parte* interviews with former employees. *See* Ellen J. Messing and James S. Weliky, "Contacting Employees of an Adverse Corporate Party: A Plaintiff's Attorney's View," 19 Lab. Law. 353, 362-374 (2004). In this context, a federal district court recently held that an attorney could hold an *ex parte* interview with a doctor's former personnel manager concerning an employment dispute involving another employee even though the manager had supervised that employee and dealt with the doctor's attorney concerning that dispute. *Smith, v. Kalamazoo Ophthalmology*, 322 F. Supp. 2d 883 (W.D. Mich. 2004).

The court provided a roadmap for attorneys who want to conduct *ex parte* interviews with former employees without risking sanctions or disqualification. Specifically, the court advised that an attorney seeking this kind of interview should notify the opposing attorney of his or her impending meeting with the former employee to allow the other party an opportunity to seek a protective order limiting the scope of the *ex parte* interview to non-privileged information. The court discussed cases suggesting that courts in other states might further restrict or limit any such interview if the employee knows or possesses employer trade secrets or confidential information.

In this case Smith was a former employee of a physician and served as the office personnel manager. She alleged that the defendant reduced her working hours and her job duties. She also claimed that the defendant "thereafter hired much younger employees to perform job functions with which Smith had more experience and could have performed and that Defendant outsourced payroll work which Smith could have performed."

Smith filed a complaint with the Michigan Department of Civil Rights and a charge of discrimination with the Equal Employment Opportunity Commission claiming age discrimination. She later sued, claiming violations of federal and state law.

Smith's attorney, William F. Piper, interviewed Anne Marie Salliotte. "Salliotte was the office administrator from approximately March 2000 until May 2002...[and] was responsible for overseeing the day-to-day business operations of Defendant, including its accounting, payroll, and, after May 2001, its personnel functions....From May 2001 to May 2002, Smith reported to Salliotte." The employer's attorney, James B. Thelen, conferred with Salliotte on twelve occasions to discuss and provide legal advice regarding the reduction of Smith's hours and the employer's response to Smith's administrative complaint. Piper informed attorney Thelen that he wanted to depose Salliotte, who knew certain confidential information concerning the dispute between Smith and her employer. Thelen informed Piper that Salliotte was a party to attorney-client communications and that he would assert the attorney-client privilege and seek a protective order as to any such discussions.

"Sometime shortly thereafter Thelen contacted Salliotte and informed her that Piper wanted to depose her.... Thelen indicated that Salliotte would be willing to appear for a deposition and requested that Piper contact him to arrange a date for the deposition....According to Thelen, Piper never provided a deposition date or issued a deposition notice, nor did he respond to Thelen's assertion of the privilege or give Thelen notice that he intended to have *ex parte* contact with Salliotte..." But according to Piper, Thelen agreed to set up a deposition date but never got back with him. Piper also claimed that he told Thelen that he disagreed with Thelen's view on the issues of privilege and the propriety of *ex parte* contact with Salliotte.

Piper claimed that Salliotte initiated contact with his office, spoke to him concerning the employment dispute, and that he informed her that her conversations with her former employer's attorneys were off limits. Salliotte signed an affidavit reflecting the information she gave to Piper at the interview.

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STATEMENT OF EDITORIAL POLICY

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

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HOW TO INTERVIEW FORMER CORPORATE EMPLOYEES WITHOUT RISKING DISQUALIFICATION OR THE IMPOSITION OF SANCTIONS

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In determining the propriety of Piper's ex parte interview of Salliotte, the court reviewed Michigan's Rule of Professional Conduct 4.2, which provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." In considering the Rule's purposes and scope, the court noted that "neither the text of the Rule nor the comment indicates whether the proscription against contacts with an organizational adversary's employees extends to former employees." Nevertheless, the court found that neither the Rule nor the comments to it could be reasonably interpreted to apply to former employees, because they cannot bind the employer by their statements.



"May I speak to you about your former employer?"

The court discussed precedents pointing out the reasons why counsel should be able to interview an organization's former employees without the restrictions applicable to counsel interviews of represented parties. Specifically, the ethical dangers those restrictions are designed to prevent generally do not arise in ex parte interviews of former employees: a former employee generally no longer works on the organization's behalf, is usually not represented by the organization's counsel, and is unlikely to be a participant in the process leading to resolution or settlement of the dispute.

The court also discussed the American Bar Association Committee on Ethics and Professional Responsibility's determination that Rule 4.2 does not apply to former employees. While noting that some states substantially limit ex parte interviews, and that some ethics opinions strike a different balance between the need for attorney access to witnesses and the goal of preventing undue influence or attorney manipulation of witnesses, the court found that the ABA position reflects the majority position of state courts.

The court determined that because Salliotte was not an agent of her employer, she could not be a party and had no connection to the organization that could reasonably place her in the role of a party. Nevertheless, the court cautioned that counsel could not seek, discuss, or use any privileged information available to Salliotte. Accordingly, the court concluded that although Smith's attorney could conduct an ex parte interview with Salliotte, he could be sanctioned if further discovery proceedings revealed that he had inquired into areas subject to attorney-client privilege or work product doctrine protection.

The court did not address steps that employers could take to prevent the type of ex parte interview that occurred in this case, but employment attorneys should be alert to the predictable conse-

quences of this decision: Employers may insist that employees sign nondisclosure or nondisparagement agreements as consideration for their hiring, continued employment, increases in salary, or receipt of severance benefits on termination. These agreements may purport to limit a current or former employee's disclosure of information concerning the employer's activities or the employee's work-related conduct to disclosures made pursuant to subpoenas, government investigations, or employer inquiries.

Future litigation may track the ongoing conflicting decisions concerning employment-related noncompetition covenants. See David J. Carr, "Ten Traps To Avoid In Drafting Enforceable Confidentiality, Non-Compete, and Non-Solicitation Agreements (with Form)" 50 *The Practical Lawyer* 33 (August 2004); Mary E. Bruno, "Some Basics About Employment Agreements," 50 *The Practical Lawyer* 45, 51-58 (August 2004). That is, particular states may develop markedly different interpretations regarding the reasonableness, fairness, scope, duration, and ultimate enforceability of these agreements.

Representing Employees: Attorney Strategies

Attorneys representing employees may wish to anticipate any employer attempts to restrict or limit interviews of former employees. For strategic purposes, the employee's attorney could file a motion to interview witnesses soon after the complaint is filed. In that way, the employee's attorney gains the strategic advantage of being the moving party. See *Sharpe v. Leonard Stulman Enters. Ltd. Pshp.*, 12 F. Supp. 2d 502 (D. Md. 1998) (defendant's motion in limine to prevent witness interviews was denied and plaintiff's motion to interview witnesses was granted; attorneys could interview former employees in housing discrimination case).

Secondly, in drafting a motion to interview witnesses, attorneys for employees could emphasize the need for counsel to interview former employees informally to zealously represent their clients. In many cases counsel could justifiably argue that the employees would be more truthful if not subject to the constraints, formality, and possible chilling effect that a deposition atmosphere might impose.

Finally, employees could fear retaliation or loss of their current employment if their employer came to know of their support for a lawsuit against the former employer. To protect former employees, counsel drafting a motion to interview witnesses could request that the court order that the former employer take no steps to threaten, coerce, intimidate, or otherwise punish the former employees for their cooperation with plaintiff's counsel or their subsequent testimony.

The lessons of *Smith v. Kalamazoo Ophthalmology* are as follows: Attorneys representing employees should take the initiative in seeking court approval before interviewing former employees who possess confidential information. Second, at the very least, the employee's attorney should give opposing counsel written notification that she plans to conduct ex parte interviews of former employees. Lastly, before interviewing former employees, counsel must determine whether those employees are subject to any confidentiality, nondisparagement, nondisclosure, or other employment agreements. ■

LOCKOUT: STRATEGIES AND HAZARDS ADVICE FOR THE EMPLOYER

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Introduction

In 1965 the United States Supreme Court recognized that employers have a corollary economic weapon to an employee's right to strike: *the right to withhold the furnishing of work*. In *American Ship Building*,¹ the Court recognized the right to lockout employees and provided employers with an economic weapon equivalent to that of the right to strike.



Twenty-one years later, in *Harter Equipment*,² the National Labor Relations Board declared that employers may use temporary replacement workers during a lockout. This gave employers the ability to continue operating their business while strengthening their hand at the bargaining table through use of the lockout.

In the nearly 20 years since *Harter*, there have been some highly publicized lockouts, most notably those occurring in major league sports. However, the use of a lockout by an employer is fraught with peril. This article will outline some of the issues employers must consider prior to implementing a strategy of locking out employees from gainful employment.

Legal Framework

The definition of a lockout is the withholding of employment for the purpose of resisting employees' demands or obtaining concessions from them. Traditionally, lockouts have been divided into two categories: (1) a defensive lockout, and, (2) an offensive lockout. Although the Board prefers not to utilize the terms "defensive" or "offensive," it is sometimes helpful to classify lockouts in this way in developing strategy.

A **defensive lockout** is the type originally discussed by the Supreme Court in the *American Ship Building* decision. This type of lockout is normally implemented as a protective measure, to secure legitimate employer interests such as: (1) protecting property from expected violence, (2) ensuring delivery of raw materials, (3) avoiding spoilage, and (4) avoiding sabotage.

A defensive lockout can also be utilized to control the timing of a work stoppage, or in a multiemployer setting, to avoid "whipsaw" or selective strikes. In this context, a defensive lockout is utilized where a strike against one member of a multiemployer bargaining unit constitutes a threat of strike at another. In this situation, an unstruck employer may choose to lockout employees to avoid the threat of a strike and control the timing of a work stoppage.

An **offensive lockout** is utilized as a tool in the collective bargaining process. An offensive lockout is an economic weapon, sanctioned by law, which can strengthen an employer's hand at the bargaining table in support of its bargaining position. An employer may lockout employees in order to obtain an agreement on a subject of collective bargaining.

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LOCKOUT: STRATEGIES AND HAZARDS ADVICE FOR THE EMPLOYER

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An employer's motivation in locking out employees is critical. A lockout must be premised on legitimate employer interests. There can be no finding of antiunion animus, no evidence of an intent to discourage membership, and no evidence of discrimination against union activities. Simply put, a lockout is unlawful if it is utilized for an unlawful purpose, i.e., it violates sections 8(a)(1), (3), or (5).³ Situations where lockouts are unlawful are when they are utilized:

- In response to organizational attempts
- Preceded and followed by antiunion comments
- To enforce threats made during bargaining
- To prefer a particular union
- To undermine support for a union
- To accomplish a transfer of work
- To avoid bargaining altogether
- To insist on an unlawful bargaining proposal

The implementation of a lockout alone, however, does not raise an inference of antiunion animus. As stated by the Supreme Court in *American Ship Building*,

[U]se of a lockout does not carry the necessary implication that the employer acted to discourage union membership or otherwise discriminated . . . [It] does not appear that the natural tendency of the lockout is to discourage union membership.⁴

Use of the Lockout: Employer Strategy

It is critical to apprise management of the ultimate weapon that it possesses in the bargaining process, but to temper that counsel with a clear articulation of the perils that can ensue when it is utilized.

The simplest analogy may be to describe to the client the fact that a lockout is like a nuclear weapon: *it may be more valuable as a deterrent than a realistic option.*

Any discussion of the potential use of a lockout with a client must first begin with practical considerations. *Are there any notice requirements to be met? Are replacements available? Can production goals and standards be maintained? Are there any requirements in supplier contracts applicable to labor disputes?*

Some Big Three contracts have specific language stating that in anticipation of a labor dispute, the supplier must ensure a 30-60 day supply of goods. Language in the standard DaimlerChrysler contract requires the supplier to build, at its expense, a 40-day inventory stored at neutral warehouse sites at least 50 miles from the supplier's manufacturing location.⁵

Second, the employer must be advised of the potential worse case scenario: *the possibility that the lockout will be declared unlawful resulting in reinstatement with full back pay of all locked out workers.* The client must be apprised that unfair labor practice charges will be filed probably before, and most certainly after, the lockout. In the event of a finding of improper motivation involved in the lockout, huge and potentially devastating financial penalties are possible. In advising the client, a thorough review of statements, documents, bargaining history and positions at the bargaining table must be reviewed to determine if there can be any claim of animus.

Third, beyond the potential economic burden, a discussion of noneconomic costs must take place. The employer should be advised that the biggest problem with a lockout may not necessarily be declaring one, but ending one. Even assuming that the employer can successfully implement the lockout without a finding of an unfair labor practice or an award of back pay, at some point the workers are going to have to be recalled. A lockout is only a "temporary fix." An employer cannot permanently replace the union. Reinstating employees and laying off their temporary replacements at the conclusion of a lockout is problematic. An employer returning locked out employees to work is essentially bringing back an angry workforce. Hard feelings may linger and may have an effect on productivity and morale. Anonymous sabotage, work slowdowns or violence could result. Thus, it is critical to discuss and determine what the employer's "end game" is going to be.

Finally, reputational damage may linger even after the lockout has concluded. Unlike a strike where the employer can assert that it is in the position of "victim," in a lockout the converse is frequently the case. It can be asserted that returning strikers have only themselves to blame for the loss of a job. In a lockout situation, the employer may be painted as an uncaring capitalist who has put innocent workers out of jobs. There may be significant injury to the employer's reputation in the court of public opinion. The employer should be prepared to expect a rash of negative press, potential boycotts and loss of business.

When Do You Lockout?

The clearest case in favor of utilizing a lockout is to protect the employer's property in the event of an actual threat of harm. Use of a lockout should be discussed where there has been a legitimate threat or actual occurrences of sabotage, violence or inappropriate harm to legitimate business needs.

A lockout should also be considered where the employer is certain that labor unrest is going to occur. A lockout can be utilized to control the timing of a work stoppage and preempt a strike at a later and more damaging time for the employer. This is precisely the situation that occurred in *American Ship Building* where the employees had historically struck the company on five consecutive occasions each time a labor agreement expired. Determined to avoid a sixth strike in 1961, the employer locked out the employees before the busy season began.

This is also the model that has been utilized in professional sports. Major league baseball players picked an obvious time to strike in 1994. With the season nearly completed, they were able to save their salaries in anticipation of a strike. By timing their strike to begin just as fan attendance began to peak, and with revenue producing playoffs approaching, the players were able to increase economic pressure on the owners. In addition, the public, having been deprived of a playoff and World Series, reacted angrily toward both the players and the owners.⁶

Learning from the baseball strike, the National Basketball Association and the National Hockey League controlled the timing of imminent labor disputes by locking out players before the season began. This effectively reversed the economic pressure because the players were at the beginning of their earning periods, while owners had little to lose, at most foregoing preseason or early season games.⁷

Most recently, in 2001 the National Football League locked out the referees two weeks prior to the start of the 2001 season. The league opted instead to use replacement referees until the end of the dispute.⁸

One of the most successful uses of the *mere threat* of the lockout without the need to impose one, occurred in 1999 with the Major League Baseball Umpire's Association. The Umpire's union feared that the league's indifference in reaching a new collective bargaining agreement was a signal that they were going to be locked out as in other professional sports. In an effort to preempt a lockout, Richie Phillips, an attorney and chief negotiator for the union, conceived of a novel plan which can only be characterized as an extremely "bad call." Phillips advised the 68 members of the union to resign in protest. Fifty-seven umpires took his advice and tendered their resignation.⁹ The league immediately announced it would accept the resignations and began to hire replacement umpires. As a result, the league never had to implement the lockout. Although the league eventually agreed to rehire many of the umpires, approximately 10 were never rehired.¹⁰

Perhaps taking a cue from this successful use of the mere threat of a lockout, the popular media has been abuzz for over a year with talk of a lockout in the NHL next season, even through the collective bargaining agreement does not expire until September, 2004.¹¹

The most recent highly publicized lockout was the lockout of longshoremen at West Coast ports. Approximately 10,500 dockworkers were locked out in September 200. Eventually, President Bush intervened and obtained a *Taft Hartley* injunction ordering the two sides to return to work for an 80-day cooling off period. In January 2003, the Pacific Maritime Association and the longshoremen's union agreed to a six-year contract. The national cost of the 10-day lockout was in excess of \$6 billion.¹²

Other major lockouts include a three month lockout in 1991-1992 at Caterpillar resulting in the furlough of 5,600 workers; a lockout at John Deere and Company of 13,000 workers for six months in 1986-1987; a lockout at USX of 22,000 workers for six months in 1986.

Potential Future Trends or Initial Indications in the Use of Lockouts by Employers

In the twenty years since *Harter Equipment* legitimized the hiring of temporary replacement workers during a lockout, several trends have emerged which may signal some indication that lockouts may be a more frequent occurrence.

According to figures released by the Bureau of Labor Statistics, major work stoppages, i.e., those involving at least 1,000 employees, have trended significantly lower over the last 20 years. The total number of major work stoppages in 2002 was a record low 19, down from 29 in 2001. The annual total of work stoppages has not reached 40 since 1991.

Despite this decline, recent discussions of work stoppages in the popular media, have centered around lockouts rather than strikes. For example, lockouts, and potential lockouts, in professional sports and the West Coast ports have received substantial publicity. The term lockout, unheard of years ago, now appears frequently on the news, in sports pages and on ESPN. Employers who read the newspaper every day over breakfast have seen that the fans of professional sports have sided, for the most part, with owners who have locked out "greedy" millionaire ballplayers. It is possible that the term lockout may have become legitimized in the court of public opinion and part of the popular lexicon.

Over the last twenty years, competition in the labor market has increased dramatically. Today, 12.9% of all workers in the United States are unionized, falling from over 20% in 1983. In the private sector only 8.2% of employees are unionized.¹³ American workers compete in an increasingly global economy. Employers are free

to relocate production to other nations, particularly Mexico and East Asia. Technological advances have created surpluses in labor markets and a reduction in unskilled jobs. Recent corporate downsizing has spawned a vast number of unemployed workers who constitute a ready pool of potential replacement workers.

Over this same period, temporary work industries have grown and flourished. Large scale employers frequently outsource large numbers of jobs to contingent or temporary workforce agencies. At least one corporation, BE&K, specializes in supplying replacement workers for employers engaged in work stoppages such as strikes or lockouts.

As a result of these drastic changes in social consciousness and the labor market over the last 20 years, employers may have more flexibility to rapidly deploy a replacement work force during a work stoppage.

Does this mean that employers will be more likely to engage in lockouts to achieve an advantage at the bargaining table? Only time will tell. However, these trends certainly make a lockout a more viable option for employers faced with economic pressures.

Conclusion

These potential trends or indications should be viewed with caution and some skepticism. While an employer should be aware of its right to lockout employees, the economic and non-economic risks will in most cases outweigh any real or perceived benefit. In the rare case an employer's only choice may be to lock out, either for defensive purposes, or in order to save the business at the bargaining table. However, any time a lockout is implemented, an employer can expect to be in litigation before the Board over the issue whether it had an improper motivation or animus. As labor counsel, it is impossible to provide an employer with any kind of guarantee, let alone reasonable assurance, that it will prevail in such an NLRB proceeding.

Like the purported benefits of the nuclear age, the "gifts" given to employers in *American Ship Builder* and *Harter* are somewhat illusory. An employer who pushes the button and unleashes the lockout "bomb" must be prepared to face the very real and potentially crippling fallout.

— END NOTES —

¹*American Ship Building Co., v. NLRB*, 380 US 300 (1965).

²*Harter Equipment, Inc.*, 280 NLRB 597, 122 LRRM 1219 (1986).

³29 USC §§151, et seq.

⁴380 US at 312.

⁵Section 7 of the DaimlerChrysler purchase order contract states: "Supplier must notify DCX immediately of any actual or potential labor dispute delaying or threatening to delay timely performance of a P.O., and supplier must also notify DCX six months in advance of the expiration of any current labor contract. Prior to the expiration of a labor contract, supplier must have built, at its expense, a 40 day supply of inventory of the products and store such products in neutral warehouse sites which are at least 50 miles from supplier manufacturing locations."

⁶*See* Althea Knight & Richard Justice, "With History Against Them, Talks Dwindle Down: Work Stoppages a Part of Baseball," *Washington Post*, 11 August 1994, D1.

⁷*See* Sandy Burgin, "NHL's Owners Blow It," *Sunday Telegram* (Worcester, Mass.), 2 October 1994, D3 and Jody Goldstein, "NBA Begins First Work Stoppage," *Houston Chronicle*, 1 July 1995, A1.

⁸*See* Leonard Shapiro, "NFL is Training Replacements," *Washington Post*, 30 August 2002, D1.

⁹*See* Murray Chass, "14 Major League Umps Call Union Plan Flawed," *New York Times*, 29 July 1999, D3.

¹⁰*See* "22 Umpires Lose Jobs for Rest of Season; Union Withdraws Suit in Exchange for Pay, Bonuses; Dispute Will go to Arbitration," *St. Louis Post-Dispatch*, 2 September 1999, A16.

¹¹*See* Elliott Pap, "Spectre of a 2004 Lockout Haunts NHL Players," *Vancouver Sun* (Canada) 8 October 2003, E4.

¹²*See* Harry Kelber, "Taft-Hartley Order Ends Port Lockout; Union blames PMA for Cargo Log-jam," *The Labor Educator, LaborTalk* for October 23, 2002 25 May 2004 <<http://www.laboreducator.org/taftlock.htm>>.

¹³U.S. Department of Labor, Bureau of Labor Statistics, *Union Members Summary*, 21 January 2004 <<http://stats.bls.gov/news.release/union2.nr0.htm>>. ■

ON JUDGES

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Some things don't change. Take, for example, the sentiments expressed in "Things You Have Wanted To Tell A Judge (But Didn't Dare)." Almost ten years old, this *Litigation* article could have been written yesterday.¹

The article's by-line is "Anonymous." This, of course, relates to the "didn't dare" portion of the title. Still, *Litigation* reveals the author's name — California lawyer and then-*Litigation*-editor-in-chief Mark A. Neubauer — but allows him a measure of self-preservation by including an "author's note":

If you are a judge I am appearing before, I have *never, ever* wanted to say these words to you. Rather, the following suggestions are from other lawyers I know who shall remain anonymous to protect their careers.

Such pusillanimity is unbecoming an officer of the court. [Author's note: *If you are a judge, I am writing this article at the point of guns wielded by lawyers who I cannot identify (except to emphasize that they represent management).*]

Here are six of Neubauer's dozen "things you have wanted to tell a judge (but didn't dare)" with my (compelled) comments.

1. "Be Civil. (Or, Just Because You Are a Judge Doesn't Mean You Have a License to Insult.)"

Neubauer observes that all lawyers have "experienced appearing before judges who are simply gratuitously mean and nasty." In the presence of such judges, Neubauer writes, we lawyers must, of practical necessity, "sit stoically as we are verbally abused." This is not good. Judges need to show not "anger and vehemence," Neubauer prescribes, but "compassion and understanding."

I witnessed an example of what Neubauer calls "black robotis" in circuit court some years ago. Two lawyers interrupted my evidentiary hearing to argue an emergency motion. It had to do with a traveling carnival about to leave town while owing the moving party money.

The carnival's lawyer argued passionately against judicial intervention. Not long into his argument, he said, "... and so, Your Honor, you can't order my client to ..." BANG! The judge pounded his gavel. "Counsel, you do *not* come into my courtroom and tell *me* what I cannot do!"



With those words — punctuated by venomous tone, bulging neck veins, and a withering scowl — the judge effectively communicated: *You lowly worm, you have intruded on my Royal Domain, given great offense, and you will regret it!*

"Er... uh... with all due respect, Your Honor..."

No fool, the lawyer responded: "I apologize, Your Honor. I meant no disrespect. I meant only to say that I do not believe that the relief requested by my opponent is consistent with the law."

Appeased, tribute having been paid, the judge gestured for argument to continue.

Minutes later, the lawyer haplessly did it again. "And Judge, you cannot require ..." As soon as it came out of his mouth, he realized what he had done. His shoulders slumped. His head bowed. Everyone in the courtroom could read his thoughts: "Uh, oh!"

BANG! The judge rose to the occasion like one of Pavlov's dogs. "I told you *once already*, counsel! *You do not* come into my courtroom ... yadda, yadda, yadda!"

I, of course, did what any red-blooded, honorable lawyer would do witnessing a brother of the bar unfairly under siege: I kept my eyes averted and my mouth shut, thinking, "Whoa, better him than me."

2. "Understand, I have a life, a family, and other clients. (Or, this may be your only case, judge, but it isn't mine.)"

Neubauer writes that in this era of "fast track" litigation, the "emphasis is for judges to push cases along." He bemoans:

Forget the fact that you, your opponent, and your respective clients have agreed on a schedule that fits everyone's calendar. The judge still wants you to try the case on the Friday after Thanksgiving

Neubauer decries "unreasonable schedules" and "irrational deadlines" set by judges despite the parties' reasonable agreements and honest needs. He reproves judges who insist lawyers "trudge down to court" for "innumerable status conferences" and "cattle calls" rather than "use a more efficient telephone conference." He laments the lack of "give-and-take on scheduling." No wonder, Neubauer writes, "many more well-heeled litigants turn to private judges." In arbitration "the litigants control the judge's schedule" and avoid "the demoralizing effect" of another postponement after "the fifth time" the case was "supposedly about to commence trial." When the parties select the arbitrator, there is neither arbitrary hurry-up nor frustrating hurry-up-and-wait.

This may foreshadow the next big issue in court reform: judicial vouchers. Will we see judges competing with private arbitrators for public funds? Will we see legions of "downsized" judges forced to hang up shingles as arbitrators or mediators or, out of desperation, lawyers? Vouchers. It's something to think about.²

3. "Can't You See What a Lying Cheating Scum My Opposing Counsel Is?"

Neubauer laments that "the Big Lie can be effective" and is "given better odds if the judge will not pay attention or simply declares, 'A pox on both your houses.'" The "miscreant lawyer" willing to dissemble, obfuscate, and deny the undeniable hopes the judge will see the dispute as the proverbial spitting-match-between-two-equally-blameworthy-skunks or, better yet (for the miscreant), that the judge will blame the victim (i.e., you).

Amen. I had a case in which I had to file eight — *eight* — motions to compel answers to interrogatories, document production, answers to deposition questions, etc. Each time the judge said: "Can't you experienced lawyers resolve your discovery disputes without taking up the time of the Court!?" Each time I responded: "Judge, the *other side* is violating the rules. We ask that you require them to follow the rules." The judge granted each motion — I was dead right, after all, and that usually enhances chances of success — but the judge would not impose sanctions on my scofflaw opponent until the *eighth* motion. So much for deterrence.

In another case, my opponents' briefs regularly asserted a material "fact" that months before had been directly, repeatedly, and unequivocally *refuted* by their client's *sworn* testimony. "Ho-hum," responded the judge.

Rambo litigation persists because it often works, and carries little risk of consequences when judges view all lawyers as equally tainted with the original sin of being advocates.

4. "Read My Briefs. (Or, at Least Admit You Haven't.)"

Neubauer remarks that "some judges can never hide the fact that they really did not prepare for oral argument on the motion you worked on until midnight." So much for your blood, sweat, and tears. Neubauer asks judges to "admit" their own time pressures and hold off on hearings "until the court is really prepared." An adverse ruling is easier to take — and easier to explain to the client — when based on the judge's informed analysis rather than first impression and impulse.

5. "Tell Me Where You Are Going Before You Get There. (Or Haven't You Ever Heard of Tentative Rulings?)"

Neubauer suggests that oral argument would be more meaningful if it would begin with a statement of the judge's "initial inclination based on the written papers." Neubauer suggests this would allow the lawyers to promptly correct any "mistakes and miscommunication" and to focus on the core issues on the judge's mind. This would eliminate the oral argument Catch 22, described by Neubauer, when you begin to "summarize your strongest argument" and "the judge screams at you either (1) 'Why wasn't it in the papers, counsel,' or (2) 'Shut up, counsel, that's already in your papers.'"



"State your appearance, counsel."

I've wondered about the expectations of judges who begin hearings with the admonition:

I've read all your papers. I understand your arguments. Do not cover the ground already addressed in your briefs.

What are lawyers supposed to reply?

No problem, judge. I'll just concentrate on the things I didn't have room for in my brief: (1) the signed confession, (2) the *in flagrante delicto* photographs, and (3) the controlling Supreme Court case.

6. "You Don't Know as Much as You Think You Do. (Or, Just Where Did You Go to Law School, Judge?)"

Neubauer writes: "Give a judge a gavel and a black robe, and he thinks he knows everything." Judges who suffer from this "strain of 'black robe-itis'" just "stop listening." Instead, they "lecture every lawyer." And when lawyers "politely suggest that the judge may be wrong, all hell breaks loose." We lawyers must "bite our tongues, shake our heads, and save our derogatory comments for hushed whispers in the hallway."

There are, of course, many judges who are impartial, open-minded, intellectually curious, and ready to be educated to possible flaws in their analysis. Still, in many court rooms you take your life in your hands when you try to constructively respond to a judge's misguided pronouncement. "With all due respect, Your Honor, you can't order my client to" BANG!

Neubauer — and the lawyers making me write this article at gunpoint — just want judges to know that lawyers are humans, too, fallible, but deserving of respect and compassion and attention. Remember judge: *you* used to be a lawyer.

When judges forget that they are just ex-lawyer public servants, California lawyer, author, and no-holds-barred commentator Vincent Bugliosi and Harvard law professor, prolific author, and ubiquitous legal observer Alan Dershowitz are there to remind them. What some lawyers "don't dare" say, Bugliosi and Dershowitz *publish*.

Bugliosi remarks on the mystique of the black robe:

The American people have an understandably negative view of politicians, public opinion polls show, and an equally negative view of lawyers. Conventional logic would seem to dictate that since a judge is normally both a politician and a lawyer, people would have an opinion of them lower than a grasshopper's belly. But on the contrary, the mere investiture of a twenty-five dollar black cotton robe elevates the denigrated lawyer-politician to a position of considerable honor and respect in our society, as if the garment itself miraculously imbues the person with qualities not previously possessed.³

But the robe doesn't guarantee wisdom, or fairness, or anything else, Bugliosi reminds. Even Supreme Court justices are "sim-

ply lawyers who wear black robes ... nine ordinary human beings who are subject to all the infirmities that afflict mankind."⁴

Not one to mince words, Dershowitz presents his case for judicial humility:

A federal judge is still likely to be a lawyer who knew a senator, and a state judge is more often than not a lawyer who was friendly with a governor.⁵

Bugliosi, too, doesn't hold back:

It has been my experience and, I daresay, the experience of most veteran trial lawyers that the typical judge has little or no trial experience as a lawyer, or is pompous and dictatorial on the bench, or worst of all, is clearly partial to one side or the other in the lawsuit. Sometimes the judge displays all three infirmities.

It's always a great relief and pleasure to walk into court and find a judge who has had trial experience, knows the law, is completely impartial, and hasn't let his judgeship swell his head. There are of course, many such admirable judges in this country, but regrettably they are decidedly in the minority.⁶

It's a pleasure, too, I'll add, to deal with judges who recognize that while they serve a function essential to the administration of justice, that function is no less essential than the lawyers' functions. And it's a pleasure to deal with judges who are courteous and helpful to lawyers and litigants and witnesses who, after all, are the consumers of judges' public services. Socrates (who neither prosecuted Charles Manson nor defended O.J. Simpson and Klaus Van Bulow, and who *never published anything*) reportedly said:

Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.

Courtesy, wisdom, sobriety, and impartiality. In the words of Ira Gershwin, "Who could ask for anything more?"

— END NOTES —

¹Anonymous (Mark A. Neubauer), "Things You Have Wanted To Tell A Judge (But Didn't Dare)" 21 *Litigation* 17 (Fall 1994).

²Hey, I'm only kidding. This is my little *reductio ad absurdum*, to make a point. Long live public courtrooms, and public education, too.

³Vincent Bugliosi, *The Betrayal of America — How The Supreme Court Undermined The Constitution And Chose Our President* (2001) at 24.

⁴Bugliosi, *Betrayal* at 23.

⁵Alan M. Dershowitz, *Contrary To Popular Opinion* (1992) at 18.

⁶Bugliosi, *Outrage — The Five Reasons Why O.J. Simpson Got Away With Murder* (1996) at 88. ■

ADVICE TO THE CIVILITY-LORN

There are, of course, (at least) two sides to every story. For every out-of-control-judge anecdote there is at least one off-setting miscreant-lawyer story. The prescription, the American Bar Association Section of Litigation offers, is adherence to the *Guidelines for Litigation Conduct*. The guidelines, which contain among other things, Lawyers' Duties to the Court, Court's Duties to Lawyers, and Judges Duties to Each Other, are available at www.abanet.org/litigation/conduct/guidelines/.

Closer to home, the United States District Court for the Eastern District of Michigan has adopted civility principles. They are available at www.mied.uscourts.gov/_civility/plan/preamble.htm.

Civility Principles are, of course, most effective if, read. Raise your hand if you've actually read them.

— Stuart M. Israel



FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Those of us who sit as case evaluators for the Circuit Courts are familiar with the following phenomenon. You read a plaintiff's summary and it's a slam dunk. Cannot lose. Lay-down hand. Then you read the defendant's summary and it's a slam dunk too.

There are three reasons for this. First, of course, it is a lawyer's job to present his client's case in the light most favorable to the client. Second, lawyers get their facts primarily from their clients, so what the case evaluator reads is a biased summary of a biased summary. And third, it is human nature to believe what we are paid to believe.

A case evaluation summary *should* sound like a lay-down hand. A competent lawyer *should* be able to prepare a summary that makes his case sound like a winner. It is not surprising that reading a stack of summaries, all but a tiny fraction are thoroughly convincing — if read alone.

But that's not the trick. That's what all our training and our psychological instincts and our business interest prepare us to do. The trick is to be able to turn it off.

The trick is to listen to the other side (*audi alterum partem* for those who prefer their legal maxims in Latin) and adjust your position if the other side is right. This, of course, is much more difficult and far more rare. It goes against our training and our psychology and, perhaps, against our business interest.

I saw it happen in a mediation recently, though. The plaintiff's attorney made his opening presentation. The defense attorney made his. I went into caucus with the plaintiff and his counsel and . . . the plaintiff's attorney changed his mind.

He changed his mind based on the evidence and the arguments presented by the other side. He reevaluated his case, explained the facts of life to his client, dramatically reduced his demand and we settled.

It was a much more impressive piece of lawyering than if he had come up with fancy arguments to spin the defendant's evidence and evade his logic.

Furthermore, it just may be that listening to the other side is not contrary to a lawyer's business interest. If a lawyer learned to listen to the other side and reevaluate based on what he heard, that lawyer's clients would spend less money on losers. And if word got around that there was a lawyer whose clients spent less money on losers, that lawyer would get more clients. And if lots of lawyers learned to listen to the other side we would have more settlements at less cost and far fewer lawsuits and arbitrations. And arbitrators and mediators would go out of business.

So far I ain't worried.

U.S. SUPREME COURT UPDATE

Regan K. Dahle
Nancy G. Itnyre
Butzel Long, P.C.

***Ellerth and Faragher* Affirmative Defense May Not be Available to Employers Where the Plaintiff Alleges a Constructive Discharge**

In *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342 (2004), the Plaintiff worked for the Defendant as a police communications officer. The Plaintiff's supervisors continuously subjected her to offensive comments and conduct of a sexual nature. On one occasion, the Plaintiff told the Defendant's Equal Employment Opportunity Officer that she "might need some help," but never followed up to file a formal complaint. On a second occasion, the Plaintiff told the same EEO Officer that she was being harassed and was afraid. The EEO Officer told the Plaintiff to file a complaint, but did not tell her where to get the form to do so. Two days later, the Plaintiff resigned after her supervisors accused her of theft.

The Plaintiff brought several claims against the Defendant, including a claim for hostile work environment sexual harassment under Title VII. Giving the Defendant the benefit of the *Ellerth* and *Faragher* affirmative defense, the District Court granted summary judgment to the Defendant on the Plaintiff's hostile work environment claim on the ground that the Plaintiff had failed to take advantage of the Defendant's internal procedures for reporting sexual harassment. The District Court did not address the Plaintiff's constructive discharge claim.

The Third Circuit reversed, holding, in part, that the District Court erred by failing to address the Plaintiff's constructive discharge claim. The Third Circuit held that if the Plaintiff could establish a constructive discharge, this would amount to a tangible employment action, thereby precluding the Defendant from benefiting from the *Ellerth* and *Faragher* affirmative defense. The Supreme Court granted cert to address a split in the Circuits regarding "whether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and therefore precludes assertion of the affirmative defense articulated in *Ellerth and Faragher*."

The Court held that in order to establish a constructive discharge, a plaintiff must show "working conditions so intolerable that a reasonable person would have felt compelled to resign." However, it is only when an official act of the employer underlies the constructive discharge claim that the *Ellerth* and *Faragher* affirmative defense will be unavailable to the defendant. By example, the Court cited a recent First Circuit case, *Reed v. MBNA Marketing Systems, Inc.*, 333 F.3d 27 (CA1 2003) in which the plaintiff based an unsuccessful constructive discharge claim on her supervisor's repeated sexual comments and an incident where he sexually assaulted her. The Court noted that these were unofficial acts of the supervisor and involved no exercise of company authority. By comparison, the Court cited a recent Seventh Circuit case, *Robinson v. Sappington*, 351 F.3d 317 (CA7 2003) in which the plaintiff based a successful constructive discharge claim on an undesirable transfer and a threat that it would be "best to resign." This, the Court noted, was the type of official act that could sustain a constructive discharge claim.

The Supreme Court ultimately reversed the Third Circuit's holding that the affirmative defenses set forth in *Ellerth* and *Faragher* are never available in constructive discharge cases and remanded the case for further proceedings.

ERISA's Anti-Cutback Provisions Preclude the Imposition of New Conditions on Rights Already Accrued

Resolving a split between the Fifth and Seventh Circuits regarding the applicability of ERISA's anti-cutback rule to a plan's suspension of benefits provisions, the United States Supreme Court sided with the Seventh Circuit, holding that the anti-cutback rule precludes a plan from imposing new conditions on rights to benefits already accrued. *Central Laborers' Pension Fund v. Heinz*, 124 S.Ct. 2230 (2004).

In *Heinz*, two participants in a multiemployer pension plan covering construction workers retired at a time when they had accrued enough pension credits to qualify for early retirement and receive the same monthly pension benefit they would have received if they had retired at normal retirement age. Subsequent to their retirement, the 39-year old participants accepted supervisory positions in the construction industry. At the time of their retirement and acceptance of the supervisory positions, the terms of the plan permitted the suspension of an early retiree's benefits if he accepted "disqualifying employment," which the plan defined as any job as a union or non-union construction worker. However, a plan amendment adopted subsequent to their retirement and acceptance of supervisory positions broadened the definition of disqualifying employment to include any job in any capacity in the construction industry, including supervisory work. Based upon the subsequent amendment, because the participants were employed in the construction industry, their pension payments were suspended.

The participants sued the pension fund to recover their suspended benefits, arguing that application of the amended definition of disqualifying employment to them violated ERISA's anti-cutback rule. The Seventh Circuit agreed with the participants and the Supreme Court affirmed, concluding that a change with respect to conditions associated with a protected benefit, such as broadening the definition of disqualifying employment when it results in the suspension of benefits already accrued, amounts to a prohibited reduction in benefits. According to the Court, an amendment, such as the amendment at issue, results in an impermissible reduction in benefits in the same way that a decreased monthly benefit reduces a benefit. Therefore, the Court concluded that the amendment violated ERISA's anti-cutback rule.

Significantly, although the case involved a multiemployer pension plan, the implications of the Supreme Court's decision extend beyond the realm of multiemployer plans to any plan subject to ERISA's anti-cutback provisions. Under the Court's ruling, ERISA's anti-cutback rule applies not only to a reduction in benefits, but also to a suspension of benefits. Accordingly, although not currently required, the case raises the question whether actuarial adjustments will be required when benefits are suspended under a plan's suspension of benefits provisions.

ERISA Preempts State Laws Granting Patient Rights against HMOs

In two consolidated cases in which the plaintiffs sued their respective HMOs under Texas law for alleged failures to exercise ordinary care in handling medical coverage decisions, the Supreme Court held that the causes of action were preempted by ERISA. *Aetna Health Inc. v. Davila*, 124 S.Ct. 2488 (2004). The Supreme

Court's decision impacts the laws of at least 10 states that, like Texas, enacted patient protection laws that would permit sizable jury awards that would generally exceed the amounts recoverable under ERISA.

In each of the cases, the plaintiffs argued that their respective HMOs refused to cover certain medical services or expenses in violation of the HMOs' duty to exercise ordinary care under Texas law and that the refusal to cover the service or expense proximately caused the plaintiffs' injuries. The HMOs removed the actions to federal district court, and the district courts denied the plaintiffs' motions to remand the cases to state court. The Fifth Circuit reversed the district courts on the basis that the plaintiffs sought tort damages rather than reimbursement for benefits denied to them.

Reversing the Fifth Circuit, the Supreme Court held that because the plaintiffs could have brought their suits under ERISA and there were no other legal duties implicated by the HMOs' actions (e.g., the decisions at issue were not made by the treating physicians), the plaintiffs' causes of action were completely preempted by ERISA and properly removed to federal court. According to the Court, distinguishing between claims that are preempted by ERISA versus those that are not preempted based upon the label affixed to the claim would permit parties to evade ERISA's preemptive scope by simply relabeling claims that would be subject to ERISA as tort claims that would not be subject to ERISA. The Court concluded that the plaintiffs' complaint was that they had been denied coverage that the plaintiffs alleged was promised under the terms of their respective ERISA-governed plans and that, upon the denial of benefits, the plaintiffs could have either paid for the benefits themselves and sought reimbursement or sought a preliminary injunction against their plan. According to the Court, permitting the suits at issue to proceed under state law could put in jeopardy employer provided health plans and adversely impact the purpose of ERISA, which is to provide a uniform regulatory scheme governing employee benefit plans.

4-Year Statute of Limitations Applies in §1981 Case.

In *Jones v. R.R. Donnelley & Sons*, 124 S. Ct. 1836 (2004), the Supreme Court addressed whether the catchall 4-year statute of limitations set forth in 28 U.S.C. §1658 applied to the Plaintiffs' claims for wrongful discharge, refusal to transfer and hostile work environment under 42 U.S.C. §1981, as amended by the Civil Rights Act of 1991. The Defendant had argued unsuccessfully to the District Court that *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) dictated that the state's most analogous 2-year statute of limitations should apply to the §1981 claim, because Congress limited the application of §1658 to actions arising under federal statutes enacted after December 1, 1990. The Seventh Circuit reversed the District Court, holding that §1658 did "not apply to a cause of action based on a post-1990 amendment to an existing statute."

The Supreme Court accepted cert and reversed the decision of the Seventh Circuit. It concluded that "a cause of action arises under an Act of Congress enacted after December 1, 1990—and therefore is governed by §1658's 4-year statute of limitations—if the plaintiff's claim against the defendant is made possible by a post-1990 enactment." In these Plaintiffs' case, the 1991 amendments to §1981 made the Plaintiffs' claims possible by overturning *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989). Accordingly, the 4-year statute of limitations set forth in §1658 applied, not the 2-year state statute of limitations that the Seventh Circuit held barred the Plaintiffs' claims. ■

WESTERN DISTRICT ENFORCES CONTRACTUAL 6 MONTH LIMITATIONS PERIOD, RULES ON EX- PARTE COMMUNICATIONS AND DECIDES ISSUES OF PRE-EMPTION

John T. Below
Heather G. Ptasznik
Kotz, Sangster, Wysocki and Berg, P.C.

CIVIL RIGHTS COMPLAINT BROUGHT OUTSIDE OF A CONTRACTUAL 6-MONTH LIMITATION PERIOD DISMISSED

1. *Komejan v Federal Express Corporation*, Case No. 1:02-CV-747 (April 27, 2004; Hon. Richard Alan Enslen). Plaintiff signed an employment agreement, requiring that she bring any complaint "within the time prescribed by law or six months from the date of the event forming the basis of my lawsuit, whichever expires first." Plaintiff filed a sexual harassment lawsuit approximately 15 months after her resignation.

On Summary Judgment, defendant argued plaintiff's complaint was barred because she agreed to file her suit within six months of the event giving rise to her lawsuit. Despite plaintiff's arguments that (1) the six month limitation was void against public policy; (2) the contract lacked consideration of mutuality of obligations; (3) the employee handbook, which listed procedures to be followed for harassment complaints, did not expressly limit the time in which an employee could file suit; (4) defendant was estopped from enforcing a time limitation because plaintiff did not have a copy of her employment agreement and could not be expected to remember its terms; (5) the time limitation was unreasonable; and (6) that the agreement was an unenforceable adhesion contract, the court found plaintiff was bound by the terms. Plaintiff's complaint was dismissed.

WESTERN DISTRICT RULES ON EX-PARTE CONTACT WITH FORMER EMPLOYEES

2. *Smith v Kalamazoo Ophthalmology*, Case No. 5:03-CV-20 (April 21, 2004; Hon. Gordon J. Quist). Defendant sought disqualification of plaintiff's counsel on the grounds he had improper *ex parte* contact with a former employee of the defendant company who had extensive knowledge of attorney-client communications related to the litigation. The plaintiff's attorney sought to depose a former employee. Defendant's counsel advised that the employee had been a party to attorney-client communications and it would be inappropriate to have any *ex parte* communications with the former employee.

Subsequently, the former employee met with plaintiff's counsel about facts surrounding her own termination as well as her relationship with plaintiff and her knowledge regarding plaintiff's termination. Rather than taking her deposition as proposed, plaintiff's counsel obtained an affidavit from the former employee and refused to provide defense counsel with a copy claiming it was protected by work product privilege.

In determining whether Rule 4.2 of the Michigan Rules of Professional Conduct applied to *ex parte* contacts with former employees, the Court held a situation involving former employees does not implicate the underlying policies behind Rule 4.2, which is to (1) prevent an attorney from circumventing opposing counsel in order to obtain statements from the adversary; (2) to preserve the integrity of the attorney-client relationship; (3) to prevent the inadvertent disclosure of privileged information; and (4) to facilitate settlement by involving lawyers in the negotiation process. The Court concluded contact with the former employee was not improper because there was no evidence the former employee had an agency relationship with the employer at the time she spoke with plaintiff's counsel. However, the Court stated although *ex parte* contact with former employees is not subject to Rule 4.2, former employees are "barred from discussing privileged information to which they are privy." As such, an attorney could have *ex parte* contact with an unrepresented former employee, but could not inquire into areas protected by the attorney-client or work product doctrine privileges.

CORPORATE DEFENDANTS' MOTION TO DISMISS CIVIL RIGHTS CLAIMS BASED ON LMRA PREEMPTION DENIED

3. *Koubaitary v Parker Hannifin Corp. and UAW, Local 1666*, Case No. 4:03-CV-72 (May 12, 2004; Richard Alan Enslen). Because the Court accepted defendant, United Auto Workers, Local 1666 voluntary Stipulated Dismissal Without Prejudice, defendant Parker Hannifin's argument regarding lack of complete diversity among the necessary parties was moot. Defendant Parker Hannifin also filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6), asserting (1) §301 of the LMRA preempted plaintiff's (union member's) complaint of unlawful national origin discrimination under Michigan's Elliott Larsen Civil Rights Act; and (2) Plaintiff failed to exhaust his arbitration remedies. The Court ruled a determination of plaintiff's civil rights and tort claims could be "separately weighed and assessed according to general legal standards a part from the terms of the [collective bargaining] Agreement." Continuing, the Court said "[n]one of the claims made are inextricably intertwined with the meaning and substance of the terms of the Agreement." The Court held §301 did not preempt the state law claims and further ruled that because the collective bargaining agreement did not include an arbitration clause requiring adjudication of civil rights claims, the exhaustion of arbitration remedies failed. The Court denied defendant Parker Hannifin's motion to dismiss.

THE MICHIGAN MINIMUM WAGE LAW TRUMPS THE FLSA MOTOR CARRIER EXEMPTION

4. *Allison, et al. v The Pepsi Bottling Group, Inc.*, Case No. 5:03-cv-244 (June 28, 2004, Hon. Richard Alan Enslin). Plaintiffs were commission based employees who shelved/delivered soda to retailers and typically worked in excess of 40 hours in a single week. Plaintiffs claimed they never received overtime wages for these excess hours and filed a complaint seeking overtime wages. At issue was whether the Michigan Minimum Wage Law or the federal motor carrier exemption to the Fair Labor Standards Act ("FLSA") was the applicable and controlling authority.

The FLSA overtime wage requirement has a "motor carrier exemption" for any employee over whom the Secretary of Transportation has power to establish qualifications and maximum hours of service. Although plaintiffs fell within the exemption, Michigan's corresponding Minimum Wage Act provides employees shall not receive less than 1 _ times their regular rate of pay for each hour of work in excess of 40 hours per week. *Congress has expressly authorized states to offer more stringent protections.* Accordingly, at issue was whether or not the FLSA, which would result in a lower minimum wage, or the Michigan wage law, a more stringent rule, determined whether the plaintiffs were entitled to overtime wages.

The Court found Congress and the Michigan legislature's intent was to allow Michigan to set a higher wage including a higher wage rate for select industries and lines of work. Because the state minimum wage laws' underlying purpose was to maintain a minimum standard of living necessary for the health, efficiency and general well-being of workers, the Court rejected the employer's interpretation that the FLSA applied to the matter. Accordingly, the Court denied the defendant's motion for summary judgment and determined that the Michigan state wage laws applied in determining liability for failure to pay overtime wages. ■

FALL READING

Lost your advance sheets, tired of the reading the 687 decisions issued by the Board in June 2004, tired of reading *Lawnnotes*? If you want to learn about the Great Lakes, I highly recommend, Jerry Dennis, *The Living Great Lakes: Searching for the Heart of the Inland Seas*. These lakes are treasures and important ecologically and economically. On a more sober note, a great web site is MEMRI, the Middle East Media Research Institute. [Www.memri.org](http://www.memri.org). It explores the Middle East by translating articles, providing analysis and showing television broadcasts. Anyone who wants to understand militant Islam, Saudi state-sponsored fascism called Wahabbism, and the horrid state of developments should read this web site regularly. C-Span should broadcast this every night for 30 minutes instead of floor debates. I hope our leaders are watching this! No illusions.

— John G. Adam

SIXTH CIRCUIT ADDRESSES TITLE VII ISSUES, ENFORCEABILITY OF ARBITRAL AWARDS, AND THE FMLA'S "HOURS OF SERVICE" REQUIREMENT

Jesse Goldstein

Vercruyse Murray & Calzone, P.C.

From May through July of 2004, the Sixth circuit published about 19 cases dealing with a wide variety of labor and employment issues. The full text of Sixth Circuit decisions are available on the Internet at: "<http://pacer.ca6.uscourts.gov/opinions/main.php>."

ERISA — Amendment of an Employee Pension Plan

In *Coomer v. Bethesda Hospital, Inc.*, Docket No. 02-3700 (June 1, 2004), the Sixth Circuit affirmed the trial court's dismissal of a claim of discrimination under ERISA and the ADEA. With respect to the ERISA claim, the pension plan at issue provided that participants would receive benefits when they reached their normal retirement age; they could also elect an earlier lump-sum distribution only if the actuarial equivalent of the benefit under the plan was under \$5,000. An under-forty employee had requested a lump-sum distribution equaling \$6,645.22 in order to attend medical school; the hospital's board of directors amended the plan specifically to allow this request. Thereafter, a number of older workers sued after one had been denied a lump-sum distribution of his pension benefits (approximately \$116,000). The Sixth Circuit began its analysis by noting that the amendment of the plan was not merely an administrative act, but rather a discretionary act within the prerogative of the hospital's board of directors. The court then held that the hospital's amendment of the plan on behalf of the first employee, and its refusal to amend the plan on behalf of the second, did not violate the plan's anti-discrimination provisions. The Sixth circuit went on to clearly hold that an employer's amendment of a plan to accommodate one participant and its refusal to amend the plan to accommodate another participant does not constitute discrimination under ERISA. Specifically, § 510 of ERISA offers no protection against an employer's actions affecting the status or scope of an ERISA plan, because this section was not designed to limit the discretion afforded employers in the creation or amendment of ERISA plans.

LMRA — Jurisdiction of Federal Courts Following Settlement

In *Bauer v. RBX Industries, Inc.*, Docket No. 02-4327 (May 17, 2004), the Sixth Circuit vacated the decision of the district court, holding that a settlement agreement which terminated a collective bargaining agreement of a closed facility had deprived the district court of jurisdiction over claim arising under § 301 of the LMRA and ERISA. After the initial lawsuit had been filed, the union and employer had entered into a settlement agreement which abrogated and superseded the previously-negotiated agreement, except for the

(Continued on page 12)

SIXTH CIRCUIT ADDRESSES TITLE VII ISSUES, ENFORCEABILITY OF ARBITRAL AWARDS, AND THE FMLA'S "HOURS OF SERVICE" REQUIREMENT

(Continued from page 11)

pension plan. The Sixth Circuit held that the effect of the settlement was to make "a § 301 claim impossible and consequently precluded the district court from asserting jurisdiction." The court noted that jurisdiction in a § 301 claim is premised upon the existence of a contract; thus, the federal courthouse is only open to suits alleging violations of contracts. Since there was no longer a contract, there was no cognizable federal claim; the court also held that there was no jurisdiction over the ERISA claim because the settlement "rendered null and void the welfare benefit plans upon which the ERISA claims were premised."

Discrimination — Enforceability of Arbitration Agreements

In *Cooper v. MRM Investment Co.*, Docket No. 02-5702 (May 3, 2004), the Sixth Circuit reversed the trial court's judgment which had invalidated an arbitration agreement. The court refused to characterize the arbitration agreement as a contract of adhesion; even though the employee had not been able to negotiate any changes to its language, the court noted that there was no evidence that the plaintiff would not have been able to find a suitable substitute job had she refused to sign the agreement. The court was not entitled to "simply assume adhesion and procedural unconscionability based on what job applicants may encounter elsewhere." The Sixth Circuit went on to hold that "while the district court's compassion for job applicants is laudable, under its approach practically every condition of employment would be an 'adhesion contract' which could not be enforced because it would have been presented to the employee by the employer in a situation of unequal bargaining power on a 'take it or leave it' basis." Such a result, according to the court, "would contravene Congress's intent that employment disputes be subject to valid arbitration agreements."

FMLA — Hours of Service Requirement

In *Rico v. Potter*, Docket No. 03-3294 (July 27, 2004), the Sixth Circuit held that make-whole relief awarded to an unlawfully terminated employee may include credit towards the hours-of-service requirement contained in the FMLA's definition of "eligible employee." In making this holding, the court reversed the district court, which had decided that the employee had not met the hours-of-service requirement due to her failure to actually work 1250 hours in the preceding year. The Sixth Circuit however, held that hours awarded to the employee in an arbitral decision could be counted towards this total. The court reasoned that hours an employee would have worked but for her unlawful termination; "such hours are different from occasional hours of absence due to vacation, holiday, illness, and the employer's failure to provide work, etc., in that they are hours that the employee wanted to work but was unlawfully prevented by the employer from working." In

deciding this case, the Sixth Circuit came to an opposite conclusion than that reached by the First Circuit in *Plumley v. Southern Container, Inc.*, 303 F.3d 364 (1st Cir. 2002).

Discrimination — Gender Identity Disorder

In *Smith v. City of Salem*, docket No. 03-3399 (June 1, 2004), the Sixth Circuit held the district court had erred by dismissing the claims of an employee who had alleged discrimination on the basis of his claimed transsexual status and diagnosed Gender Identity Disorder. The court held that the plaintiff had pled an actionable claim under Title VII, because he had alleged discrimination "because of sex" stemming from sexual stereotypes; namely, his gender non-conforming conduct and identification as a transsexual: "having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, the plaintiff has sufficiently pleaded claims of sex stereotyping and gender discrimination."

Title VII — Certification of Class Action

In *Bacon v. Honda of America Manufacturing, Inc.*, Docket No. 01-33520 (May 27, 2004), the Sixth Circuit affirmed the district court's refusal to certify a class in a discrimination lawsuit. The plaintiffs had alleged that Honda had engaged in a pattern or practice of discrimination against African-American employees by denying them promotions, and then sought to certify a class of all current and former African-American employees at Honda's four manufacturing plants located in central Ohio. The court had no trouble concluding that the requirements for class certification had not been met: "we view with skepticism a class that encompasses 1) both workers and supervisors; 2) production-line workers and those in administrative positions; 3) workers in four plants with different production capabilities; and 4) workers and supervisors spread over more than 30 departments." The court held that because the prospective class members had such different jobs, "we find it difficult to envisage a common policy regarding promotion that would affect them all in the same manner." ■

WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for *Lawnotes*. But the muse is elusive. And you just can't find the perfect topic. You make the excuse that it's the press of other business but in your heart you know it's just writer's block. We can help. On request, we will help you with ideas for article topics, no strings attached, free consultation. Also, we will give you our expert assessment of your ideas, at no charge. No idea is too ridiculous to get assessed. This is how Larry Flynt got started. You have been unpublished too long. Contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, Klass, Legghio & Israel, P.C., 306 South Washington, Suite 600, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@martensice.com.



REVERSE DISCRIMINATION REVISITED: STANDARDS REDEFINED UNDER THE MICHIGAN CIVIL RIGHTS ACT

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Until the Michigan Supreme Court's recent decision in *Lind v. City of Battle Creek*, 470 Mich 230; 681 NW2d 334 (2004), plaintiffs alleging "reverse discrimination" under the Michigan Elliott Larsen Civil Rights Act (CRA), Mich. Comp. Laws § 37.2201 et seq., had to satisfy heightened standards different from those required of plaintiffs who are members of a protected class. To establish a *prima facie* case of reverse discrimination, a plaintiff needed to show background circumstances supporting the suspicion that the defendant is the unusual employer who discriminates against white employees. The Michigan Supreme Court in *Lind*, overruling decisions from the Michigan Court of Appeals, now has eliminated the higher threshold of proof applied in reverse discrimination cases and made it clear that a heightened standard that draws a distinction between plaintiffs on account of their race is inconsistent with the CRA.

Interestingly, the majority opinion and the dissent are divided between squarely opposite judicial approaches and along lines traditionally reserved for political debate between liberals and conservatives. The majority, exercising apparent judicial restraint, finds that the definition of "individual" is unambiguous under the clear language of the statute and therefore finds that the same standard applies to white and black employees asserting discrimination claims. The dissent, in contrast, firmly believes that examination of the context of the CRA is as equally important as its text, and argues that continuing racism and the purpose of the passage of the CRA requires an activist approach by maintaining dual standards depending upon the plaintiff's race. The majority opinion makes it easier for white plaintiffs to assert discrimination claims and should be welcomed by the plaintiffs' bar, while the dissent's position would have benefited employers who defend reverse discrimination claims.

Moreover, as a result of the elimination of a heightened burden for establishing a *prima facie* case of reverse discrimination, counsel representing plaintiffs in reverse discrimination cases now are more likely to assert claims under the CRA in state court, as opposed to bringing the claims under Title VII, where the heightened burden still applies. It may create challenges for employers who utilize affirmative action policies or adopt goals to promote minority employment, which could be used as evidence to satisfy the standards for a *prima facie* case of race discrimination.

Lind v. City of Battle Creek

In *Lind*, a white police officer alleged that the defendant city violated the CRA when it promoted an African-American officer to the position of police sergeant. On the basis of a number of written and oral examinations and seniority, the plaintiff was rated second among five eligible officers, while the selected officer ranked fifth. At the close of discovery, the defendant filed a motion for summary disposition. The trial court granted the defendant's motion,

finding that the plaintiff failed to establish a *prima facie* case of race discrimination under the heightened burden "background circumstances" standard adopted in *Allen v. Comprehensive Health Services*, 222 Mich App 426; 564 NW2d 914 (1997). The plaintiff filed a motion for reconsideration after learning about the defendant's affirmative action plan. The trial court denied the motion for reconsideration, finding that the city had never implemented its affirmative action plan and it was not applicable to the promotion at issue in the case. The plaintiff appealed and the Court of Appeals affirmed the trial court's grant of summary disposition, applying the *Allen* standard and concluding that the plaintiff did not provide sufficient evidence to establish an issue of fact regarding whether the city was the unusual employer who discriminates against the majority. *Lind*, 470 Mich at 237. The Michigan Supreme Court granted leave to consider whether the "background circumstances" test in *Allen* is consistent with the CRA.

In a one-page opinion, the majority led by Justice Markman, and joined by Justices Corrigan, Weaver, Taylor and Young, reversed the lower court's decisions, and overruled *Allen*. The Court found that the standards adopted in *Allen* are "so clearly contrary to the language of Michigan's Civil Rights Act." *Lind*, 470 Mich at 233. According to the Court, the CRA provides that an employer shall not discriminate against an individual with respect to employment because of race and draws no distinctions between individual plaintiffs on account of majority or minority race. The Court stated that the *prima facie* test set forth in *Allen* impermissibly draws a distinction between plaintiffs on account of race and the lower court's reliance on that test was improper.

Justices Cavanagh and Kelly submitted dissenting opinions. Justice Cavanagh, joined by Justice Kelly, criticizes the majority opinion for its premise that we live in "a utopian society where all races are treated equally." *Lind*, 470 Mich at 235. Justice Cavanagh contends that the majority opinion perverts the purpose of the CRA and ignores federal case law precedent. Based on this precedent, the dissent argues that the background circumstances test should be retained.

Writing separately, Justice Kelly argues that the lower court decisions should be affirmed. According to Justice Kelly, the experience of white employees is different from that experienced by their minority counterparts:

In our society, demeaning acts of prejudice directed against whites because of their race are uncommon. Historically, whites have not suffered from pervasive racial oppression, discrimination, and stigmatization as have members of minority races. A national survey conducted in 1990 found that prejudice against whites continues to be relatively rare. Only seven percent of whites interviewed claimed to have experienced any form of racial discrimination. [citation] Conversely, with respect to minorities, "race unfortunately still matters." [citations]

Lind, 470 Mich at 246 (Kelly, J., dissenting)(citations omitted). Accordingly, Justice Kelly advocates for application of a different standard for reverse discrimination claims.

Conclusion

The import of the *Lind* decision is that plaintiffs asserting claims for reverse discrimination now will have a lower threshold burden of proof under the CRA than Title VII. The elimination of a heightened standard could lead more majority employees to sue for race discrimination. The decision will make it easier for white

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REVERSE DISCRIMINATION REVISITED: STANDARDS REDEFINED UNDER THE MICHIGAN CIVIL RIGHTS ACT

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employees to allege discrimination and expose employer programs to promote diversity to challenge. This is a difficult predicament for employers, given the desire to promote diversity and increasing demands to do so. The courts will continue to grapple with how the elimination of the heightened standard in reverse discrimination cases under Michigan law will impact the modern workplace.

— END NOTES —

¹In *Allen*, the Michigan Court of Appeals adopted a modification of the burden-shifting framework set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Allen* held that a reverse discrimination plaintiff who has no direct evidence of discriminatory intent may establish a *prima facie* claim of discrimination under the CRA by showing (i) background circumstances supporting the suspicion that the defendant is the unusual employer who discriminates against the majority; (ii) that the plaintiff applied and was qualified; (iii) that despite plaintiff's qualifications, he was not promoted; and (iv) that a minority employee of similar qualifications was promoted. Generally, "background circumstances" can be shown by evidence "indicating that the employer has some reason to discriminate against the majority or by evidence indicating that there is something suspect about the particular case, which raises an inference of discrimination." *Lind*, 470 Mich. at 241 (citing *Harding v Gray*, 9 F3d 150 (DC Cir 1993)). Upon this showing, a presumption of discriminatory intent is established for possible rebuttal by the employer; absent this showing, a reverse discrimination plaintiff cannot proceed. *Allen*, 222 Mich App at 433.

²Federal courts adopt three general approaches in reverse discrimination cases. The majority of the federal courts, including the Sixth, Seventh, Eighth, and D.C. Circuit Courts of Appeals, adopt the same "background circumstances" test set forth in *Allen*. See e.g., *Parker v Baltimore & Ohio R Co*, 209 US App DC 215; 652 F2d 1012 (1981); *Boger v Wayne County*, 950 F2d 316, 324 (6th Cir. 1991); *Nelson v City of Flint*, 136 F Supp 2d 703 (ED Mich 2001); *Murray v Thistle-down Racing Club*, 770 F2d 63, 67 (6th Cir. 1985); *Mills v Health Care Services Corp*, 171 F3d 450, 457 (7th Cir. 1999); *Duffy v Wolle* 123 F3d 1026, 1036 (8th Cir. 1997). Other jurisdictions, including the Third and the Eleventh Circuits, require a majority plaintiff to prove membership in "a class." See e.g., *Iadimarco v Runyon*, 190 F3d 151, 163 (3rd Cir. 1999). The Fourth and Tenth Circuits permit a reverse discrimination plaintiff to prove either background circumstances or specific facts that support an inference that the challenged decision would not have been made but for the plaintiff's membership in the majority class. See e.g., *Notari v Denver Water Dept*, 971 F2d 585, 589 (10th Cir. 1992). ■

MERC UPDATE

Michael M. Shoudy

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Since the previous issue of *Lawnotes*, the Michigan Employment Relations Commission has issued 27 Decisions and Orders in a variety of cases. A brief summary of 4 of those cases follows. Of the 27 cases, 11 were unfair labor practice hearings, 7 were representation and/or unit clarification hearings, 8 were duty of fair representation/unfair labor practice hearings, and one was a Decision And Order On Motion For Reopening Of The Record And Reconsideration And Motion For Stay Of Election. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/cis.

UNFAIR LABOR PRACTICES.

Interurban Transit Partnership

Case No. C02 K-220 (June 30, 2004).

On June 13, 2003, the ALJ issued his Decision and Recommended Order finding that Respondent had engaged in and was engaging in certain unfair labor practices by subcontracting bargaining unit work without first giving Charging Party notice and an opportunity to bargain in violation of PERA. Respondent filed timely exceptions to the ALJ's Decision and Recommended Order. In brief, the Commission affirmed the ALJ's findings and conclusions without additional analysis and adopted the Recommended Order which was modified to include a status quo ante remedy. As such, the ALJ's Decision will be discussed.

Charging Party represented a bargaining unit of bus drivers and mechanics employed by the Interurban Transit Partnership (ITP). The ITP provided public transit service for Grand Rapids and five nearby cities.

A portion of the services provided by ITP included small buses to serve the transportation needs of the elderly and disabled. This service was known as Go!Bus. Go!Bus provided curb to curb service to eligible passengers on an as-needed basis. Some time around 1986, the services performed by Go!Bus were subcontracted.

In April 2001, ITP added an additional service to give suburban residents more convenient access to the bus system. This new program was called PASS. PASS vans arrived and departed from hubs on a fixed schedule. All PASS runs were driven by members of Charging Party's bargaining unit. The ITP eventually determined that there was insufficient demand for the PASS service on nights and weekends. As a result, ITP eliminated the night and weekend PASS runs. However, in order to provide continued service to the suburban customers, the decision was made to refer PASS customers on nights and weekends to the Go!Bus system.

The Go!Bus system was run by an outfit entitled Calder City. Charging Party argued that ITP violated PERA by subcontracting night and weekend PASS service to Calder City. Charging Party also argued that PASS service was an extension of historical bargaining unit work. Respondent contended that the work in question was not exclusively performed by bargaining unit members. Further, Respondent asserted that Charging Party waived its right to bargain over the issue.

The ALJ first noted that the subcontracting of bargaining unit work constituted a mandatory subject of bargaining. In reaching his decision, the ALJ relied on the U.S. Supreme Court decision



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in *Fibreboard Paper Products Corp v NLRB*, 379 US 203 (1964). In applying the *Fibreboard* decision, the NLRB has held that where the subcontracting decision turns on labor cost considerations and involves the same work under similar conditions of employment, there is no need to apply any further tests in order to determine whether this decision is subject to the statutory duty to bargain.

Based on these principles, the ALJ found and the Commission affirmed that the Respondent's decision to subcontract the night and weekend public transportation services was a mandatory subject of bargaining. The record established that the ITP continued to serve the same customers; in the same geographic areas; using the same vehicles previously driven by bargaining unit members. Further, the Employer admittedly subcontracted the work purely for economic reasons. As the ALJ noted, "Instead of discussing the matter, . . . the Employer simply replaced its employees with those of an independent contractor to perform similar work under like circumstances. Under such circumstances, there is no need to apply any further tests; I find this to be a prototypical *Fibreboard* subcontracting situation giving rise to a mandatory duty to bargain." As to the Employer's defenses, the ALJ found they had no merit. The Commission modified the remedy to require the Respondent to restore the status quo that existed prior to its unlawful actions.

City of St. Clair Shores

Case No. C00 K-201 (May 26, 2004).

On December 6, 2002, the Administrative Law Judge issued her Decision and Recommended Order finding that Respondent violated PERA by retaliating against the union steward for protected activities. Respondent filed timely exceptions. In brief, the Commission found that the exceptions had merit and dismissed the charges in their entirety.

Charging Party represented a bargaining unit of salaried and hourly non-supervisory employees. From May of 1999 to November of 2000, the union's chief steward, Ronald Demski, was given wide latitude to investigate grievances during hours of employment. In October 1999, the supervisor for the Department of Public Works changed. According to Demski, the new supervisor told Demski, "I don't need you and I don't need the Union."

Some time around April 2000, Demski had a conversation with the personnel director. During this conversation, he made a statement to the effect, "Unless I turn around and give you a black eye, you're going to keep slapping me in the head." As a result of the exchange, the personnel director sent Demski a memorandum expressing concern over his use of "hostile phrases."

On November 7, 2000, Demski requested three to five days off to investigate grievances. Management discussed the effect his proposed absence would have on the City. As a result, they decided Demski would be given one hour each day to work on grievances, plus possible additional time if it became available. As a result, the Union filed the unfair labor practice charge alleging that the restrictions were motivated by a desire to retaliate against Demski for his diligent pursuit of grievances.

The Commission noted that the elements of a prima facie case of discrimination under PERA are (1) employee union or other protected activity; (2) employer knowledge of that activity; (3) union animus or hostility towards the employee's protected rights; and (4) suspicious timing or other evidence that protected activity was the motivating cause of the alleged discriminatory actions. The

Commission held that the first two elements were present. However, it opined that Charging Party had not met its burden of establishing that union animus was the motivating factor in the Employer's decision regarding the release time. The evidence offered was too remote and ambiguous to conclusively establish union animus. Therefore, the Commission concluded Charging Party failed to meet its initial burden of establishing that Demski's union activity was one of the motivating factors in denying his request for extra days off for investigating grievances.

Unit Clarification/Representation

Christian Brothers Institute of Michigan, d/b/a Brother Rice High School

Case No. R03 E-88 (May 26, 2004).

A petition for representation was filed by the Michigan Education Association seeking an election in a unit described as all full-time and part-time teachers employed by Brother Rice High School. The parties agreed that the bargaining unit sought by Petitioner was appropriate. The Employer objected to the election on statutory, jurisdictional, and constitutional grounds. In brief, the Commission held that it had jurisdiction over the Employer and its jurisdiction did not violate the free exercise and establishment clauses of the United States and the Michigan Constitutions.

Brother Rice High School is a four year boy's Catholic high school located in a suburb of Detroit. The school is affiliated with the Roman Catholic Church. An Employer witness testified that the teachers had an essential role in the educational process and communicating the essential elements of a Christian brother education. Besides theology class, the curriculum consisted of topics and subject matter found in a secular college preparatory high school.

The teaching staff included approximately 50 people. Membership in the Order or in the clergy was not required for faculty. Several years ago, the Employer entered into a contract with the Lay Faculty Association which defined the terms and conditions of employment of the lay teachers. The Employer did not contend that participating in collective bargaining was contrary to Catholic doctrine. In fact, Petitioner elicited testimony from Employer witnesses that church teachings not only permitted, but encouraged collective bargaining.

As to the jurisdiction issue, the Commission considered the U.S. Supreme Court decision of *NLRB v Catholic Bishop of Chicago*, 440 US 490 (1979). In *Catholic Bishop*, the Court concluded that there was no congressional intent to apply the NLRA to religious educational institutions. Because of this finding, the Court did not determine whether the NLRB's exercise of jurisdiction would result in conflicts with the U.S. Constitution. The Commission rejected the notion that it must seek a legislative expression of intent to assert jurisdiction over this type of employer. To the contrary, Michigan court decisions suggest a broader and more inclusive approach in interpreting the LMA. Since there was no legislative intent to exclude this Employer from the jurisdiction of the Commission and the legislative intent was to have the LMA apply to all labor disputes, the Commission held that it had jurisdiction over the Employer.

As to the constitutional issues, the Employer first argued that MERC's enforcement of the LMA over Brother Rice violated the free exercise clause of the U.S. and Michigan Constitutions. As the U.S. Supreme Court stated in *Employment Div v Smith*, 494 US

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MERC UPDATE

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872 (1990), the free exercise clause is not violated if prohibiting the exercise of religion is not the object of the regulation but merely an incidental effect of an otherwise valid provision. The Commission noted that the LMA is a facially neutral statute that generally applies to all employers under MERC's jurisdiction, whether religious or secular. The LMA's purpose is to promote harmony between employers and employees through collective bargaining. If there was any effect on the Employer's exercise of religion, it would be merely incidental.

As to the Michigan Constitution, the Commission noted that the Michigan Supreme Court has declined to articulate a specific standard for issues that implicate the free exercise clause under the Michigan Constitution. The Court has alluded to similarities between the constitutional protections. Therefore, the Commission applied the *Smith* test to the Michigan constitutional argument which resulted in the same outcome.

Second, the Employer argued that MERC's enforcement of the LMA over Brother Rice violated the establishment clause of the U.S. and Michigan Constitutions. The U.S. Supreme Court set forth the applicable test in *Lemon v Kurtzman*, 403 US 602 (1971). The test is stated as: "First the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"

In applying the *Lemon* test, the Commission first found that the LMA has a secular purpose which is to avoid conflict between employers and employees by fostering collective bargaining and to protect consumers within the state. The second and third prongs of the *Lemon* test require a similar analysis. As such, the Commission looked to whether there was excessive government entanglement. The Commission found the Employer's arguments were speculative, noting that it had been a party to a binding collective bargaining agreement with an independent association representing its faculty for several years.

As to the Michigan Constitution, the Michigan Supreme Court has never specifically adopted the *Lemon* test for analyzing an establishment clause issue under the Michigan Constitution. However, other Michigan courts have applied the test to determine whether a state regulation violated the establishment clause of the Michigan Constitution. Therefore, the Commission applied the *Lemon* test to the Michigan constitutional argument which resulted in the same outcome.

Since MERC had jurisdiction over the Employer and this jurisdiction did not violate the free exercise and establishment clauses of the United States and Michigan Constitutions, the Commission directed an election within the unit as described.

DUTY OF FAIR REPRESENTATION/UNFAIR LABOR PRACTICE

West Branch-Rose City Education Association and Michigan Education Association

Case No. CU98 J50 (May 25, 2004).

This matter was before the Commission on remand from the Michigan Court of Appeals. On October 27, 2000, the Commission issued its Decision and Order finding that Respondents had violated their duty of fair representation by failing to give notice

to Charging Party regarding restrictions on his ability to resign from the Union. The Court of Appeals reversed, finding that the Commission erred by basing its decision on the notice issue which was not raised in Charging Party's exceptions. The Court remanded the case, directing the Commission to consider whether it had jurisdiction over this dispute and then to decide whether PERA had been violated. In brief, the Commission adopted the Decision and Recommended Order of the ALJ, concluding that the MEA's restrictions on the timing and manner of withdrawal were reasonable and did not violate PERA.

On October 5, 1998, Frank Dame filed an unfair labor practice charge alleging that Respondents violated their duty of fair representation by refusing to immediately honor his request to resign from the Union. Pursuant to the Union's constitution, membership could be terminated during a one month period from August 1 to August 31. Dame's attempt to resign his membership in April 1998 was refused by the Union.

The Administrative Law Judge concluded that nothing in PERA precluded Respondents from placing reasonable restrictions on the timing and manner of withdrawal from membership, and the Union had demonstrated the reasonableness and necessity of the window period.

Charging Party filed timely exceptions pertaining solely to the Union's maintenance and enforcement of the window period. The Commission held that the Union failed to notify Charging Party of his right to refrain from joining the Union, and failed to provide him with information concerning its internal rules regarding membership obligations. As a result, the Commission found that Respondents had violated the duty of fair representation. The Michigan Court of Appeals reversed. Since the notice issue was not raised in Dame's exceptions, the issue was deemed waived and not properly before the Commission.

On remand, the Commission first considered whether it had jurisdiction in the case. Respondents argued that the collection of dues was an internal union matter not properly before the Commission. The Commission disagreed, noting that the collection of agency fees can only be accomplished pursuant to a negotiated contract provision, and there is a potential impact on employment should the nonmember refuse to pay. Numerous courts have found that a union's collection and use of agency fees implicates the duty of fair representation. Therefore, the Commission found that it had jurisdiction over the matter.

The Commission framed the remaining issue as whether the Union's use of a window period with respect to resignation of membership violated its duty of fair representation. Relying on *Nielsen v International Assn Machinists & Aerospace Workers*, 94 F3d 1107 (CA 7, 1996), the Commission found that it was reasonable for a union to require that objections be filed within an administratively convenient period. The Commission agreed with the ALJ that the Union's one month window period was a reasonable rule justified by the Union's administrative and budgetary needs. Therefore, the Commission adopted the Order of the ALJ, dismissing the charges in their entirety. ■

EASTERN DISTRICT UPDATE

Jeffrey Steele
Brady Hataway

Union's Alleged Failure to Interview All Potential Witnesses Did Not Sustain Hybrid Claims

Judge Gadola ruled in *Jacob v. Advantage Logistics Michigan*, 322 F.Supp.2d 825 (E.D. Mich. 2004), that it was neither arbitrary or "wholly irrational" for union representatives to permit the plaintiff to personally argue his case at step one of the grievance process. "Simply alleging that the union representative could have done better does not suffice to allege that the union representative's actions were arbitrary or wholly irrational." Judge Gadola also ruled that the local union did not improperly decline to investigate further or proceed to arbitration where two union members corroborated the employer's allegation that the plaintiff threatened another employee with a metal bar and there was no evidence that another employee witnessed the incident.

In *Ginderske v. Eaton Corp.*, 317 F.Supp.2d 803 (E.D. Mich. 2004), Judge Lawson dismissed a "hybrid" action, in part, because "the [union's] failure to interview one witness when many others were interviewed does not make the entire investigation unreasonable." Although the employer may have technically violated the collective bargaining agreement by failing to immediately honor the plaintiff's demand for a union representative, there was no evidence that the representative's allegedly untimely arrival had any impact on the plaintiff's conduct.

CBA Did Not Expressly Preclude Arbitrator's Chosen Remedy

The collective bargaining agreement in *National Ass'n. of Broadcast Employees and Technicians – Communications Workers of Am. v. Meredith Corp.*, 2004 WL 1347032 (E.D. Mich. 2004), contained a "just cause" provision and no language that limited the arbitrator's authority to either fashion a remedy or evaluate the employer's chosen discipline. Judge Lawson thus ruled that the arbitrator did not exceed his authority in reinstating an employee, with back pay, after determining that the employee was terminated without "just cause." "Even if it genuinely can be argued that Miner's termination was 'other than for just cause' – rather than an invalid just cause termination – it was not unreasonable for the arbitrator to reject an interpretation of the CBA that viewed Section 11.3 as an exclusive remedy. That section certainly obligates the employer to pay severance to laid-off employees, but the plain language of the provision does not compel the conclusion that severance is the *only* remedy available for terminations 'other than for just cause.'"

Prima Facie Whistleblowers' Case Preempts Public Policy Discharge Claim

The plaintiff in *Serrin-Brandel v. Pier 1 Imports (U.S.), Inc.*, e-Journal Number: 23293 (E.D. Mich. 2004), presented a *prima facie* whistleblowers' case by showing that she had been terminated after filing a police report against a subordinate. Her public policy discharge claim was therefore preempted. Judge Lawson dismissed the plaintiff's case, however, because she lacked evidence to prove that her employer lacked an "honest belief" that she lied and failed to act in good faith during an investigation. ■

MICHIGAN SUPREME COURT UPDATE

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Lind v. City of Battle Creek, 468 Mich 869 (2004).

A plaintiff attempting to establish a *prima facie* case of reverse racial discrimination under the Michigan Civil Rights Act, MCL 37.2202(1)(a), does not have to prove "background circumstances," as required by *Allen v. Comprehensive Health Services*, 222 Mich. App. 426 (1997). In this case, plaintiff, a white police officer, claimed reverse discrimination against his employer, the City of Battle Creek, when a black officer was promoted to police sergeant instead of him. The Court of Appeals relied on *Allen*, which held that a majority plaintiff, when establishing a *prima facie* reverse discrimination claim, must additionally present background circumstances to support a suspicion that defendant is the unusual employer who discriminates against the majority. The Supreme Court overruled *Allen* in a 5-2 vote, holding that *Allen* is contrary to the language of the MCL 37.2202(1)(a), which does not draw a distinction between plaintiffs on account of race. The Supreme Court reversed the judgment of the Court of Appeals and remanded the case to the circuit court for further proceedings consistent with their holding in this opinion.

Corley v. Detroit Board of Education, 470 Mich. 274 (2004).

In this case, plaintiff alleged a hostile work environment and an adverse employment action as a consequence of having a prior romantic relationship with her supervisor. Their relationship ended when plaintiff's supervisor began dating another employee. Both supervisor and co-employee were named defendants. At issue was whether plaintiff had been subjected to "conduct or communication of a sexual nature;" the third element of MCL 37.2103(i). Plaintiff claimed that her supervisor repeatedly warned her not to interfere with his new relationship and threatened plaintiff with consequences if she did. Further, plaintiff alleged her co-employee engaged in "catty" conversations about plaintiff and caused plaintiff's work station to be relocated. However, the Supreme Court found that the supervisor's threats were not inherently sexual in nature, and therefore could not constitute sexual harassment. In addition, the defendant co-employee's conduct or communication was not sexual in nature, but instead was nothing more than the co-employee's person animosity towards plaintiff. The Court noted that MCL 37.2103(i) does not forbid the "communication of enmity between romantic rivals." The Supreme Court reversed the decision of the Court of Appeals with respect to plaintiff's sexual harassment claims and reinstated the circuit court's order granting summary disposition for defendants.

Peden v. City of Detroit, 470 Mich. 195 (2004).

In *Peden v. City of Detroit*, the Supreme Court held that plaintiff did not have a disability discrimination claim under the American with Disabilities Act (ADA), 42 USC 12101, et seq or the Michigan Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.101 et seq, because he could not perform the essential functions of a police officer as defined by the City of Detroit due to his heart condition. Plaintiff, a former Detroit police officer, suffered a heart attack in 1986. He returned to work

MICHIGAN SUPREME COURT UPDATE

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on indefinite restricted duty. He performed clerical duties for about 10 years. In 1995, the Detroit Police Department (Department) implemented a list of Essential Job Functions for all city police officers. Included in this list were such tasks as pursuing suspects on foot chases, engaging in vehicle pursuits, effecting forcible arrests and overcoming violent resistance. Since plaintiff, due to his heart condition, could not perform these tasks, the Department placed plaintiff on involuntary, non-duty disability retirement. Plaintiff sued the Department alleging it violated the ADA and the PWDCRA because the Essential Job Functions tasks were not essential to his job duties, which were basically clerical.

Under both the ADA and the PWDCRA, a plaintiff must show that he is a "qualified person with a disability" as part of his prima facie case. Put another way, a plaintiff must show that he is capable of performing the "essential functions" of his position. The Supreme Court broke this down into the following two issues: (1) whether the Department properly characterized the essential functions or duties of a police officer position under the ADA and the PWDCRA; and (2) whether plaintiff, who suffers from a permanent heart condition, has presented prima facie evidence that he is able to perform the essential functions of his position.

With respect to the first issue, the Supreme Court concluded the plaintiff failed to prove that the Department's Essential Job Functions were not essential to his position. In analyzing plaintiff's ADA claim, the Court referred to the Equal Opportunity Employment Commission (EEOC) regulations for a list of relevant factors for use in determining whether the job functions are essential. These factors weighed against the plaintiff and in favor of the Department. As for plaintiff's PWDCRA claim, the Court held that the Department's definition of a police officer's job duties is entitled to substantial deference. Plaintiff did not present sufficient evidence to overcome this deference.

As to the second issue, the Court held that the plaintiff did not meet his burden of raising a genuine issue of material fact regarding whether he could perform the Department's Essential Job Functions. On the contrary, the evidence showed that plaintiff suffered a heart attack, was diagnosed with heart disease, was confined to light duty, and spent the majority of his career as a desk clerk. In addition, plaintiff's own counsel admitted to the trial court that plaintiff was unable to perform many of the tasks within the Essential Job Functions list. Therefore, the Court reversed the decision of the Court of Appeals on both issues and reinstated the circuit court's grant of summary disposition in favor of the defendant.

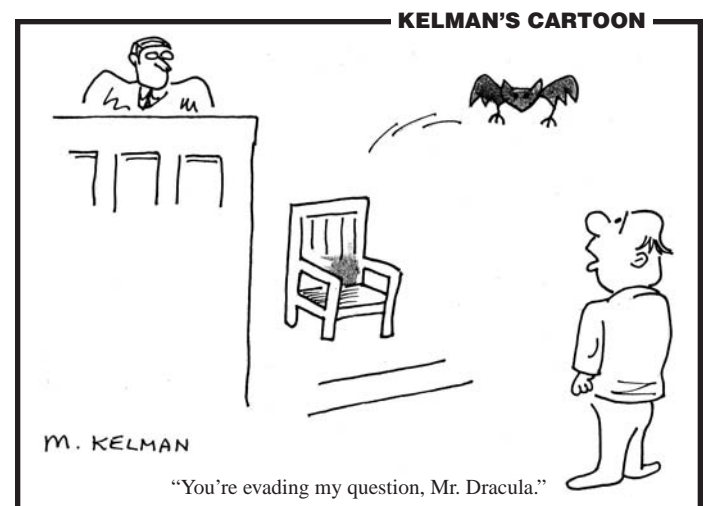
Gilbert v. DaimlerChrysler Corporation, 470 Mich. 749 (2004).

In an appeal involving the largest recorded compensatory award for a single-plaintiff sexual harassment suit in the history of the United States, the Michigan Supreme Court, in a 4-3 decision, held that the case should be remanded for a new trial due to plaintiff's counsel's deliberate and repeated efforts to divert the jury's attention from the facts and the law, and instead plaintiff's counsel "sought to inflame passion and to incite the jury to punish the defendant even while disclaiming that he was seeking punitive damages." Examples of plaintiff's counsel's conduct cited by the Court included: (1) analogizing plaintiff as a Holocaust survivor and DaimlerChrysler, a company partially under German ownership,

with the Nazis; (2) attempting to convince the jury that DaimlerChrysler had physically injured plaintiff, where there was no evidence of physical injury in the record; (3) playing on the prejudice against corporation by arguing that DaimlerChrysler thought it did not have to obey law due to its corporate status; and (4) repeatedly using language calling for punitive rather than compensatory language.

Also, the Supreme Court clarified a trial court's gatekeeping role required by MRE 702 as a result of the controversy surrounding the expert testimony of a social worker. Plaintiff's expert, a social worker, was allowed to interpret plaintiff's medical records and render an opinion that required medical expertise. The social worker's opinion was used to support plaintiff's theory at trial that the sexual harassment she encountered as an employee had produced a permanent change in her "brain chemistry," which change led to an increase in substance abuse and that, in the end, DaimlerChrysler's failure to curb sexual harassment at her plant would cause plaintiff to die the most painful death imaginable. This opinion became the "linchpin of plaintiff's case and unmistakably affected the verdict." The Court concluded the social worker was unqualified to interpret plaintiff's medical records and to give medical opinions. There was no evidence in the record that the social worker was qualified by training, experience, or knowledge as required by MRE 702. In addition, the Court rejected the Court of Appeals argument that the social workers' lack of expertise or experience merely related to the weight, and not the admissibility, of his testimony. The proffered expert testimony was simply far beyond the scope of the social worker's expertise.

Finally, the Supreme Court addressed the defendant's appeal regarding the trial court's denial of a motion in limine to exclude incidents that plaintiff reported for the first time at her deposition. The Court upheld the trial court's ruling, stating that such evidence may be admissible under two rationales. "First, such evidence may be admissible in order to establish the nature and extent of the hostile environment to which plaintiff was subjected and the adequacy of defendant's response upon being notified about sexual harassment. Second, that evidence may be admissible under a 'constructive notice' theory when a plaintiff contends that sexual harassment was so pervasive that her employer should have known of the need for corrective measures." Any incidents the plaintiff reported for the first time during her deposition were admissible under the first rationale. ■





VIEW FROM THE CHAIR

David E. Khorey, *Chair*
Labor and Employment Law Section

LOOKING AHEAD

By the time this issue of *Lawnnotes* “hits the newsstands,” as Stu Israel likes to say, my term as Chair of the Section will be over.

For that reason, writing this particular column feels a little like writing my will, a document written to be read after the end of something, devised to influence subsequent events. I’ll try to make something of that opportunity.

The greater opportunity this column provides at this time, however, and its greatest value, is the ability it provides to thank the other officers and departing council members for their work this past year.

Jim Moore served ably as Vice Chair and will make a superb Chair. He is reliable and a straight shooter. Deb Gordon was more than the Council Secretary (incidentally, one of the tougher jobs on the Council). She was a founder and driving force behind our mini-seminars and new lawyer program, and is a constant and talented source of creativity and innovation for the Section. Michael Lee has been a worthy Treasurer with whom it has been a delight to serve on the Council. He has a great sense of history and a great sense of humor, two qualities which serve him and the Section well.

My thanks go not only to the officers but to the departing members of the Council as well: Joe Barker of the NLRB, Nora Lynch of MERC, and Joe Ritok of Dykema, Gossett. I owe Joe Ritok a special thank you for his generosity not only in hosting meetings, but also for making his firm’s videoconferencing available to us so that I could occasionally meet with the Council without having to drive to Detroit.

I also need to especially mention and thank Dave Kotzian and the aforementioned Stuart Israel for their selfless efforts on managing the Section Listserv and publishing *Lawnnotes*, respectively. Finally, I would like to thank my predecessor, Andrea Dickson, for her guidance and for leaving the Section in such healthy shape.

Indeed, today we are a healthy Section. So here comes the last testament part:

What is striking about the people mentioned above is that with the exception of Joe Ritok (Dykema, Gossett) and Andrea Dickson (Butzel, Long), all those lawyers are on the “other side” of cases from me. They represent my clients’ opponents in an adversarial system, or at least the agencies before which they appear often (albeit unjustly) accused of wrongdoing. And with respect to Dykema and Butzel, my law firm competes with those firms for clients in a process sometimes just as adversarial and most times less edifying.

How is it in a fractured, competitive society and Bar that we continue to work so effectively together for what we define as our common goals and objectives? More importantly, how does the Section and its Council sustain this ability, when each of us professionally seek such disparate ends?

The key is our ability — uncanny as it may seem to some — to identify and define what we have in common as professionals, even though the barriers of those things that would appear to divide us. Indeed, what we share in common is our profession and, ideally, our professionalism; these things both underlie and transcend the particular and diverse results we each seek. Our commitment to the practice of law as it should be practiced is our common language. That language is not always precise, but it is nonetheless expressive. Would that everyone with a “P” number could speak it.

We must continue to focus on those things we hold in common as lawyers and avoid the temptation to cluster with those whose clients most resemble our own (to the extent, in a competitive business, that even this level of interaction is likely). Our Section has a true quality of diversity through which we really do learn more about being better lawyers and more responsible members of the Bar by means of our interaction with the lawyers on the other side of the “v.”

This is not an easy task and will be more difficult in the future. We are all good advocates sworn to uphold our clients’ interests. We all take positions and hold them against all comers and all odds, in a particular system which currently affords us as lawyers certain privileges in that process. In these respects, no one else is like us, but we are like each other.

To those who remain on the Council and who will serve as officers next year, thank you for all of your efforts this past year. Please keep up the good work uniquely achievable by this Section.

THE BALLOT'S IN THE MAIL: THE NLRB AND MAIL BALLOT ELECTIONS

Ethan Ray
NLRB Region 7 Field Examiner¹

Background

- The Act itself does not specify the manner in which the elections are conducted. It states only that the ballots are secret.
- The NLRB has used mail ballot elections since 1936.
- The Regional Directors have discretion in determining the manner in which elections are conducted.
- NLRB precedent and policy favor a manual election.

Current

- *San Diego Gas & Electric*, 325 NLRB 1143 (1998). This case sets forth the criteria Regional Directors should consider when deciding whether to order a mail ballot election.
 1. Where eligible voters are geographically scattered because of their job duties.
 2. Where eligible voters' work schedules vary so that they are not present at a common location at common times to vote manually.
 3. Where there is a strike, lockout or picketing in progress.
- When any of these factors are present, the Regional Directors should also consider:
 1. Desires of the parties.
 2. Likely ability of the voters to read and understand the ballot.
 3. Availability of addresses of employees.
 4. What constitutes the efficient use of NLRB resources.

Standards

- Regional Directors have broad discretion to authorize mail balloting when appropriate. *Pacific Gas & Electric, Co.*, 89 NLRB 938 (1950); *National Van Lines*, 120 NLRB 1343 (1956).
- Only where it is shown the RD has clearly abused their discretion will the Board nullify an election and prescribe other election standards. *National Van Lines*, supra.

When A Mail Ballot Is Warranted

- Mail ballot election properly ordered for unit of home health care workers who work at locations scattered across N.Y. City—would have been significant effort to use public transportation to vote manually in central location & would have required use of replacement workers to do job while voting. *Kwik Care Ltd. v. NLRB*, 82 F.3d 1122 (D.C. Cir. 1996)
- Mail ballot election appropriately within RD discretion in unit of over-the-road drivers working out of 4 different locations far apart at odd reporting times—otherwise would require long voting sessions over 2 days—National Mediation Board has tradition of mail ballots. *London's Farm Dairy*, 323 NLRB 1057 (1997)

- Mail ballot appropriate for Ees whose working shifts so varied that 3 consecutive days of manual balloting would be needed to accommodate all eligible voters. *Reynolds Wheels International*, 323 NLRB 1062 (1997)
- Mail ballot election properly ordered for unit of groundfish & shellfish observers whom ER provides to commercial fishing vessels & plants operating in Bering Sea & Gulf—also appropriate to conduct election in second busiest peak period where it is closer in time & ER has about 7 months of peak times as seasonal ER. *Saltwater, Inc.*, 324 NLRB 343 (1997)
- Sending mail ballots to Ees who were on “layoff status” without obtaining consent of parties not abuse of discretion by RD where such Ees were widely scattered at time of election & would otherwise have been unable to vote. *Sitka Sound Seafoods*, 325 NLRB 685 (1998)
- Mixed mail-manual ballot appropriate for unit of permanent full-time production workers & seasonal workers at seafood processing plant in Alaska—election need not wait until peak season since plant operates year-round & permanent workers should be allowed to vote without delay. *Sitka Sounds Seafood v. NLRB*, 163 LRRM 2897 (D.C. Cir. 2000)
- Not shown RD abused his discretion by ordering mail ballot election where Ees scattered across 8 facilities which would require most to travel to 1 or 2 voting locations, or require significant expenditure of agency resources by agent traveling to all locations—Case Handling manual should be modified to delete reference to “unfeasibility” of conducting manual ballot as necessary for mail ballot election. *San Diego Gas & Electric*, supra
- Nothing improper in RD's notification of parties by letter for positions on mail ballot election because no requirement that decision to conduct mail ballot election be contained DDE, although failure to articulate rationale for conducting election by mail ballot troubling, but not fatal here. *Odebrecht Contractors of Florida*, 326 NLRB 33 (1998)
- Mail ballot election proper where Ees have scattered work schedules so that if election were confined to any given 2-workday period, 5 of 34 employees (15% of unit) would not be scheduled to work or be available for manual election—also appropriate to consider Agency budget since Board agent would have to conduct election over 2 day period, which would not be an efficient use of limited available Board resources. *M & N Mail Service*, 326 NLRB 451 (1998)
- RD's direction of mail ballot election based on eight widely scattered work sites & need to conserve agency resources fits squarely within parameters of Casehandling Manual and guidelines set forth in *San Diego Gas & Electric*- all Ees could not be present at common place at common times to vote manually—also none of jobsites owned by ER & not all Ees report to same office each morning. *Masiongale Electrical-Mechanical*, 326 NLRB 493 (1998)
- RD decision to direct mail ballot election appropriate even though “this is not the usual or ‘normal’ mail ballot case; rather it is case in which ER has interfered with normal (and agreed-on) Board processes & then comes to us objecting to the resolution reached to the problem it created”—ER

renewed on agreement to allow all potentially eligible voters onto its premises to vote. *North American Plastics*, 326 NLRB 835 (1998)

- RD decision for mail ballot election appropriate where based on scattering of Ees & husbanding Board's resources—ER has 30 regularly scheduled Ees who work day or night shifts in a 24-hour, 7-days-a-week operation—RD declined to accept ER's offer to call all Ees to work on single shift or single day (two shifts) so manual election could be held. *GPS Terminal Services*, 326 NLRB 839 (1998)

When A Mail Ballot Is Not Warranted

- Ordering mail ballot election after parties had signed stipulation overruled because RD bound to same & it clearly contemplated manual election—even though difficulty in getting location for election at customer's premises, not shown no suitable site available. *T & L Leasing*, 318 NLRB 324 (1995)
- Board improperly reversed RD's discretionary decision to use split-session manual election over 2 1/2 hour period rather than mail ballot since manual election not "infeasible" per Casehandling Manual—by ordering mail ballot election, Board "second-guessed" RD. *Shepard Convention Svcs. v. NLRB*, 85 F.3d 671 (D.C. Cir. 1996)
- Mail ballot election should not have been directed—distance of 80 miles between Regional Office & ER's facility is insufficient to justify departure to presumption that favors manual election where unit Ees work at single site. *Williamette Industries*, 322 NLRB 856 (1997)
- Region's failure to order mail ballot election for truck terminal not objectionable where 2 voting sessions held & only 2 of 67 voters prevented from voting because of conflict with their routes—Casehandling Manual only requires RD to "explore" use of mail ballot election, which was done here. *Cast North America Trucking*, 325 NLRB 980 (1998)
- RD holding second election manually rather than by mail ballot not reason for nullifying election where "there is no basis for saying that a mail ballot is essential for striker participation in the election." *Diamond Walnut Growers*, 326 NLRB 28 (1998)
- RD didn't abuse his discretion in refusing to conduct mail ballot elections for 1600 Ees at 25 different ERs throughout N.Y. metropolitan area because manual elections would maximize turnout & afford all voters adequate opportunity to cast ballots—facts could have supported mixed mail/manual election, but that discretion up to RD not Board. *Nouveau Elevator Industries*, 326 NLRB 470 (1998)
- Rerun election by mail ballot can't be ordered where stipulated election agreement mandated manual election (*T&L Leasing*) even though manual election involved 105 hours of voting over 3 days at 3 different sites at substantial expense to Board & resulted in 90% voter turnout instead of the typical 95%—also, mail balloting would eliminate allegations of improprieties that occurred during manual election, such as list keeping, etc. *St. Vincent Health System*, 330 NLRB 1051 (2000)

Not an abuse of RD's discretion to refuse to allow an employee who will be on vacation to vote by absentee ballot. *NLRB v. Cedar Tree Press*, 169 F.3d 794 (3d Cir. 1999)

Interesting Mail Ballot Issues

- Late arriving mail ballots – Ballots that arrive after the deadline, but before the counting has begun should be counted. *Watkins Construction*, 332 NLRB 828 (2000).
- Electioneering – The election starts when the mail ballot kits are placed in the mail. No captive audience meetings after that. *Oregon Washington Telephone Co.*, 123 NLRB 339 (1959). However, captive audience meeting can be held within the 24-hour period before the election starts.
 - In a mixed manual, mail ballot election – Those voting manually are subject to the *Peerless Plywood* rule. No captive audience meetings within 24-hours of the voting. *Conroe Creosoting Company*, 149 NLRB 1174 (1964), *Peerless Plywood*, 107 NLRB 427 (1953).
- Notices of Election – They must be posted three full working days before the start of the election. *Club Demonstration Services*, 317 NLRB 349 (1995).
- Voter eligibility -
 - In the unit as of the payroll cutoff date.
 - In the unit on the date they mail in their ballot. *Dredge Operations, Inc.*, 306 NLRB 924 (1992).
- Unsigned return ballot envelopes or printed signature – The ballot is void. *Thompson Roofing*, 291 NLRB 743 (1988).
- Collect calls from voters – We accept collect calls from voters seeking to have a mail ballot kit sent to them.
- Vote cast on a sample mail ballot – It's good. *Aesthetic Designs, LLC*, 339 NLRB No. 55 (2003).
- A party to the election collecting or handling a voter's mail ballot – Objectionable conduct. *Fessler & Bowman, Inc.*, 341 NLRB No. 122 (2004).
- Voter sends in original and duplicate ballots. Which one counts? The one with the earliest postmark. If postmark unreadable, the earliest date/time stamp from the Regional Office.

Mail ballots present different legal and practical issues for the Board and the parties and remember that the Board has observed that "[m]ail ballot elections are *more vulnerable to the destruction of laboratory conditions* than are manual elections because of the absence of direct Board supervision over employees' voting." *Thompson Roofing, Inc.*, 291 NLRB 743 at fn. 1 (1988) (emphasis added).

— END NOTE —

¹Acknowledgement and credit also to the staff of NLRB Region 7 and the NLRB Office of Employee Development. The views expressed herein are my own and are not intended to be an official statement of NLRB policy. Portions of this paper were presented at the Annual Gottfried Symposium on October 14, 2004. ■

SOME TRUTHS ABOUT REQUESTS FOR ADMISSION

Stuart M. Israel and John G. Adam
Martens, Ice, Klass, Legghio & Israel, P.C.

Federal Rule of Civil Procedure 36 “serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be.” 1970 Advisory Committee Notes, Federal Civil Judicial Procedure and Rules (West, 2004 rev. ed.) at 191.

1. Admission Requests And “Undue Burden.”

The opposition may seek to avoid responding to admission requests, particularly comprehensive requests, by complaining the obligation is an “undue burden.” The Rule 36 obligation, however, is no more “undue” than participation in the final pretrial order process, which often requires parties to make extensive and diligent efforts to narrow disputed issues of law and fact. See *O’Neill v. Medad*, 166 F.R.D. 19, 21 (E.D. Mich. 1996) (citation omitted) (“requests for admissions are similar in nature to a pretrial order, which narrows issues and eliminates those issues with which there is no dispute.”) There is nothing “undue” about using Rule 36 to require a party to admit the indisputable.

2. The Number Of Admission Requests.

How many is too many? There is no formulaic limit on admission requests. Rule 36 has none and typically there are no limits in local rules. Nor is any formulaic limit appropriate. Numeric complaints and “generalized criticisms” do not demonstrate that admission requests are “unduly burdensome.” The court must assess the substance of *each* request objected to, and the basis for each objection, to determine the propriety of each in the circumstances of each case.

See (1) *Photon, Inc. v. Harris Intertype, Inc.*, 28 F.R.D. 327 (D. Mass. 1961) (court permits, with modification, most of the 704 admission requests made to plaintiff, totaling 114 “legal size” pages, in patent infringement declaratory judgment action); (2) *Phillips Petroleum Co. v. Northern Petrochemical Co.*, 1986 WL 11004 (N.D. Ill.) (upholding magistrate judge’s order disallowing 2,068 admission requests, but disagreeing with the magistrate judge’s 20-request limit, and inviting reconsideration to ask magistrate judge to assess whether the requesting party has “a reasonable basis for believing its requests for admissions are true, and that it is not seeking to bypass limitations on the number of interrogatories”); (3) *Duncan v. Santaniello*, 1996 WL 121730 (D. Mass.) (addressing 292 admission requests, totalling 322 with sub-parts: “the sheer number of admissions sought is insufficient, at this time, to convince the court to issue a protective order” where there were no “specific objections to particular requests” and “no claim that the admissions sought are irrelevant.”); (4) *Berry v. Federated Mutual Insurance Co.*, 110 F.R.D. 441, 442-443 (N.D. Indiana 1986) (denying motion asserting that requests to admit genuineness of 244 letters, office memoranda, checks and other documents were “overwhelming, vexatious, oppressive, and unduly burdensome”; the “purpose of Rule 36 is to expedite the trial by determining what issues are in genuine dispute and by resolving issues which are not disputed ... Rule 36 is an appropriate procedure to determine which documents will have foundational problems and which will not.”); (5) *Moscowitz v. Baird*, 10 F.R.D. 233, 234 (S.D.N.Y. 1950) (court denies motion to strike 267 admission requests and rejects recipients’ assumption “that generalized criticisms, coupled with the number of requests, were enough to relieve them of the duty imposed” by Rule 36; “The number of requests is large, to be sure, but not unreasonably so in the circumstances of this case.”).

Consider *Misco, Inc. v. United States Steel Corp.*, 784 F.2d 198 (6th Cir. 1986), where Misco served 2,028 admission requests, totaling 343 pages. Later Misco withdrew 580 requests, leaving 1440, totaling 225 pages. The magistrate judge individually reviewed the requests and found that most were really Rule 33 interrogatories, and

that Misco made “an improper attempt to circumvent the local district court rule which limited the number of interrogatories to thirty.” The magistrate judge held that only 18 of the 1,440 “requests” were “actually valid requests for admission under Rule 36.” The Sixth Circuit upheld the magistrate judge and the district court, holding it was an abuse to file 2,028 “requests for admissions” which really were interrogatories, to circumvent the 30-interrogatory limit.

3. Requests At Or After The End Of Discovery.

A party cannot evade Rule 36 responsibilities merely because discovery is ongoing, or because the parties have exchanged interrogatories and documents and conducted depositions, or because responses to the admission requests are due at or after the close of discovery. Indeed, the close of discovery often is the *most appropriate* time to seek admissions.

Rule 36 exists within a framework of multiple mechanisms for discovery and information exchange — depositions (Rule 30), interrogatories (Rule 33), document requests (Rule 34), admission requests (Rule 36), initial disclosures (Rule 26(a)(1)), and pretrial disclosures (Rule 26(a)(3)). The various discovery and disclosure methods may be used serially or simultaneously, and are not mutually exclusive. See *Duncan* at 1, quoting *Wright & Miller*: “A party need not elect between Rule 36 and the other rules and he may use the various devices at the same time.”

Rule 36 requests often are directed at refining what already has been discovered or disclosed. Admission requests often are *most appropriate* at the conclusion of discovery, to reduce “complexity” and produce manageable, clear statements to facilitate communication with the court and the jury. Indeed, as Judge Gilmore wrote in *O’Neill*, 166 F.R.D. at 21 (emphasis added), allowing admission requests after the close of discovery:

According to *Wright & Miller*, Rule 36 is not a discovery device at all because it assumes that the party proceeding under it *already knows the fact* or has a document and merely seeks the opposing party to authenticate its genuineness.

In *Phillips* at 1, the court suggested that the standard for the magistrate judge’s review of the 2,068 requests was whether the drafter had “a reasonable basis for believing its requests for admissions are true.” Such a “reasonable basis” may be found in deposition testimony and other discovery. In *Duncan* at 1, the recipient argued that “most, if not all” the requests were “discussed” at deposition and “mirror the deposition transcripts” and so were “excessive, unduly burdensome, unnecessary and duplicative.” The court disagreed, finding the requests properly were “designed to elevate defendant’s deposition answers from evidence to fact.”

In short, Rule 36 *assumes* the requesting party has an educated foundation for its requests, and that this foundation comes from discovery. Accordingly, the recipient is not excused from responding merely because discovery is closed and covered the same subjects as the requests; to the contrary, post-discovery admission requests may be particularly appropriate to “elevate” discovered information from evidence to admissions.

4. The 30-Day Response Deadline.

The 30-day response deadline is set by Rule 36(a). This short timetable may be a source of dispute when admission requests are served at the close of discovery, which is likely to be shortly before the dispositive motion cut-off or the pre-trial conference. While civility principles may call for accommodation, unforgiving court-mandated due dates may lead the requesting party to insist on the 30-day response period. In addition, courts may be unsympathetic to efforts to expand the 30-day period. Motion or pretrial deadlines may be given priority and courts may perceive (often wrongly) that responding to admission requests won’t take much time or effort. See *Duncan* at 1 (responses “should be relatively easy” where a party seeks admissions “with respect to ‘statements or opinions of fact or the application of law to fact’ set forth in [the responders’] depositions.”) and *O’Neill* at 21 (Rule 36 “assumes that the party proceeding under it already knows the fact” that is the subject of each admission request).



THE JOY OF LABOR LAW

2 Minute Oral Arguments. Perhaps the courts will adopt the presidential “debate” format and lawyers will adopt the rhetoric of the candidates, “Opposing counsel lied to the Union, lied to its employees and he is now lying to this Court. I will not lie”; “My opponent wants to run away from his client’s record of illegal discharges, harassment and breach of contract”; “We lack the same intelligence”; “My opponent may be certain but he is certainly wrong”; “My opponent is, to quote Churchill, ‘a modest little man with much to be modest about’” “This Union rushed into a preemptive strike and in doing so made a colossal error of judgment.”

Affidavits. Speaking of lying and lack of intelligence, what if the candidates had to file “affidavits” in support of their positions and arguments under penalty of perjury? I bet you would see a lot of conclusory affidavits. Which reminds me, why can’t lawyers write good affidavits. If “it is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment”, *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir.1994), how come the affidavits from opposing counsel- not mine own - are often conclusory and inadmissible. Reason: to quote a candidate: “They can run from the facts but they cannot hide the facts, see my affidavit!”

Disabled Workers Are Handicapped by NLRB. Expressing concern that the disabled worker’s rehabilitative process may be handicapped, in a 3-2 decision involving Brevard Achievement Center, the NLRB ruled that disabled workers who are in a primarily rehabilitative relationship with their putative employer are not employees under the NLRA. The majority opinion — Chairman Robert Battista, and Members Schaumber and Meisburg — emphasized that the Board has never asserted jurisdiction over relationships that are primarily rehabilitative in nature. Members Liebman and Walsh dissented. The majority noted this decision was consistent with *Brown University*, 342 NLRB No. 42 (2004) which ruled that graduate student assistants are not statutory employees because their relationship with their employer is “primarily educational.” With this type of “consistency”, what next? “We hold today that the recognition bar and card check agreements are illegal under the NLRA.”

— John Adam

NLRB PRACTICE AND PROCEDURE

Stephen M. Glasser
Regional Director

Region 7, National Labor Relations Board

In recent months the Board has issued several decisions impacting its jurisdictional reach. Although Region 7 has not received any cases that have required application of these decisions, they are described here because presumably they are of interest to the affected employment sectors.

In *Brown University*, 342 NLRB No. 42 (July 13, 2004), the board overruled *New York University*, 332 NLRB 1205 (2000) and held that graduate student assistants (who had yet to complete and receive their academic degrees) were primarily students, not “employees” within the meaning of Section 2(3) of the National Labor Relations Act (NLRA). The Board stated that it would not intrude into the educational process, finding that an *academic relationship* existed between the employer and the petitioned-for individuals, rather than a fundamentally economic relationship.

In *Brevard Achievement Center, Inc.*, 342 NLRB No. 101 (Sept. 10, 2004), the Board held that the petitioned-for disabled workers were not “employees” within the meaning of the NLRA. The employer is a nonprofit corporation with its mission to assist adults with severe disabilities to become independent members of the community, providing training, educational, and rehabilitative services. The Board held that the relationship between the employer and the petitioned-for janitors, custodians, and lead persons was *primarily rehabilitative* in nature, as opposed to the typical industrial setting premised upon “business considerations.”

In *San Manuel Indian Bingo and Casino*, 341 NLRB No. 138 (May 23, 2004), the Board asserted jurisdiction over the employer’s on-reservation commercial activities. The NLRA being a statute of general application, not specifically exempting Indian tribes, the Board stated that it would not confine its jurisdictional analysis as to whether the activities occurred on — or off — reservation. Compare *Sac and Fox* 307 NLRB 241 (1992); *Yukon Kuskokwim Health Corp.* 328 NLRB 761 (1999). Citing *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985), the Board held that jurisdiction would not be found where: 1) the law “touches exclusive rights of self-government in purely intramural matters,” 2) application of the law would abrogate treaty rights, or 3) “proof” existed in statutory language or legislature history that Congress did not intend the law to apply to Indian tribes. In a companion case, *Yukon Kuskokwim Health Corporation*, 341 NLRB No. 139 (May 28, 2004), the Board — as a matter of policy — declined to assert jurisdiction over a regional nonprofit corporation which provided a comprehensive health services program for Southwestern Alaska. The employer operated a hospital where 95 percent of the patients were Native Alaskans. Its board of directors was elected by the membership of the tribal government of 58 Alaskan Native tribes. One or two of the 40-member bargaining unit was Native Alaskan. The Board found that the employer fulfilled a traditionally tribal or governmental function unique to its status, and that Federal Indian law discourages interference in the affairs of Indians when they act in a manner consistent with their unique status. The Board declined jurisdiction.

At the regional office level, a meeting of our Practice and Procedure Committee will be held near the end of January, at the winter meeting of the Labor and Employment Law Section. Topics of any nature impacting NLRB policy, procedure, and practice are open for discussion; details regarding the upcoming agenda will be mailed to Committee members. ■

5. “Generalized Criticisms” Are Insufficient To Obviate Rule 36 Obligations.

Admission requests call for individualized assessment and good faith compliance, not “generalized criticisms.” *Moscowitz*, 10 F.R.D. at 234 (“generalized criticisms” and the “large” number of requests do not relieve recipients of the Rule 36 “duty” to respond).

Indeed, a party seeking a protective order must, at minimum, demonstrate *specific* improprieties in *individual* requests, and is not relieved of Rule 36 obligations for *all* requests because *some* requests maybe improper. In *Photon*, 28 F.R.D. at 328, the objecting plaintiff admitted 176 of the 704 requests while simultaneously objecting (largely unsuccessfully) to the remainder. In *Phillips* at 1, the court invited reconsideration, to obtain the magistrate judge’s *specific* assessment of the 2068 requests. In *Duncan* at 1, the court denied a protective order where there were no “specific objections to particular requests” and “no claim that the admissions sought are irrelevant.” In *Moscowitz*, 10 F.R.D. at 234, the court refused to strike 267 requests based only on “generalized criticisms.” Finally, Rule 36(a) states: “If objection is made, the reasons therefor shall be stated.” ■

INSIDE *LAWNOTES*



- John Spitzer discusses the protocol for interviewing the other side's former employees.
- Dan Bretz tells employers what they ought to know about lockouts.
- Stuart Israel offers observations on judges (compelled at gunpoint), and then joins with John Adam to offer some truths about admission requests.
- Barry Goldman reveals his secret thoughts as a case evaluator and mediator.
- Jeff Kopp looks at the state of "reverse discrimination" claims under Elliott Larsen.
- Dave Khorey pens his final View From The Chair.
- NLRB field examiner Ethan Ray reviews mail ballots.
- 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, MERC, MDCR, and EEOC, websites to visit, a cartoon by Maurice Kelman, and more.
- Authors John G. Adam, John T. Below, Dan Bretz, Regan K. Dahle, Stephen M. Glasser, Barry Goldman, Jesse Goldstein, Kurt M. Graham, Stuart M. Israel, Nancy G. Itnyre, Jeffrey S. Kopp, Maurice Kelman, David E. Khorey, Aaron Leal, Heather G. Ptasznik, Michael M. Shoudy, John B. Spitzer, Ethan Ray, Jeffrey A. Steele, and more.

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