



## LOOSE LIPS SINK SHIPS: THE HIDDEN MENACE OF THE INDEPENDENT REFERENCE CHECKER

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For years employment lawyers have provided their clients with a “less is more” approach to answering inquiries about former employees. The reason for the “name rank and serial number” approach has traditionally been the fear that a negative comment by a former employer could spark a defamation claim or be used in an employment discrimination lawsuit. These fears are still very real as evidenced by a new technique utilized by would-be plaintiffs: the independent reference checker.

As reported recently in the *New York Times*, many job seekers are utilizing independent reference checking services to monitor what their previous employer may say about them.<sup>2</sup> Independent reference checkers typically advertise on the web and stress their ability to “discreetly” ascertain whether your previous employer is providing “correct” information without revealing their clients identity. In other words, the reference checking service will probably not reveal who they work for and may even masquerade as a potential employer. They may even attempt to bypass normal human resource channels and speak with front line managers. (For an example, see [www.jobreference.com](http://www.jobreference.com)). These techniques are often a trap for unwary managers and supervisors whose candor may provide an employee with a basis for a lawsuit.

Statements made to independent reference checkers are most commonly used to support a claim of defamation, either against an employer or against the individual making the statement. This type of claim is usually fostered by the former employee’s belief that the statements made about him or her were false and made with an intent to damage their ability to obtain new employment.

### Fighting the Defamation Claim

Aside from the typical defenses utilized in any defamation claim, such as truth, an employer has at least two defenses particular to the reference checker context. The first is to attack the elements of the prima facie case. Under Michigan law, to constitute defamation, a statement must contain actual facts about the plaintiff and be provably false.<sup>3</sup> Accordingly, subjective statements of opinion or generalized comments are not actionable.<sup>4</sup> This is an important distinction because a supervisor’s most pointed criticisms of an employee will most likely be phrased in the form of an opinion.

(i.e., “He doesn’t seem too motivated.” “She has a poor attitude.” “He performed poorly on project X.”) While these type of statements may seem unfair and certainly untrue to a former employee, it is difficult to classify them as objectively false.

Also, Michigan law requires that any supposedly defamatory statement be communicated to a third party. In the reference checker context, it is quite likely that the reference checker was the only person who heard the comment at issue. Thus, agency law may provide the defendant with the argument that there has been no publication beyond the plaintiff.<sup>5</sup> The relationship between the reference checker and the former employee may also lead to a defense of consent. That is, by charging his agent with the task of collecting information from his former employer, the plaintiff as essentially consented to the release of possibly unfavorable information.<sup>6</sup> This will be particularly true if the former employee has reason to believe, either through reviews or an exit interview, that his former employer had a negative impression of his work.

In addition to attacking the elements of a plaintiff’s prima facie case, a defendant may plead an affirmative defense based upon the qualified privilege protecting communications between an employer and a prospective employer.<sup>7</sup> If applicable, this privilege “ups the ante” for the plaintiff because he or she must now show that the defamation was made with actual malice – not mere negligence. This hurdle is particularly difficult if the defendant is able (at deposition or trial) to offer a reasonable basis for their statements and/or other individuals are able to offer corroborating testimony. Bear in mind that the qualified privilege typically applies only to information central to an employment relationship. It will not cover allegedly defamatory comments about a candidate’s personal life.

### Protecting Yourself Early

In sum, an employer who faces a claim based upon statements made to an independent reference checker has a number of legal defenses. Unfortunately, they are defenses that will require motion practice or discovery, and may be quite expensive. For this reason, employers may want to take precautions in order to avoid such a lawsuit. The following strategies may help protect your company:

- Have a policy and publicize it. Make sure that *everyone* in your management team is aware of your policy regarding inquiries about former employees. Independent reference checkers are often astute at avoiding human resource personnel and going straight to managers and supervisors, whom they view as more likely to offer a candid assessment. As one website boasts:

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## STATEMENT OF EDITORIAL POLICY

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# LOOSE LIPS SINK SHIPS: THE HIDDEN MENACE OF THE INDEPENDENT REFERENCE CHECKER

*(Continued from page 1)*

Sure, companies are typically limiting the release of employee information to basic data only but we have encountered far too many managers all too willing to bypass company policy and comment subjectively - are you certain your former managers will comply with company policy? ([www.jobreference.com](http://www.jobreference.com))

In larger organizations, it may be best to simply require that *all inquiries* be addressed to human resources.

- Make sure your policy is adhered to consistently. Treating an inquiry about one ex-employee differently than an inquiry about another may be used as evidence of malice or bias.
- Confirm who you are speaking with and whom they represent. If necessary, tell the caller that you will only respond to an inquiry made in writing. This will give you time to investigate the source of the inquiry.
- *Don't gossip.* Apprise managers of the possible dangers inherent in supplying *any* non-work related information even in opinion form. Commenting on areas outside the employment context can possibly destroy a claim of privilege.
- Use common sense. When it crosses your mind to say “I really shouldn't tell you this but...,” *don't say another word.*
- At separation, have former employees consent *in writing* to the release of certain information to prospective employers.

As the economy continues its jobless recovery, and competition for available jobs becomes more intense, independent reference checkers are not likely to go away. As with many issues in employment law, well planned (and well publicized policies) can help an employer avoid any possible claim involving an independent reference checker.

— END NOTES —

<sup>1</sup>The author wishes to thank Nakisha Chaney, also of Dickinson Wright, for her assistance.

<sup>2</sup>Marci Nusbaum, *When a Reference is a Tool For Snooping*, *New York Times*, October 19, 2003, § 3 at p. 12.

<sup>3</sup>*Kevoorkian v American Medical Ass'n*, 237 Mich App 1, 5-6 (1999), citing *Milkovich v Lorain Journal Co*, 497 US 1, 17-20 (1990); *Haynes v Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (CA 7 1993).

<sup>4</sup>*See e.g., Mino v Clio School Dist*, 255 Mich App 60, 77 (2003).

<sup>5</sup>*See generally*, 50 *Am Jur 2d*, Libel and Slander, § 244, p 505.

<sup>6</sup>*See generally, Schechet v Kesten*, 3 Mich App 126, 133-134 (1966); *Smith v Holley*, 827 SW2d 433, 436-437 (Tex App 1992)(consent privilege protecting otherwise actionable defamation applies when a party has given references for a prospective employer to contact and the former employer makes defamatory statements); *Patane v Broadmoor Hotel, Inc.*, 708 P2d 473, 476 (Colo App 1985)(former employer was absolutely privileged in discussing plaintiff's work history with an employment counselor hired by plaintiff, even if defamatory statements were made).

<sup>7</sup>*See, Moore v St. Joseph Nursing Home, Inc.*, 184 Mich App 766, 768 (1990); *George v Wayne County*, 1997 WL 33350581 (Mich App 1997)(recognizing qualified privilege); *Moore v St. Joseph Nursing Home*, 184 Mich App 766 (199)(same); *Minnis v McDonnell Douglas Tech. Serv.*, 162 F Supp 2d 718 (2001)(same). ■

# REVISITING LEAVE NOTIFICATION POLICIES AFTER *CAVIN V. HONDA*

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A recent Sixth Circuit decision, *Cavin v. Honda of America Mfg., Inc.*, 346 F.3d 713 (6th Cir. 2003), raises several issues regarding employees' compliance with the notice requirements of the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §2612 *et seq.* Many employers maintain leave notice procedures that require employees to report their anticipated absence to a specific department. These policies are intended to increase staffing efficiency and ensure accurate implementation of the FMLA. Despite the apparent need for these policies, in *Cavin*, the Sixth Circuit invalidated an employer's reasonable internal procedure that required notice of requested leave to be provided to a designated department.

As a Honda employee, Samuel Cavin received an associate handbook that detailed Honda's leave policies. The policy expressly required employees to notify Honda in the event of an absence. In the case of a one-day absence, the employee was to notify plant security or his department. However, anything beyond a one-day absence was to be reported to Honda Administration – Leave Coordination as follows: "[i]f the need for leave is unforeseeable, leave must be requested no later than three (3) consecutive workdays of the first day missed...[t]he first day counts as day one." Failure to follow this policy could result in termination.

On June 21, 1999, Cavin was injured in a motorcycle accident and treated at a hospital before being released the same day. Cavin's doctor excused him from work until June 28. Cavin called and reported his absence to plant security every day of the week, June 21-25. When Cavin returned to work on the next regular workday following a plant shut-down, July 6, 1999, he reported his absence to Leave Coordination for the first time. Although he presented Leave Coordination a medical certification, Honda denied FMLA coverage for the absence dated June 21-23, but granted FMLA coverage for the absence between June 24-25 since those days were within three consecutive workdays of his July 6 request to Leave Administration. Later in 1999, Cavin failed to comply with Honda's medical certification requirements for a subsequent leave request and Honda terminated his employment.

Cavin sued Honda, alleging that the company interfered with his rights under the FMLA when it denied a portion of his leave and disciplined him in accordance with the notification policy. The trial court granted Honda's motion for summary judgment, holding that no reasonable juror could have found that Cavin provided Honda with "timely notice of his FMLA leave because Cavin did not follow Honda's policy for contacting the Leave Coordination department." Cavin appealed and the Sixth Circuit reversed.

The Sixth Circuit held that Honda's policy improperly imposed more stringent requirements on employees seeking FMLA leave than required by the Act. Disagreeing with the Seventh Circuit, Tenth Circuit and an *amicus curiae* brief filed by the National Association of Manufacturers ("NAM"), the court found that 29 C.F.R. § 825.302(d), which provides that an employer "may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave" did not protect Honda because, under the regulation, "failure to follow such internal employer procedures will not permit an employer to disallow

or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice." The court noted that the regulations governing the application of the FMLA state that an employee seeking foreseeable leave only need "provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." 29 C.F.R. § 825.302(c).

The court found that Cavin provided sufficient notice when he informed plant security that he had been injured in a motorcycle accident and required hospitalization. The court stated that it would be illogical to hold that Honda could be put on notice of requests for leave made to plant security, such as single day absences, but could only be put on notice of requests warranting FMLA protection by notification to the Leave Coordination department. In addition, the court found that, even if the plant security was not deemed an "employer" under the Act, the Company was still provided sufficient notice because Cavin's supervisor was aware that he was on leave due to injuries from a motorcycle accident. Based on the regulations and the notice provided to Honda, the court concluded that Honda's policy had the effect of interfering with Cavin's FMLA rights.

The obvious mandate from *Cavin* is that employers must be counseled not to deny an employee's FMLA request for merely failing to follow the employers' internal reporting procedures that are more stringent than the requirements of the Act. In addition, employers must be counseled that supervisors should understand the dictates of the FMLA. The court found that the supervisor's knowledge of Cavin's injuries was sufficient to put Honda on notice of his need for FMLA leave, despite the fact that Cavin had not spoken to the supervisor about the injury. Accordingly, the court has taken steps to expand the definition of "employer" and "reasonable notice" under the Act. As NAM stated in its *amicus curiae* brief, the court's "decision essentially converts the simplified call-in procedures...into a hair-trigger device obligating the employer to consider every such phone call as a potential request for FMLA leave."

Despite its apparent condemnation of leave notice policies, the *Cavin* decision does not sound the *death knell* for efficient FMLA recording systems. Employers may still institute leave notice policies that strongly encourage employees to report leave requests to specific recipients. However, employers must be counseled that *all* requests for leave should be encouraged to go to the same department, that they cannot deny FMLA leave to employees who fail to follow the procedure, and that human resources must not place a "silent requirement" on its employees by disproportionately denying leave to those who fail to follow the procedure. Importantly, courts must still undertake a substantive analysis of the notice provided and *Cavin* does not preclude employers from arguing that the notice provided was insufficient. In addition, *Cavin* does not prevent employers from arguing that the notice recipient was an independent contractor and not an agent of the company, which would negate a finding of notice to the employer. Finally, although it cannot be an absolute barrier to FMLA protection, an employee's failure to comply with an employer's notice policy may be a factor in the court's determination that the employer did not have reasonable notice of the employee's need for leave.

No matter your affiliation, after *Cavin* practitioners on both sides of the table must reevaluate their potential claims or defenses and rethink the validity of often long-standing FMLA notice policies that previously might have been the norm and deemed to be compliant with the FMLA. ■

# LABOR AND EMPLOYMENT LAW AND INDIAN TRIBES

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The recent growth of American Indian casinos and economic development in Michigan has generated many employment opportunities for Indians and non-Indians, alike. The often misunderstood concepts of tribal sovereignty and jurisdiction have left many experienced labor and employment law practitioners wondering how state and federal laws apply to tribal employment.

While these scenarios would be elementary if the employer was other than a tribe, consider the following:

- A woman tells you that she has been sexually harassed by her supervisor at a Michigan tribal casino. You should advise her to bring her claim to: A. MDCR; B. EEOC; C. Federal Court; D. None of the above.
- A man employed by a tribal casino complains that he was discharged for his attempts to organize a union. You should advise him to: A. File a claim with the NLRB; B. File with MERC; C. File a lawsuit in federal court; D. None of the above
- Both Mary and Sally work for a Michigan tribe. Mary is employed by the casino and Sally works for tribal operations. Both are injured in separate work related incidents. You should advise: A. Both employees to file claims with the Michigan Workers' Compensation Bureau; B. Both employees to file claims in federal court; C. Both employees to seek internal tribal remedies; D. Advise Mary to file a state workers' compensation claim and recommend to Sally that she pursue internal tribal remedies.

If you answered "D. None of the above," to the first two questions, you are well on your way to understanding the impact of Indian tribal sovereignty and jurisdiction on labor and employment law. If you answered "D" to the third question, you are probably an expert already.

**Tribal Sovereignty.** Any discussion of jurisdiction over Indian tribes inevitably begins with the tribal sovereignty. Historically, the Supreme Court considered the tribes to be distinct nations occupying distinct territory over which the laws of the states have no force. *Worcester v. Georgia*, 31 US (6 Pet) 515, 559 (1832). Although, today, the recognition of sovereignty is more limited, it is well recognized Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory," *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

**State labor and employment laws do not apply to Indian tribes.** The Commerce Clause of the United States Constitution grants Congress the exclusive power to "regulate commerce" with Indian tribes. Accordingly, the Supreme Court has determined that states have no authority to regulate conduct by the tribes unless specifically authorized by Congress. *California v. Cabazon Band of Mission Indians*, 480 US 202, 204-207 (1987).

In Michigan there are two notable exceptions: the Michigan Employment Security Act, MCL 421.1 and the Workers' Compensation Act, MCL 418.101. As part of the negotiation of the gaming compacts between the state and the tribes, the parties agreed that the state will have jurisdiction over tribal casino employees under the limited scope of these two statutes. The compacts can be found at [http://www.michigan.gov/mgcb/0,1607,7-120-1380\\_1414\\_2182--,00.html](http://www.michigan.gov/mgcb/0,1607,7-120-1380_1414_2182--,00.html). For non-casino tribal employees, these laws do not apply unless the tribe voluntarily submits to the state's jurisdiction.

Similarly, state courts do not have jurisdiction over statutory and common law employment claims that arise on a reservation or trust land, including casinos. *Williams v. Lee*, 358 US 217, 220 (1959). Further, before federal courts will exercise jurisdiction over state law, internal tribal remedies must be exhausted. *Iowa Mutual Ins. Co. v. La Plante*, 480 US 9 (1987).

**Federal Claims.** Federal statutory and common law claims fall into several groups: those specifically exempting or including Indian tribes and those covering or excluding Indian tribes by implication.

**Explicit Exemption.** Congress has specifically exempted tribes from several familiar employment laws. As in the following:

- Title VII of the Civil Rights Act of 1964, 42 USC 2000e (1).
- Title I of the Americans with Disabilities Act, 42 USC 12111 (b).
- The Workers Adjustment and Retraining and Notification Act, 20 CFR 639.3(a)(1).

**Explicit Coverage.** On the other hand, Congress can make a statute applicable to tribes through the exercise of its plenary powers. Congress did so in the 1983 amendments to the Social Security Act. As a result, tribes are now subject to both Social Security and federal unemployment taxes.

**Federal Common Law.** As to federal common law, two issues must be addressed before bringing a claim. The first is whether the tribe or Congress has clearly waived the tribe's sovereign immunity. *C & L Enterprises v. Potawatomi Indian Tribe of Oklahoma*, 532 US 411(2002). A tribe's mere act of entering into a commercial transaction does not necessarily waive its immunity as to claims arising from that transaction. *Kiowa Tribe of Oklahoma v. Manuf Technologies, Inc.*, 523 US 751(1998) Once a waiver of sovereign immunity has been established, jurisdiction must be determined. A tribal court has primary jurisdiction over claims arising from commercial transactions with the tribe, including employment. *Montana v. U.S.*, 445 US 960 (1980). Accordingly, administrative and judicial remedies must typically be exhausted before resorting to federal court. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 US 845 (1985).

**Implied Waiver of Immunity.** The remaining federal employment laws must be examined on a case-by-case basis, based on the waiver of sovereign immunity and tribal self-determination. Under the commerce clause, only a tribe or Congress can waive tribal sovereignty. At one time a congressional waiver had to be "clearly manifest," *Elk v. Wilkins*, 112 US 94 (1994). Today, this is changing, as seen in the volumes of litigation following *Federal Power*

*Commission v. Tuscarora Indian Nation*, 362 US 99 (1960). The *Tuscarora* case established a two-part test for implied waiver: (1) Is the statute one of general application, intended by Congress to apply to all citizens?; and (2) Can the statute be applied to Indian tribes without undermining treaty rights or unduly interfering with internal governance?

#### *Tribes not Covered by Implication*

- Under the *Tuscarora* test, the National Labor Relations Act does not apply to employment by tribes. The National Labor Relations Board has consistently held that tribes are units of government and, as such, are exempt from the NLRA's definition of employer. *Fort Apache Timber Co*, 226 NLRB 63 (1976). In recent years, the Board has come to distinguish employment by entities not directly controlled by tribal councils. For example, the Board would exert jurisdiction over a tribe's joint venture with non-Indian partners. *Sac & Fox Industries, Ltd*, 307 NLRB 241 (1991). Similarly, the Board has found the NLRA applicable to organizations created by tribes but controlled by semi-autonomous boards. *NLRB v. Chapa De Indian Health Program, Inc*, 316 F3d 995 (CA9, 2003). A helpful discussion of the NLRB decisions is found in *Yukon-Kuskokwin Health Corp v. NLRB*, 234 F3d 714 (US App DC, 2000). The application of tribal "right to work" laws to non-Indian enterprises operating on a reservation remains unsettled. In *NLRB v. Navajo Nation*, 288 F2d 162 (US App DC, 1961), the NLRB was found to have jurisdiction over a business operating on land leased from a tribe and shipping uranium ore in interstate commerce. Yet, a tribe's "right to work" law was found to deprive the NLRB of jurisdiction over contractors doing work for a tribe on reservation land. *NLRB v. Pueblo of San Juan*, 276 F3d 1186 (CA10, 2002).

#### *Tribes covered by Implication and/or Consent*

- Tribes tend to voluntarily follow the requirements of COBRA and ERISA notice requirements. In any event, at least one court has found coverage to be mandatory. See *Colville Confederated Tribes v. Somday*, 96 F Supp 2d 1120 (ED WA, 2000).

*Implied Coverage of Tribes in Doubt.* The application of several other familiar laws remains uncertain due to disagreement among the Courts of Appeal.

- The application of the Age Discrimination in Employment Act is unclear. The Act was found to apply to the tribes in *EEOC v. Karuk Tribe Housing Authority*, 260 F3d 1071 (CA9, 2001) However, tribes were exempted in *EEOC v. Fond du Lac Heavy Equipment and Construction*, 986 F2d 246 (CA 8, 1993) and in *EEOC v. Cherokee Nation*, 871 F2d 937 (CA 10, 1989)
- The application of the Occupational Safety and Health Act is similarly in doubt. OSHA was found to apply to the tribes in *USDOL v. OSHA*, 935 F2d 182 (CA 9, 1991) and in *Reich v. Mashantucket Sand & Gravel*, 95 F3d 174 (CA 2, 1996). However in *Donovan v. Navajo Nation*, 692 F2d 709 (CA 10, 1982), the Court held that OSHA *does not* apply.

- Few cases discuss application of the Fair Labor Standards Act to the tribes. The Seventh Circuit has refused to apply the overtime provisions to the FLSA to wardens employed by an inter-tribal commission charged with enforcing tribal hunting and fishing regulations on treaty land. The Court declined to decide whether tribes are generally subject to the FLSA. Rather, the Court found that, even if the commission were subject to the FLSA, the employees in question were subject to the same overtime pay exemptions applicable to law enforcement officers employed by the states. *Reich v. Great Lakes Fish and Wildlife Comm'n*, 4 F3d 490 (1993).
- Since the Family and Medical Leave Act incorporates the FLSA definition of employer, application of that Act remains similarly in doubt. It is not uncommon for tribes to offer a similar benefit to their employees.

*Practical Implications.* Practitioners may want to become comfortable with internal tribal remedies. Michigan tribes have adopted comprehensive personnel policies and procedures. Many include internal dispute resolution mechanisms. Often the internal dispute procedures for employees will, at least in the first instance, be administrative rather than judicial. In any event, to the extent the tribe has waived its sovereign immunity in employment matters, there may also be a claim in tribal court based on tribal policy, tribal law or tribal constitution.

**Authors' Note:** Special thanks to Kathryn Tierney, Attorney, Bay Mills Indian Community, for her assistance with this article. For additional information, contact the authors at [betzl@michigan.gov](mailto:betzl@michigan.gov) or [budnickd@michigan.gov](mailto:budnickd@michigan.gov) ■

## I SAY AMERICAN INDIAN, YOU SAY NATIVE AMERICAN

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The Michigan Department of Civil Rights is aware that some individuals prefer the term Native American. According to the 1995 U.S. Census Bureau survey, 49 percent of the persons asked preferred American Indian and 37 percent preferred Native American. The department prefers the use of American Indian because under federal guidelines the term Native American also includes native peoples from Guam, American Samoa, the Commonwealth of Northern Mariana and Hawaii. In Michigan the term used by members of the Three Fires Nations to describe themselves would actually be Anishnaabe.

# APPELLATE REVIEW OF MERC CASES

(February 2003 through February 2004)

Roy L. Roulhac  
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Michigan Employment Relations Commission<sup>1</sup>

## Unfair Labor Practice Charges

**Capitol City Lodge No. 141 v Ingham County Board of Commissioners and Ingham County Sheriff**, Court of Appeals No. 233838, issued February 7, 2003, affirming the Commission's decision at 2001 MERC Lab Op 96. In an unpublished opinion, the Court of Appeals affirmed MERC's order requiring respondents, Ingham County Board of Commissioners and Ingham County Sheriff, to cease and desist making changes in their light-duty policy without first bargaining and to restore the light-duty policy that was in effect before respondents made unilateral changes.

The Court rejected arguments that light-duty assignments were not mandatory subjects of bargaining and that the parties' collective bargaining agreement granted the sheriff the exclusive right to determine job assignments. The Court found that the agreement was silent regarding any light-duty policy and that the parties' acceptance of and adherence to the past practice modified the parties' contract language. Accordingly, the Court affirmed MERC's conclusion that the union did not waive its rights regarding the light-duty policy.

**Michael J. Garcia v Eaton Rapids Education Association and Michigan Education Association**, Court of Appeals No. 234584, issued May 27, 2003, affirming the Commission's decision at 2001 MERC Lab Op 131. In an unpublished opinion, the Court of Appeals affirmed MERC's order granting summary disposition in favor of respondents, Eaton Rapids Education Association and Michigan Education Association, and dismissing charging party's claims of breach of duty of fair representation and various constitutional violations. Additionally, the Court of Appeals found that charging party's assertions that MERC committed various procedural errors were without merit. Rejected were arguments that MERC erred in denying his request for further oral argument after his hearing before the ALJ; MERC erred by not affording him special consideration with regard to informing him of his procedural rights because of his *pro se* status; his due process rights were violated because the hearing only lasted one hour; and that MERC lacked authority to grant summary disposition and dismiss his claim. The Supreme Court denied leave to appeal on January 9, 2004

**City of Lansing v Carl Schlegel, Inc. and Associated Builders and Contractors of Michigan**, Court of Appeals No. 238839, issued July 24, 2003, affirming the Commission's decision at 2001 MERC Lab Op 403. In a published opinion, the Michigan Court of Appeals affirmed MERC's decision dismissing the charge for lack of subject matter jurisdiction. The Court held that PERA did not govern the dispute because charging parties, Carl Schlegel, Inc. and Associated Builders and Contractors of Michigan, were not public employees and PERA does not address the legality of construction project labor agreements.

This case is currently on appeal to the Michigan Supreme Court.

**Supervisors Association of Engineers v Pontiac School District**, Court of Appeals No. 239835, issued September 2, 2003, affirming the Commission's decision at 2002 MERC Lab Op 20. In an unpublished opinion, the Court of Appeals affirmed MERC's order dismissing the union's unfair labor practice charge that alleged that the employer refused to bargain with the union and unilaterally increased the duties of the engineers represented by the union, by requiring them to take on additional cleaning duties. The Court also agreed with the Commission's finding that there was no demand to bargain by the Union.

The court agreed with MERC that the employer had no obligation to bargain before expanding the engineers' cleaning duties because the plan to clean classrooms on a daily basis had no effect on the engineers' hours, wages, or benefits. The cleaning was already part of the engineers' duties and the increase in cleaning simply meant that they might be unable to complete some of their other maintenance responsibilities.

**Branch County Board of Commissioners, Branch County Clerk, Register of Deeds, and Treasurer v International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW**, Court of Appeals No. 241189, issued December 23, 2003, affirming in part and reversing in part the Commission's decision at 2002 MERC Lab Op 110. In a published decision, the Court of Appeals affirmed MERC's dismissal of unfair labor practice charges alleging that the Branch County Clerk and Treasurer failed to bargain in good faith by asserting co-employer status with Branch County.

The Court of Appeals concurred with MERC that MCL 50.63 allows the county clerk to hire and discharge any of her deputies. The Court also agreed with MERC that MCL 48.37 permits the county treasurer to appoint and remove all deputies in the treasurer's office. Thus, the Court held that the county clerk and treasurer are co-employers because they have the statutory authority to hire and discharge all of their employees. However, the Court found that because the register of deeds does not have the authority to hire and discharge all of his or her employees, he or she is not a co-employer. The Court did not consider the issue of whether the register of deeds failed to bargain in good faith.

**Southfield Education Association, Southfield Public Schools Michigan Education Support Personnel association and Educational Secretaries v Southfield Public Schools**, Court of Appeals No. 240050, issued February 9, 2004, affirming the Commission's decision at 2002 MERC Lab Op 53. In an unpublished decision, the Court of Appeals affirmed MERC's dismissal of an unfair labor practice charge alleging a violation of the duty to bargain in good faith by enforcing leave policies in the parties' collective bargaining agreement and thereby deviating from the permissive leave policy it had previously applied. MERC held that the employer's announcement that it would begin to exercise its discretion when granting leaves of absences did not violate PERA. The Commission also dismissed a claim that the employer engaged in direct dealing by sending a memo directly to employees regarding the policy.

The Court, in affirming the Commission's decision, noted that the employers past practice of granting all leave requests did not necessarily conflict with the contract terms that unambiguously gave it discretion to grant or deny leave requests. Even assuming that the practice was contrary to the contract, the Court found no evidence that the employer intended to modify that term. The Court

stated that “[T]o establish that a past practice modified the contract, a party must show that both contracting parties had a ‘meeting of the minds’ with respect to the changes and specifically intended that the practice would replace the agreed upon term.” *Id.* at 329. The Court distinguished *Detroit Police Officers Ass’n v Detroit*, 452 Mich 339 (1996), where substantial evidence was presented to show that the parties intended past practice to constitute an amendment to the contract.

### Representation Cases

Wayne County Airport Police Department and Service Employees International Union Local 502 -and- Wayne County Police Association, Court of Appeals No. 235669, issued February 14, 2003, affirming the Commission’s decision at 2001 MERC Lab Op 163. In an unpublished opinion, the Court of Appeals affirmed MERC’s decision dismissing the petition of the Wayne County Police Association seeking to represent airport police employed by respondent, Wayne County Airport Police Department. The airport police were part of an existing bargaining unit represented by the incumbent union, Service Employees International Union, Local 502.

Petitioner contended that the airport police are Act 312 eligible and that their bargaining unit included Act 312 eligible and non-eligible employees. Petitioner argued that MERC erred by refusing to conduct a representation election to permit the airport police to decide whether to sever from the mixed unit.

The Court pointed out that MERC places a heavy burden on parties seeking to disturb an established bargaining unit and has determined that it will only break up an established unit where the unit is per se inappropriate or where an extreme divergence in community of interest is present. The Court also noted that MERC has held that Act 312 employees should be in bargaining units separate from those of non-Act 312 employees, although MERC does not require the severance of existing bargaining units containing both Act 312 and non-Act 312 employees. Accordingly, it would not be per se inappropriate for Act 312 employees to be in a bargaining unit with employees who are not Act 312 eligible.

**Ferris Faculty Association v Ferris State University**, Court of Appeals N. 243885, issued January 27, 2004, affirming the Commission’s decision at 2002 MERC Lab Op \_\_\_\_\_. In an unpublished decision, the Court affirmed MERC’s decision to deny the union’s petition to add the full-time faculty at Kendall College of Art and Design at Ferris State University to the collective bargaining unit of full-time faculty at Ferris State University (FSU).

The Court noted that Kendall is technically a sub-unit within FSU, with FSU having the power to make changes at Kendall. However, the Court found that based Kendall’s autonomous character, evidenced by the lack of interaction between the faculties and of Kendall’s separate academic governance, there was competent, material and substantial evidence to support MERC’s finding that Kendall’s existing bargaining unit was appropriated. The Court disagreed with the union’s assertion that the Commission should not have considered the bargaining history of the unit at Kendall.

— END NOTES —

<sup>1</sup>Appreciation is extended to Lynn Morison, Ben Frimpong, Marie E. Matyjaszek, Jennifer Y. Brazeal, and Brendan Canfield for their assistance in preparing these case summaries. ■



## VIEW FROM THE CHAIR

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

### CERTIFIABLE

This Spring the State Bar of Michigan will begin to take up the issue of certifying specialties. The issue has been raised by the Health Care Section, apparently.

I am sure most of us have seen this sort of designation used by lawyers from other states. The issue in Michigan is still in the *very* early stages of study and development. Our Section Council will be monitoring the issue closely and will be actively participating in the process.

I am not sure I can tell you what all the arguments for state certification of “specialties” are. I do know we see this sort of thing applied in the medical field and elsewhere, as well as with lawyers from a limited number of other states.

I also know I usually take a designation of certified specialty with a grain of salt. I suspect most lawyers have a similar response, reacting with however many grains of salt may be justified by the circumstances.

I think it is best to keep an open mind on this issue while it is being studied, however. The ultimate question is and has to be whether the *public* is served by state certification of “specialties.” Lawyers, I think, can fend for themselves; few would refer a matter purely on the basis of a certified specialty, and fewer still would (or should) be intimidated into less than adequate advocacy merely because their adversary has more initials after their name.

A number of years back the issue of mandatory CLE for lawyers was debated, and I believe turned as well on the same ultimate issue: would the public be served by requiring mandatory CLE for all lawyers?

My personal opinion on the question changed as I followed the debate. My initial reaction was, “Of course it would.” But then I remembered the reality of what in practice CLE is for many lawyers, even for those in states where it is “mandatory.” Once I concluded that that reality was unlikely to change except to the extent it persisted in what would be a more lucrative market, however, and once I concluded the public would be even *less* able to tell one lawyer from another once those who openly and actively participated in CLE prior to it becoming mandatory could not distinguish themselves on this basis, I changed my mind.

I am sure there are a number of other issues, such as standard of care in malpractice actions, that would be affected by this credentialing process. These issues warrant further study. A “process” it will be, we can be sure of that, however, and to the extent that process is a mere substitute for the real client experience that lawyers we would all recognize as “specialists” could cite on their own behalf, one has to wonder who the true beneficiaries of such a process will be.

## GORDON A. GREGORY DISTINGUISHED SERVICE AWARD RECIPIENT

James M. Moore

*Gregory, Moore, Jeakle, Heinen & Brooks, PC*

Gordon A. Gregory was presented with the Section's Distinguished Service Award at the annual mid-winter meeting on January 30 in Ypsilanti. He joined a small and truly distinguished group of labor and employment lawyers whose careers have exhibited the demanding standards for the Award: major contributions to the practice, the highest ethical standards, advancing the development of labor and employment law, a long-established commitment to excellence and recognition and respect from all the constituents of the labor and employment law community.

Gordon was raised in Janesville, Wisconsin. His father was an Assistant Regional Director for the United Automobile Workers Union and, thus, Gordon's exposure to the labor movement began at an early age. After attending Beloit College Gordon transferred to the University of Wisconsin where he earned his undergraduate degree in Zoology. He received his Juris Doctor from the University of Wisconsin's Law School in 1955 and began his legal career as an Associate General Counsel in the UAW's Legal Department in Detroit.

At the UAW Gordon worked under General Counsel Harold Cranefield, one of the lawyers "present at the creation" of the modern era of labor law; Cranefield was Chief Legal Officer of NLRB Region 7 in Detroit before the Supreme Court upheld the constitutionality of the National Labor Relations Act. *Jones & Laughlin Steel, Corp.*, 301 US 1 (1937). Under Cranefield's watchful and demanding tutelage, Gordon was involved in many of the UAW's battles in the late 1950s and early 1960s, including the Kohler boycott and Cross Company strike.

In 1963 Gordon entered private practice with Harold Cranefield and others in Detroit, representing Unions and workers. What began as Livingston, Gregory, Van Lopik & Cranefield is now Gregory, Moore, Jeakle, Heinen & Brooks, one of the state's if not the nation's leading Union-side labor law firms. In his over 40 years in private practice, Gordon has represented an impressive variety of public and private sector Unions always with the highest measure of professionalism, and influenced the development of labor and employment law along the way. For example, as General Counsel to the United Plant Guard Workers of America (now known as the Security Police and Fire Professionals of America ("SPFPA")) Gordon successfully argued the landmark *Burns* case before the United States Supreme Court that established the successor doctrine. 406 US 272 (1972). Following the passage of Michigan's Public Employment Relations Act in 1965, and the Policemen and Firemen's Binding Arbitration Act in 1969 ("Act 312"), Gordon's representation of clients, including the Pontiac and Warren Fire Fighters Unions and the Detroit and Pontiac Police Officers Associations, helped shaped the contours of those statutes. Gordon was



involved in job actions at Wayne State and Oakland Universities as well as the Detroit Police officers "blue flu" in the late 1960s. He argued labor cases on behalf of Unions and their members in a wide range of judicial and administrative forums from the National Labor Relations Board, the Michigan Employment Relations Commission, state and federal courts at the trial and appellate levels throughout the country and even the Ontario Labour Relations Board. The range and longevity of Gordon's clients is a testament to his uncommon skill and unmatched professionalism. Gordon is a former member of three Unions: UAW Local 95, the Laborers' Union and the American Federation of Musicians (his career as a drummer is in hiatus). In addition, two long-time clients, the SPFPA and the Local 3G of the Bakery, Confectionary, Tobacco and Grain Millers Union (who make the cereal at Kellogg's in Battle Creek) have elected him to honorary membership.

In addition to Gordon's legal representation of Unions and workers in all areas of the workplace, Gordon's service to his fellow lawyers and the profession have been substantial. In addition to serving as Chair of the Section in 1975-1976 (when it was known simply as the Labor Law Section) he was President of the Detroit Chapter of the Industrial Relations Research Association. Gordon has been an adjunct faculty member at Macomb County Community College, teaching a variety of workplace courses for many years. And he has been a guest lecturer and presenter at the University of Michigan, Wayne State, the University of Detroit-Mercy and Cornell University as well as a faculty member at programs sponsored by the Institute for Continuing Legal Education (ICLE), the National Academy of Arbitrators, the Michigan Public Employers Relations Association, and the Society of Professional in Dispute Resolution. His public service also included 15 years as a member of the South Lake School District Board in St. Clair Shores, including a number of years as Board President.

The esteem with which Gordon is held in the eyes of his fellow lawyers was exemplified by the fact that no less than three previous recipients of the Section's Distinguished Service Award nominated him. They described Gordon as "one of the pathfinders and outstanding lawyers in the labor bar," a "preeminent lawyer" and a person of "integrity and exemplary character."

At the presentation of the Award at the Section's Friday night dinner, Gordon was accompanied by his wife of 53 years, Joyce, and their two children, Deborah and Steven. Their spouses, George and Karen, respectively, were joined by Joyce and Gordon's two grandchildren, Kristy and Brian. In addition to my few words of introduction, management attorney Bob Verduyck, spoke of the pleasure and challenge of "doing battle" with Gordon in the legal arena, observing that when you "have the best on the other side, it makes you a better lawyer." And certainly Gordon is one of the "very best" lawyers representing Unions and workers in the nation.

In his remarks accepting the award, Gordon offered his profound appreciation, perhaps first and foremost to his wife Joyce, who, "through undergrad days, law school, Union meetings and conventions, walking a picket line, long hours and absences from home . . . has always been there with love, support and wise counsel." He observed that she had "given the profession and my Union clients distinguished service and has earned this award." Gordon declared that he was humbled by the "vote of confidence" from colleagues, especially in view of the distinguished practitioners who had previously received the honor. One of them, Erwin Ellmann, had sent a letter of congratulations and Gordon read a portion which recounted an event where they had both been deeply involved—on opposite sides of the bargaining table. Shortly after the passage of PERA, when Gordon was President of the South Lake School District and its chief negotiator, and Erwin was representing the MEA teachers' union, the School Board accepted "with grace if not alacrity" the Union's proposal for impartial binding arbitration—a revolutionary departure from traditional managerial authority. This agreement became a model for the use of arbitration in public collective bargaining agreements in Michigan and throughout the nation. For Gordon this was a matter of implementing Michigan's state labor policy, but an attorney for the Michigan Association of School Boards took issue with the agreement and berated Gordon for it. In the end, the South Lake School Board withdrew from the MASB.

Gordon's actions, even in what he characterized as his "plunge into employer-side labor relations," reflected an unwavering commitment to do what was right. Over the years, as he has watched the Section develop from its roots in traditional labor law into many areas of employment law, Gordon observed that Section members had consistently exhibited professionalism, scholarship and collegiality in their vigorous representation of clients. Gordon has been proud to be a part of that historical development. The presentation of the Distinguished Service Award is a small token of recognition and appreciation for his nearly half century of contributions and exemplary service to his clients and the practice of law.

## WORKPLACE VIOLENCE – A SCAR THAT LASTS

Robert F. Conte

*Miller Carson Boxberger & Murphy, LLP*

Workplace violence has been described as a form of national terrorism and is a recurring nightmare for many employers. It is a nation-wide problem that has increased significantly in the last twenty-five years. Today it is the fastest-growing type of homicide in the United States. Its long-term impact, both financially and psychologically, is devastating, affecting families, co-workers, friends, and the general community long after the event has occurred. Incidents of workplace violence happen when the stresses created by our environment, both work-related and personal, turn into rage and then become violence. The result is often death, injury, and deep psychological trauma to everyone involved. Sadly, the signs that precede these horrible events go unnoticed or are ignored.

Following these tragic events there are countless meetings involving business owners, community leaders, human resource specialists, members of management, and attorneys. There are also seminars, newspaper articles depicting the event, media reports, and speeches from a wide range of "specialists" who focus on these tragedies, discuss the reasons for their occurrence and attempt to raise public awareness of the serious and long term effects of the problem. Organizations generally react by developing policies and prevention programs, and putting them into place. There the matter ends.

Unfortunately, the memories of these horrific incidents linger well beyond the event. Although we wish that such events never occurred, in reality they do and they can happen anywhere. There are always many questions but a few answers. The biggest question – Can such acts of violence be prevented? Yes, maybe, or we do not know are the likely responses. The best we can hope for is to create an awareness of the signs of potential workplace violence. The healing process for those involved, both physically and mentally, usually lasts a lifetime. The thought that it can and will happen again is frightening. So the question remains, how do we "fix" the problem?

Violence-prone individuals may not be easy to identify, but there are always warning signs that employers can train their managers and employees to recognize. Unfortunately, these signs usually go undetected, unnoticed, or are ignored. Here are some common signs of a potentially violent and troubled employee:

- Pattern of increased absenteeism and lateness.
- Excessive use of alcohol or drugs.
- Depression.
- Dramatic mood swings.
- Poor performance and decreased productivity.
- Aggressive behavior.
- History and fascination with guns.
- Strained relationship with fellow workers.
- History of violence.
- Serious personal or family problems.



*"Aberrant behavior may be a cry for help."*

Whether we accept it or not, violence has become part of our everyday life. It can occur in the home, at school or in the workplace. It is a big concern and getting bigger.

*(Continued on page 10)*

## WORKPLACE VIOLENCE – A SCAR THAT LASTS

(Continued from page 9)

A simple definition of workplace violence might be: Workplace violence is violent acts, including assaults and threats of assault, directed toward persons at work or on duty. It includes threats of violence against workers, any language or action that makes a person uncomfortable in the workplace, or any verbal or physical assault that occurs in the workplace, including threats and harassment.

The National Institute for Occupational Safety & Health (NIOSH) has reported some alarming statistics:

- An average of 20 workers are murdered each week in the United States.
- Homicide has become the third highest work-related cause of death.
- Homicide is the leading cause of workplace death among females and men.
- Homicide is the leading cause of death for workers under 18 years of age.

The numbers associated with workplace violence are equally troublesome:

- \$4.2 billion per year in lost work and legal expenses (Bureau of National Affairs, 1990).
- 22,400 attacks in the workplace when employees survived but were seriously injured, and 1,063 workplace deaths (Bureau of Labor Statistics, 1992).
- 2.2 million employees were attacked in the workplace, another 6.3 million employees were threatened with violence, and another 16.1 million employees were harassed in some way in the workplace setting (National Life Insurance Company, 1993).

Despite these numbers, the most alarming statistics are not what you read but rather what you do not read. They include violence related to physical or sexual assault, assaults which injure but do not kill, and acts of sabotage against equipment, materials, and property that goes unreported. There are also the numerous unreported incidents related to psychological and verbal abuse, threats, sexual abuse, demeaning or belittling. While these acts do not cause direct bodily harm, they can affect an individual's mental health and if left unchecked will negatively impact an employer's profitability and business health.

While the numbers are staggering, one thing is certain, death or injury to an individual should not be an inevitable result of one's chosen occupation, nor should the reported figures be routinely accepted as the cost of doing business in our society. Workplace violence is a very serious problem that is not going to go away unless we make a concentrated effort to attack its roots.

While the incidents of workplace violence increase, it is equally alarming that no definite strategies exist to prevent it. Employers and employees must begin assessing the risks of violence in their workplaces and take action to help reduce the risk of occurrence. Collecting information is an important first step that will help determine what prevention strategies are necessary, appropriate and effective. Throughout any assessment, it is important to keep in mind that there are no state-of-the-art security systems, psychological expertise, or human resource information that can guarantee an end to workplace violence. However, taking positive steps through the development of preventive measures will help reduce the risk.

Workplace violence can happen anywhere and at any time. In big or small cities, large or small businesses, colleges, schools, hospitals, law firms, "mom & pop" shops, the list is endless. Finding

that important "cure" is everyone's responsibility. While it is virtually impossible for any employer to guarantee that its workplace will be free from violence, there are several things an employer can do to minimize the likelihood of violence in its organization.

The first step toward preventing workplace violence and an employer's top priority should be to develop a **Zero Tolerance Policy**, have it endorsed by top management, and promoted throughout the organization. Below are additional steps that an employer can take to help reduce the likelihood of workplace violence.

- **Hire the best candidate.** This can be accomplished through a well planned and coordinated pre-employment process.
- **Carefully scan all applicants for employment.** This includes in-depth interviews and background and reference checks. Be sure to verify all of an applicant's credentials including degrees and dates of previous employment.
- **Consider testing job applicants.** Tests may include psychological, drug and alcohol, honesty tests, and post-offer medical examinations. (Beware of legal implications.)
- **On-going training and instructions to all employees.** Provide information during the training process that will help your managers and employees recognize the warning signs of potential violent behavior. Also, be prepared to cover a broad range of training topics such as conflict resolution, sexual harassment prevention, and substance abuse prevention.
- **Provide adequate workplace security.** This may include the development of emergency signaling, alarms and monitoring systems, and metal detectors. Installing security cameras and good lighting in the parking lots is also very helpful.
- **Develop an internal warning system.** A necessary procedure when a threat of violence is imminent. It is advisable to have members of management accessible to employees in any internal crisis situation.
- **Availability of an Employee Assistance Program (EAP).** An independent, professional, and confidential counseling service should be part of every employer's workplace violence program. The EAP offers counseling, usually by an independent outside treatment group, to troubled employees.
- **Other considerations.**
- Modifying cash-handling policies.
- Physically separating workers from customers, clients or the general public.
- Having adequate insurance coverage in place to protect against the losses that could result from an incident of workplace violence.
- Ready access to courts for the possible use of restraining orders and injunctions.

In a workplace violence situation, or where there is an immediate threat of violence, all of an organization's internal resources (legal, human resources, and management personnel) and external resources (employee assistance providers, community mental health, and law enforcement) should be utilized in order to create a quick and effective response. Minimizing the risk of injury, suffering and loss of life must be every organization's number one priority. Employers are also advised to document their efforts with regard to every action and prevention step it undertakes in a workplace violence incident. The price for not doing so may be prohibitive.

Workplace violence is a complex subject and is a growing problem for all organizations. It is also a subject that raises more questions than answers. To date, no piece of research has provided a clear reason that explains why violence occurs in one workplace setting and not another. We do know, however, that no workplace

is immune. History has shown that workplace violence can happen anywhere. Accepting that everyone enters the workplace with some sort of "baggage," will go a long way toward understanding the nature of the problem.

Stressful situations and the emotions they raise is not something that can be easily "checked" at the factory or office door. Generally, if we are unhappy in our job, that unhappiness will follow us out the door and into our relationship with family and friends. A bad day at work usually means a bad day at home. The converse is also true. Being unhappy at home will usually follow us into the workplace. Once the individual enters the work setting, that unhappiness will likely have an adverse effect on everyone with whom he or she comes into contact, managers, co-workers and our attitude toward the job we perform. The result is often unsatisfactory performance, inferior quality, poor service and the likelihood of disciplinary action. All of these situations have the potential to lead to violence.

As our internal value system is threatened and our feelings negatively impacted, we become candidates for having a truly bad day. How employees approach their fellow workers during these emotionally charged periods may make the difference between having peace and tranquility in the workplace or adding fuel to an already-smoldering fire. Without proper training, most managers and employees are ill-equipped and unprepared to deal with the emotional needs of the employees with whom they work.

Employers are well-advised to take proactive measures in their effort to reduce violence in the workplace. In doing so they must learn to recognize the warning signs associated with violent activity and avoid confrontation with a potentially violent person. It is advisable to protect the bulk of the company's employees and to treat those who need help individually. That is the best any employer can do. An organization cannot wait until the problem becomes uncontrollable before it acts. The employer's policies and procedures must be firmly in place and circulated throughout the organization, if there is going to be a chance of controlling the problem before it escalates.

As we have seen, workplace violence does not just happen. There are always signs, usually detectable before the incident, but often ignored or inadequately addressed either at home or at the job site. These missed signs can become the basis for disaster. The employer who learns to recognize the early signs, personal problems and stresses created by the workplace will usually be in a position to make a difference in the de-escalation of a potentially violent situation. Such things as terminations, lay-offs, poor performance evaluations, demotion and employee discipline are all events that incite anger that can turn into rage and become violence.

Awareness and education are the keys that may unlock the box for understanding and resolving workplace problems. Improving communications, recognizing the early warning signs of erratic or changed employee behavior and learning to deal with that behavior through well developed programs that are fairly and consistently applied in a balanced discipline system will go a long way toward reducing stress in the workplace. The failure to be alert, to take steps to prevent acts of violence from occurring, is an invitation to disaster. Once the event has occurred, whether there is a loss of life or physical and emotional injury, the scaring will become deeply imbedded in the workplace and it will never be the same. A single incident of workplace violence will forever change the lives of everyone involved and it may take years, if ever, before healing occurs.

— END NOTE —

Information in this article was taken from my book *They Never Saw It Coming — An Employer's Guide for Reducing Stress and Violence in the Workplace*, (Bristol Banner Books, 2003). You may contact me at P.O. Box 1913, South Bend, Indiana 46634 or RFC@MCM.BM.COM. ■

## SIXTH CIRCUIT ADDRESSES THE NLRA, COVENANTS NOT TO COMPETE, DAMAGES UNDER THE FLSA, AND THE MEANING OF "INCAPACITY" PURSUANT TO THE FMLA

Jesse Goldstein

*Vercruyse Murray & Calzone, P.C.*

From November of 2003 through January 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>".

### FLSA – Emotional and Mental Distress Damages

In *Moore v. Freeman*, Docket Nos. 01-6372/6536 (January 13, 2004), the Sixth Circuit affirmed a jury verdict awarded under the Fair Labor Standards Act (FLSA) awarding emotional and mental distress damages. The court upheld the jury's finding of retaliatory discharge, holding that it could have reasonably come to this conclusion considering that the plaintiff was fired less than three months after complaining of unequal pay, and his immediate supervisor had found him competent and had opposed his dismissal. Concerning the FLSA, the court joined the Seventh Circuit in holding that 29 U.S.C. § 216(b), which states that violators of the FLSA "shall be liable for such legal or equitable relief as may be appropriate," allows for damages for mental and emotional distress.

### Covenants Not to Compete – Location of Competing Business

In *United Rentals (North America), Inc. v. Keizer*, Docket No. 02-1580 (January 7, 2004), the Sixth Circuit affirmed the district court's decision that a defendant had not violated a covenant not to compete. This particular covenant proscribed the defendant's operating a business in a specified geographic area. The defendant had sold to customers within this area, but successfully argued that he was not in breach of his agreement because his competing business was not physically located in this area. The court affirmed the district court's holding that "[w]hen ordinary speakers refer to where a business is operated, they refer to the location of the business." The court also based its holding upon the fact that the plaintiff had known of the defendant's interest in a competing business before hiring him, and that the physical location of this business had been specifically excluded from the geographic area covered by the non-competition agreement.

### FMLA – Serious Health Condition

In *Perry v. Jaguar of Troy*, Docket No. 02-1816 (December 30, 2003), the Sixth Circuit affirmed the district court's holding that a plaintiff had been properly terminated for taking FMLA leave to which he was not entitled. The plaintiff had taken leave for the pur-

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## SIXTH CIRCUIT ADDRESSES THE NLRA, COVENANTS NOT TO COMPETE, DAMAGES UNDER THE FLSA, AND THE MEANING OF "INCAPACITY" PURSUANT TO THE FMLA

(Continued from page 11)

poses of supervising his son, who suffered from learning disabilities, attention deficit disorder, and attention deficit hyperactivity disorder. The court held that the son was not "incapacitated" within the meaning of 29 C.F.R. § 825.114(a)(2), because he still was able to work, attend school, and perform other regular daily activities. The plaintiff was unsuccessful in arguing that his son was incapacitated because he could not perform regular daily activities when compared to other children without these learning disabilities: "[t]he fact that a child with learning disabilities does not function at the same level as a child of the same age without learning disabilities sheds no light on whether that child can perform regular daily activities."

### NLRA – Nonemployee Union Representatives of Construction Subcontractors

In *Wolgast Co. v. NLRB*, Docket Nos. 01-1904/2056 (October 28, 2003), the Sixth Circuit considered "whether nonemployee union representatives of the organized employees of a construction subcontractor, whose collective bargaining agreement contains a union access clause, can be categorically barred from a construction jobsite by the [non-union] contractor with the asserted property interest." The court concluded that no such protectable interest existed, and enforced the NLRB's order. The court distinguished cases holding that nonemployees are generally barred from an employer's property for purposes of solicitation, holding that "the union agent at issue here did not seek access for purposes of organizing employees, handbilling patrons, boycotting, or other similar activity in exercise of the union's 'derivative' § 7 rights." Rather, the agent "sought access as the direct representative of the subcontractor's employees under the authority of [that] collective bargaining agreement."

### NLRA – Preemption

In *Mattis v. Massman*, Docket No. 02-1301 (January 6, 2004), the Sixth Circuit reversed the district court, holding that the plaintiff's tort claims were preempted by § 301 of the NLRA. The court held that the claim of "tortious interference with an advantageous economic relationship" was preempted because this relationship was created by the collective bargaining agreement. The court then held that the claim of "intentional infliction of emotional distress" was preempted because it would require a court to interpret the collective bargaining agreement in order to determine whether the alleged conduct was "outrageous," an element of this particular tort claim.

### NLRA – Partial Strike

In *Vencare Ancillary Services, Inc. v. NLRB*, Docket Nos. 01-2165/2300 (December 11, 2003), the Sixth Circuit denied enforcement of an NLRB order because it found that the employees had

engaged in an unprotected partial strike. The employees in question, rehabilitative therapists in a nursing home, were upset over a proposed reduction in their wages. They collectively refused to see patients until management met with them to address their concerns, although they did stay on the premises and did paper work. They were then terminated for insubordination. The court held that the ALJ and NLRB erred in concluding that the employees did not perform a partial strike, finding it "significant that the [employees] did some work after making their demands known." The court also noted that the NLRB has "repeatedly condemned employees' refusal to work on the terms lawfully prescribed by the employer while remaining on their jobs." The court reiterated that the "employee must completely stop working or risk being discharged for engaging in an unprotected activity."

### NLRA – Retaliation for Organizing Attempt

In *Ishikawa Gasket America, Inc. v. NLRB*, Docket Nos. 02-1167/1310 (January 7, 2004), the Sixth Circuit affirmed an NLRB order finding that an employer had violated § 8(a)(1) and (3) of the NLRA by reducing its annual bonus for hourly production employees during a failed union organization effort. The court found that the employer had engaged in numerous unfair labor practices, such as surveilling union activities, distributing racially inflammatory literature, and terminating the employment of a union organizer. The court then found that there was substantial evidence to support the Board's conclusion that the bonus was reduced in retaliation for the union organizing drive and to "chill protected activity." The court rejected the employer's argument that this was not retaliatory, because it had reduced its managers' bonuses by a much greater amount, stating that its "motivation for reducing the employees' bonuses is simply irrelevant to its motivation for reducing the employees' bonuses." ■



## LOOKING FOR *Lawnotes* Contributors!

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

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

For information, contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, Klass, Legghio, Israel & Gorchow, P.C., 306 South Washington, Suite 600, Royal Oak, Michigan 48067 or (248) 398-5900 or [israel@martensice.com](mailto:israel@martensice.com).

## WHY BAD JUDGMENT IS GOOD...FOR LAWYERS

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

I know we typically pay homage to good judgment. But, if it weren't for bad judgment, would there be enough work to keep us all busy? It will probably come as no surprise that my favorite story is about someone else's bad judgment.

The story involves an individual defendant joined as the "villain" or wrongdoer in a sexual harassment case – in the old days when it was still permissible to do so. He contacted me for help with his own employment problems shortly after the ink had dried on a final settlement agreement. Most plaintiff's lawyers have had this experience; some of us more than once. The one I plan to share was by far the best of the worst.

The underlying case itself involved bad judgment. The plaintiff was a woman in her late 40s supervised by two substantially younger managers. The store manager was 21 years of age, his assistant, the individual defendant, 35. The immaturity of the managers was palpable, the sexual harassment offensive, if not ridiculous. It only became a case, however, when complaints of harassment were ignored by the younger but more senior of the two supervisors. The plaintiff had problems of her own, of course, but I'll spare you those details. How these three individuals managed to end up in the same place working together would make a pretty good story in itself! Let's call the company Pottery Products, Inc. Pottery Products and the individual defendant retained separate counsel.

As I began an investigation of her claims, my client related that the defendant manager had been a police officer in a mid-sized Michigan city before joining the defendant employer. She did not know the circumstances of his departure but suspected I would find a story of some kind if I looked into it. My investigator soon uncovered the sordid but useful details. On routine patrol, our villain had pulled over a speeder. Finding the driver intoxicated and barely coherent, he did more than make an arrest. He took personal possession of the driver's license and credit card of the drunk, as well. With these he purchased thousands of dollars in gifts for a girl friend he kept on the side. He concealed his actions from his wife - for a while - but not from the police department which had placed in him the public trust. He was soon suspended, indicted, prosecuted, discharged, convicted, incarcerated, and divorced. And, if I'm not mistaken, once the presents were retrieved, he lost the girl friend, too.

After serving his debt to society, our harasser sought new employment. Eventually, he and the plaintiff were hired at or about the same time. He took a shine to the plaintiff – a feeling that was not reciprocated - and soon engaged in what could only be characterized as sexual harassment, causing plaintiff a great deal of psychic pain. There were offensive words, and a little physical contact, as well. Plaintiff's complaints fell on the deaf ears of an insensitive and arrogant store manager and she eventually lost her job.

Before suit was filed, the company denied all allegations of sexual harassment. It even denied that plaintiff complained. Because the denials were based exclusively on the word of an

alleged harasser, his credibility was a matter of utmost importance. Our challenge was to convince the other side that it was error to invest so heavily in believing him.

The depositions could not have proceeded better from my point of view. The employer flew in two senior vice presidents from home office to observe. Both mature. Both female. Both serious. I happily consented to letting them sit in. After a few preliminaries, exploration of defendant's prior work history began. I opted for a quiet, simple, calm and non-adversarial approach using short, straightforward questions. I had the goods. There was no escape. Dramatics were unnecessary. Just sit back and watch it all unfold. I learned this technique the hard way: some of the finest management side litigators in the practice had demonstrated it to me on one or another of my own clients over the years. It was enormous fun, and easy to see why they enjoyed it so much.

- Q. "Where did you work immediately before you started with Pottery Products?" [Nice and neutral.]
- A. "City of Jonesville."
- Q. "What was your job?"
- A. "Sworn police officer."
- Q. "Why did you leave Jonesville?" [Holding my breath.]
- A. "I realized that the life of a police officer was not for me." [Undoubtedly the truth! His candor so far was impressive. It was not to last long.]
- Q. "What caused you to come to that realization?" [I needed an opening.]
- A. "I had enough and decided it was time to go." [!]
- Q. "Did you have occasion to work routine patrol?" [Closing in, documents at the ready.]
- A. "Yes."
- Q. "Did your duties include investigating traffic violations, including possible driving while intoxicated?" [Here we go.]
- A. "Yes."
- Q. "And did you have occasion to stop a potential drunk driver on the night of July 15, 1999?"
- A. "I don't remember." [Is that a look of panic developing in his eyes?]
- Q. "Would it help to look at a police record?"
- A. "It might."
- Q. "Showing you what I've marked for identification as Deposition Exhibit 1, can you identify this document?"
- A. "Yes."
- Q. "What is it?"
- A. "It's a preliminary complaint record of an arrest for driving under the influence."
- Q. "Is this your signature?"
- A. "Yes."

And so on.

(Continued on page 14)

## WHY BAD JUDGMENT IS GOOD ...FOR LAWYERS

(Continued from page 13)

Slowly, but surely, one question at a time, each low key question building on the last, I walked the defendant through the whole dreadful story. From taking the credit card to using it to purchase a TV and stereo for the “other” woman. From falsifying police reports to lying to departmental investigators. From departmental discipline through criminal conviction, we discussed the whole sordid mess. There was more, but you get the idea. When he occasionally resisted or denied the foundation for a question, I was able to refresh his memory with one of the many documents my investigator uncovered. And to every relevance objection, a simple reminder of the importance of credibility in determining who was telling the truth about what transpired at Pottery Products sufficed. The two vice presidents never let me see them sweat. For this I give them credit. The one time they seemed to grow ever so slightly agitated was when I asked defendant if he had informed the company of his prior employment as an officer of the law. He “thought” he had. Of course, he had not.

The case quickly settled. As we signed the final documents, I promised my client her tormentor would himself be fired by sundown. No special foresight was needed for that prediction!

A week or so later, the former defendant called me. I never saw it coming.

“Mr. Stark, this is Bob Smith. Do you remember me?”

“Of course, I remember you!” I exclaimed.

“Pottery Products, Inc. fired me, Mr. Stark.”

I was confused. “And you’re calling me because...?” Was he blaming me? Was he mad at me? Wasn’t he a former police officer? I wondered if he still had his guns.

“I loved what you did to me, Mr. Stark! I want you to represent me!”

What can you say to someone with such monumentally flawed judgment and yet....

“I’m sorry, but I can’t do it,” I replied.

“Why can’t you do it?” he demanded, his voice growing edgy.

I thought a moment before responding. I wanted to find just exactly the right words. Any misunderstanding or insult might have been dangerous. “I spent a lot of time and money to discredit you, Bob. I don’t think it possible for us to now go back and spend time and money to credit you.”

“Oh.” Pause. “Does that mean you don’t think I have a case?”

Over the years, whenever I hear the phrase “bad judgment,” I think of this story. It has become my gold standard for measuring just how bad judgment can be. But without individuals like Bob exercising judgment this flawed, where would we lawyers be? There is something to be said about bad judgment: bad judgment is good – so long as it is exercised by or on behalf of others. ■

## MICHIGAN COURT OF APPEALS UPDATE

John W. Smith  
Dykema Gossett PLLC

### Considering Individual Elected Officials As “Employers” Under PERA Leads To Statutory Interpretation: *Branch County Board of Commissioners, et al. v UAW* (per curiam) No. 241189 (December 23, 2003)

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (“UAW”), is the collective bargaining representative of Branch County employees. When bargaining commenced, the Branch County Board of Commissioners, Branch County Clerk, Branch County Register of Deeds, and Branch County Treasurer asserted that they, along with the County itself, were co-employers of their chief deputies, and all other deputies in their respective offices, and demanded that the charging party bargain with them.

The UAW filed a complaint with MERC alleging that respondents violated section 10(1)(e) of PERA by failing to bargain in good faith by demanding that it recognize them as co-employers of all deputies in their respective offices. Section 10(1)(e) provides that: “[I]t shall be unlawful for a public employer or an officer or agent of a public employer . . . to refuse to bargain collectively with the representatives of its public employees.” After conducting a hearing on the complaint, and without engaging in a separate analysis of each of the relevant statutory provisions, MCL 50.63, MCL 48.37, and MCL 53.91, that delineate the powers of appointment for county clerks, treasurers, and registers of deeds, the administrative law judge (ALJ) determined that each of these elected officials was a co-employer *only* of their chief deputy, and not a co-employer of other deputies in their respective offices.

The various elected County officials filed an exception to the ALJ’s order, objecting to the ALJ’s determination that they were not co-employers of all deputies in their respective offices. MERC concluded that the elected officials were co-employers of all deputies in their respective offices and thus did not violate section 10(1)(e) of PERA, and dismissed the unfair labor practice charges as to the elected officials. The UAW appealed to the Court of Appeals.

After setting out the standard of its review, the Court of Appeals explained “employer” status under MERC:

To determine whether an elected official is a co-employer, we look to see whether the elected official ‘possesses coemployer status by virtue of his statutory authority to hire and discharge his employees at his pleasure.’ *Genesee Co Social Services Workers Union v Genesee Co*, 199 Mich App 717, 719; 502 NW2d 701 (1993). This Court explained: “[W]here [a] statute gives an elected official the power both to appoint an employee and to revoke that appointment at pleasure, or at any time, under *St. Clair County Prosecutor v American Federation of State, County and Municipal Employees, Local 1518*, 425 Mich 204 (1986) that official becomes the coemployer of that employee.” *Id.*, quoting *Berrien Co v Teamsters, Local 214*, 1987 MERC Lab Op 306, 314. [Emphasis added in *Genesee Co*.]

The Court of Appeals then went on to examine the statute providing for each elected official’s authority. Beginning with the County Clerk, the Court found that a careful reading of MCL 50.63 does not support the UAW’s contention that the county clerk is a co-employer of only his or her chief deputy, and commented that “nothing in this language suggests that a county clerk is limited to appointing one deputy.” Despite varying interpretations by the UAW,

the Court of Appeals concluded that because MCL 50.63 gives the clerk the power to appoint deputies and to revoke such appointments at his or her pleasure, “we find no substantial and material error of law in MERC’s conclusion that the Branch County Clerk is a co-employer of all of its deputies, not just the chief deputy.”

Moving to the duties and powers of the county treasurer, found in MCL 48.37, the Court agreed with MERC that the statute is replete with the use of plural phrases indicating an expectation that a county treasurer might make multiple appointments. The Court, therefore, found no substantial and material error of law in MERC’s conclusion that the Branch County Treasurer is a co-employer of all of its deputies.

Finally, the Court examined the county register of deeds, whose duties are provided for in MCL 53.91. MERC had interpreted the statute as consistent with the county clerk and county treasurer statutes. The Court found that, unlike the other two statutes, there was no basis upon which to interpret the statute as allowing multiple appointments. Accordingly, the Court held that “MERC made a substantial and material error of law in its determination that the Branch County Register of Deeds is a co-employer of all of its deputies, and find that the Branch County Register of Deeds is only a co-employer of the chief deputy.”

**Michigan’s Minimum Wage Law Remains Inapplicable Where FLSA Provides Same Rate: *Allen v MGM Grand Detroit, LLC* (Zahra, J.) No. 241350 (July 17, 2003)**

Plaintiffs Randall Allen and Randal Lefevers were at one time, full-time slot machine floor supervisors at the Detroit MGM Grand Casino (“MGM” or “the Casino”). They were required to arrive at work fifteen minutes before each eight-hour shift and remain at work at least twenty to thirty minutes after each shift. From August 1999 to early 2000, MGM paid plaintiffs their regular rate of pay for time worked over forty hours a week. In early 2000, MGM stopped paying plaintiffs for hours worked over forty hours a week. Also, plaintiffs were required to attend training sessions without being paid.

Plaintiffs filed a complaint asserting that MGM violated the Michigan Minimum Wage Law (“MWL”) by failing to pay overtime compensation at the rate of 1½ times their regular rate of pay. MGM moved for summary disposition based on the applicability provision of the MWL, which provides that employers covered by the Federal Fair Labor Standards Act (“FLSA”) are exempt from the MWL, unless the federal law would result in a lower minimum wage. MGM argued that it is governed by the FLSA, and that the FLSA and MWL provided the same minimum hourly wage rate during the time of the alleged violations, and therefore, it was entitled to summary disposition. Their was no dispute that MGM met the commercial requirements to fall under FLSA jurisdiction. However, the circuit court denied MGM’s motion, finding that because the FLSA had a shorter statutory limitation period than provided under the MWL, application of “federal minimum wage provisions would result in a lower minimum wage than provided [by the MWL].” MGM appealed.

The Court of Appeals reaffirmed that the MWL parallels the FLSA. The Court acknowledged, however, one discrepancy between the MWL and the FLSA: the MWL provides for a three-year statute of limitations while the FLSA generally provides for a two-year statute of limitations.

The trial court had found the phrase “a lower minimum wage” in MCL 408.394 ambiguous because of its interaction with other statutes. In applying MCL 408.394, the trial court read this provision together with MCL 408.384a(6), which provides that for “purposes of administration and enforcement, an amount owing to an employee which is withheld in violation of this section shall be considered to be unpaid minimum wages under this act.” From the phrase “unpaid minimum wages” in MCL

408.384a(6), the trial court concluded that the “MWL is concerned with more than just the determination of the hourly rate to be paid to an employee; its scope encompasses the total sum which may be owing to an employee.” The trial court also concluded that “because the statute of limitations would allow plaintiffs to bring [his] entire employment period within the scope of [the] complaint, application of the MWL does result in a higher ‘minimum wage’ as defined by the MWL.” Thus, the trial court held that application of federal minimum wage provisions would result in a lower total amount payable to an employee than provided in the MWL.

The Court of Appeals disagreed. The Court restated that the MWL does not apply “unless application of those federal minimum wage provisions would result in a lower minimum wage than provided in this act.” The statute then went on to identify which federal statutes constituted “federal minimum wage provisions.” The Court found that, “those federal minimum wage provisions” plainly refers to the expressly identified provisions that are enumerated in the previous phrase.” The trial court’s holding was based on the FLSA’s statute of limitations, 29 USC 255, resulting in a lower minimum wage than provided by the MWL. However, 29 USC 255 is not one of “those federal minimum wage provisions” expressly identified by the Michigan Legislature which should be applied to determine whether the FLSA results in a lower minimum wage than provided by the MWL:

The Michigan Legislature specifically precluded application of the MWL to employers subject to the FLSA unless application of “29 USC 201 to 216 and 217 to 219,” results in a lower minimum wage than provided under the MWL. Defendant is an employer subject to the FLSA and application of the above referenced provisions to the present case does not result in a lower minimum wage. Defendant is entitled to summary disposition.

The Court concluded that the statute of limitations under the FLSA is not a relevant distinguishing feature allowing the courts to impose the MWL, and the Court of Appeals held that the trial court improperly denied defendant’s summary disposition.

**The Threat of Individual Liability Under Elliott-Larsen Returns As One Panel of the Court of Appeals Openly Attacks *Jager*, Setting the Stage for Decision by the Michigan Supreme Court: *Elezovic v Ford Motor Company* (Neff, J.) No. 236749 (October 23, 2003, Updated December 30, 2003, released for publication January 8, 2004)**

Plaintiff Lulu Elezovic appealed the trial court’s grant of a directed verdict in favor of defendant Ford Motor Company and defendant Daniel Bennett, a former supervisor at Ford, on Elezovic’s claims of sexual harassment and gender discrimination. Elezovic was an hourly production worker at Ford’s Wixom Assembly Plant who, in November 1999, brought suit against Ford and Bennett alleging claims of sexual harassment, gender discrimination, and retaliation. At the core of Elezovic’s claims was alleged conduct by Bennett from 1995 through 1999 that included Bennett exposing his penis and masturbating when alone with plaintiff in the Wixom plant rail yard, obscene gestures and lewd facial expressions simulating oral sex, a physical attack at a plant bathroom, and repeated sexual remarks such as asking plaintiff if her “boobs [were] real,” saying that he “would like to stick [his] dick in between [her] boobs,” and licking his lips and asking for a “blow job.” According to Elezovic, she did not complain to Ford of Bennett’s sexual harassment because of her Albanian cultural background and fear of reprisals or further intimidation by Bennett. However, Elezovic complained about nonsexual matters involving Bennett and her work conditions at Ford. She also sought psychological counseling and medical care, which she said were made necessary by the harassment at work.

(Continued on page 16)

## MICHIGAN COURT OF APPEALS UPDATE

(Continued from page 15)

Following a three-week jury trial in August 2001, the trial court directed a verdict in favor of Ford and Bennett, finding that Elezovic had failed to establish a prima facie case of discrimination or retaliation by Ford or Bennett.

In its de novo review, the Court of Appeals started with Elezovic's hostile environment sexual harassment claim. To establish a claim of hostile environment harassment, an employee must prove the following elements by a preponderance of the evidence: "(1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of sex; (3) the employee was subjected to unwelcome sexual conduct or communication; (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior."

The Court's discussion focused on the fifth element, respondeat superior, explaining that an employer may avoid liability in a hostile environment case if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment. Such prompt and appropriate remedial action will permit an employer to avoid liability if the plaintiff accuses either a co-worker or a supervisor of sexual harassment. An employer, of course, must have notice of alleged harassment before being held liable for not implementing action.

The Court thus explained that an employer may avoid liability for a claim of sexual harassment if it does not have actual or constructive notice of the alleged harassment:

Where . . . the plaintiff seeks to hold the employer responsible for the hostile environment created by the plaintiff's supervisor or co-worker, she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. . . . The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management of the harassment . . . or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." [Id. at 457, quoting *Henson v Dundee*, 682 F2d 897, 905 (CA 11, 1982).]

In *Sheridan v Forest Hills Pub Schools*, 247 Mich App 611, 622; 637 NW2d 536 (2001), the Court of Appeals defined the term "higher management" to mean someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee.

With regard to actual notice, plaintiff asserts that she told two of her supervisors of the 1995 incident in which Bennett masturbated in front of her. However, plaintiff asked them as friends to keep this confidential and to not tell anyone. She admitted that she did not want them to report Bennett's conduct to labor relations, the department responsible for investigating complaints of sexual harassment. Under these circumstances, plaintiff's report of Bennett's conduct to her supervisors does not constitute actual notice to Ford, such that it could investigate the matter and take remedial action.

The Court rejected Elezovic's argument that actual notice was provided by communications to Ford made on her behalf. The Court found that, contrary to plaintiff's contention, there was no evidence that the letters from her psychologist provided Ford with adequate notice that plaintiff was being subjected to sexual harassment by

Bennett or to a work environment made hostile by sexual harassment because the letters made no reference to sexual conduct, and, Elezovic filed various grievances and labor relations complaints over the years against Bennett, but never once complained about sexual harassment by him. The Court dismissed this and other evidence as not, under the objective standard of *Chambers*, establishing that Ford would have been aware that sexual harassment was occurring.

The Court went on to consider whether Ford had constructive notice. In addition to the incidents involving Bennett's sexual harassment, Elezovic provided testimony that other supervisors sexually harassed her and that other female employees were sexually harassed. Nonetheless, this evidence did not establish that the sexual harassment was such that Ford had constructive notice. Elezovic indicated that there were no witnesses to the alleged incidents of sexual harassment against her. Further, the Court held that complaints of alleged sexual harassment of plaintiff's coworker cannot be said to establish notice with respect to Elezovic's claim of harassment.

The Court of Appeals affirmed the directed verdict for Ford on Elezovic's hostile environment claim.

The Court also affirmed dismissal of the claims against Bennett in light of its recent decision in *Jager v Nationwide Truck Brokers, Inc.*, 252 Mich App 464, 478; 652 NW2d 503 (2002), that supervisors cannot be held individually liable under Elliott-Larsen. This panel, however, made it clear that it would not have done so, if not bound by *Jager* as controlling precedent:

The Court in *Jager* relied on federal precedent and analyses under title VII in deciding that the CRA does not allow for individual liability for sexual harassment, stating: "We believe that, like title VII, the language in the definition of 'employer' concerning an 'agent' of the employer was meant merely to denote respondeat superior, rather than individual liability." *Jager, supra* at 484.

We find *Jager's* reliance on federal law misplaced. The Michigan Supreme Court has recognized that unlike the federal law, the CRA expressly establishes a cause of action for sexual harassment and that employer liability under the CRA for sexual harassment is based on traditional agency principles. *Chambers, supra* at 311, 315-316, 326. Thus, this Court has observed that the theories of liability underlying federal sexual harassment cases must be distinguished from those underlying the CRA.

....

We conclude that under the controlling legal principles regarding sexual harassment under Michigan law, *Chambers, supra* at 313, the Legislature did not intend to preclude individual liability for sexual harassment. Were it not for this Court's holding in *Jager*, we would reverse the trial court's grant of a directed verdict in favor of Bennett with regard to plaintiff's hostile environment claim.

The Court of Appeals very deliberately and thoroughly for the bulk of this opinion set forth the arguments in favor of *Jager's* reversal including a detailed analysis of the statutory language and distinguishing the federal law upon which the *Jager* decision was largely based.

The Court of Appeals went on to affirm the trial court on various other issues including the dismissal of a quid pro quo sexual harassment claim and various evidentiary matters. The import of this decision for the plaintiff and defense labor and employment bar, however, is the clear appeal to the Michigan Supreme Court to reverse *Jager* and restore individual defendants in Elliott-Larsen lawsuits. ■

# HANDLING A LABOR CASE

## A PRACTICE GUIDE

Michael K. Lee  
Amberg, Firestone, and Lee, P.C.

and

Stanley C. Moore, III  
Plunkett & Cooney

**[Editor's Note:** The following guide was distributed at the seminar for new labor and employment law practitioners at the LELS Mid-Winter Meeting on January 30, 2004.]

1. Learn the substantive law and keep current.
  - (a) Read advance sheets.
  - (b) Keep a digest.
  - (c) Books versus computer for research.
  - (d) Revisit your resources each time you handle the matter.
2. Learn procedure in the agencies (MERC or NLRB) and arbitration.
  - (a) Regularly access agencies' websites.
  - (b) Attendance at conferences and seminars.
  - (c) Hearings are open to the public — call the agencies for schedules and attend hearings as an observer.
  - (d) Ask arbitrator for opportunity to attend hearing and observe.
  - (e) Prepare and update trial notebook.
  - (f) The first legal issue is procedural compliance.
3. Know your judge.
  - (a) In arbitration or before MERC you will know who your judges or arbitrators will be and you can read their prior decisions for guidance not only on your particular issue, but how they deal with matters in general.
  - (b) With the NLRB it is more difficult in that the settlement judge may not always be the trial judge.
  - (c) Benefits of joining the LEL Section.
  - (d) Argue (and write) for your audience. You must communicate *before* you can persuade.
  - (e) Use the LELS Listserv (request private replies).
4. Know your Opposition.
  - (a) Inquire about the attorney, business representative or management representative who will be on the other side to learn about his or her reputation and nature of handling matters.
  - (b) Call in advance to introduce or reintroduce yourself and discuss the case in general or specific terms.
  - (c) Informal discovery.
  - (d) Recognize that the labor relations community is relatively small regarding the number of advocates and your reputation will clearly proceed you.
  - (e) Civility will enhance your reputation and be in the best interests of your client.
- (f) Integrity is essential — once you are caught in a lie, your reputation will severely suffer.
- (g) Benefits of joining the LEL Section.
- (h) Provocation is not an excuse for retaliation.
- (i) Use the LELS Listserv.
5. Thorough preparation is essential.
  - (a) The judge or arbitrator will expect it.
  - (b) Your opposition will be thoroughly prepared.
  - (c) You owe it to your client.
  - (d) Witness interviews — management side — *Johnnie's Poultry*, 146 NLRB 770 55 LRRM 1403 (1964).
  - (e) Prepare to try the case, not to settle the case.
  - (f) Interview the key witnesses in confidence (Presence of others may inhibit candor).
6. Thorough assessment of your case.
  - (a) From your opposition's perspective.
  - (b) From your client's perspective
  - (c) From your perspective based upon your fact gathering and legal research.
  - (d) From the administrative law judge's, hearing officer's or arbitrator's perspective.
  - (e) Master the Michigan Rules of Professional Conduct. (Who is your client? To whom do you owe the highest duty?)
7. Value of Settlement.
  - (a) Attack dog mentality generally not in your client's best interest.
  - (b) There is certainty in settling.
  - (c) Recognize your ego is not paramount, but your client's best interest is.
  - (d) Always remember your client and your opposition's client generally have to live with one another.
  - (e) However, you cannot be afraid to try a case.
8. Benefits of joining the LEL Section.
  - (a) An opportunity to meet other practitioners including arbitrators, administrative law judges, and hearing officers.
  - (b) *Labor and Employment Lawnotes*.
  - (c) Mid-Winter Meeting Programs (January).
  - (d) Annual Meeting Program (September)
  - (e) Listserv
9. Continuing Education Programs.
  - (a) ICLE Annual Labor and Employment Law Seminar (Spring).
  - (b) Bernard Gottfried Annual Labor Law Symposium (October).
  - (c) ABA Section of Labor and Employment Law — Receive *The Labor Lawyer*.
  - (d) Local Bar Association Labor and Employment Law Section.

## MDCR FORUM

**W. Ann Warner, Attorney**  
*Michigan Department of Civil Rights*

Greetings from the Michigan Department of Civil Rights, where we have a new director, Linda Parker, who joined MDCR in November 2003. Ms. Parker is a former partner at Dickinson Wright PLC and was the first Executive Assistant U.S. Attorney for the Eastern District of Michigan. She is a past president of the Wolverine Bar Association and prior to joining MDCR served as the Director of Development at the Detroit Institute of Arts. Ms. Parker has done volunteer work for the Women's Justice Center, the Coalition of 100 Black Women, and New Steps. She graduated from the University of Michigan and earned her J.D. at the National Law Center at George Washington University.

In other news, Mark Bernstein has been appointed to the Michigan Civil Rights Commission to fill the unexpired term of Francisco Villaruel, who resigned after ten years of service. Bernstein served as the White House Director of Press Pool Operations during the Clinton Administration and has worked in the real estate investment banking group at a major Wall Street bank. He received his B.A., M.B.A., and J.D. from the University of Michigan and is an active member of the University of Michigan Hillel Board of Trustees.

Mohammed Abdrabboh was reappointed to the commission. Abdrabboh earned his J.D. from the University of Toledo School of Law and serves as a board member on the American Arab Anti-Discrimination Committee (ADC) and chairman of the ADC advisory board. Abdrabboh serves on the advisory boards of the University of Toledo Law School and the American Civil Liberties Union of Michigan. He is a member of the Michigan Alliance Against Hate Crimes.

Of the seven current commissioners, six are attorneys. One seat remains to be filled.

**MDCR Mediation Program** — The MDCR expanded facilitative mediation program is proving to be very successful. Cases are mediated by internal mediators (employees of MDCR), by experienced mediators provided by community mediation centers throughout Michigan, and by experienced individuals who volunteer on a pro bono basis. Because of budget constraints, mediation is proving to be a cost effective method for resolving employment discrimination claims. Mediated settlements allow MDCR to allocate resources to other tasks which are equally important in furthering our mission.

From October 1, 2002, through September 30, 2003, 162 cases went to mediation and 84 (52%) were resolved. We are seeing continued growth and success in fiscal year 2004. From October 12, 2003, through January 31, 2004, the parties agreed to mediation in 69 cases and in 42 of those (61%), the parties reached an agreement. We are encouraged by both increased participation and rising resolution numbers and are pleased that both internal and external mediators are assisting to resolve so many disputes. MDCR anticipates that well over 200 cases will reach mediation this fiscal year.

If you have any questions or concerns about MDCR mediation, or if you are a trained and experienced facilitative mediator and would like to provide pro bono mediation services, please contact Kerry Bernard, Mediation Coordinator at (313) 456-3765 or email him at [bernardk@michigan.gov](mailto:bernardk@michigan.gov). ■



## FOR WHAT IT'S WORTH

**Barry Goldman**  
*Arbitrator and Mediator*

*What is it with you arbitrators? You let in every cockamamie piece of foolishness anybody wants to present. Didn't you ever hear of the rules of evidence? Why **do** you waste everybody's time? Just to pad your bill? - DAH, Detroit*

Actually, pointless testimony is just as painful to arbitrators as it is to everybody else. And an arbitrator who wants to pad a bill would be silly to do it by adding hearing days. It would be far easier to add study and writing days, and we can do *that* back in the office with our shoes off.

The rules of evidence are relaxed in arbitration for three reasons. **FIRST**, at least in theory, arbitrators are a sophisticated audience. We are supposed to know how to apply appropriate weight to what we hear. There is a reduced chance we will be unduly swayed by evidence that is more prejudicial than probative. We are pros.

**SECOND**, there is what the literature calls the "therapeutic effect" of allowing the parties to tell their stories. Arbitration is not just about getting to a decision. It is also about giving the parties an opportunity to be heard. Labor arbitrations do not take place between strangers. There is an ongoing relationship between the employer and the union. In that context, if someone has something to say, there is value in giving him a chance to say it.

**THIRD**, there is the fact that arbitration decisions can be vacated if an arbitrator fails to admit relevant evidence. (Or, more cynically, if he fails to admit evidence that a reviewing judge, who doesn't like the result and wants to vacate the award, later *deems* to be relevant.) Arbitration decisions cannot, however, be vacated on the grounds that the arbitrator admitted too much.

**FINALLY**, if those reasons are not enough to persuade you, remember that the arbitrator is a creature of the parties' agreement. If you and your opponent agree, you can require the arbitrator to apply the rules of evidence. Assuming he remembers what they are, he should be happy to comply.

## MERC UPDATE

Michael M. Shoudy

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

Since the previous issue of *Lawnnotes*, the Michigan Employment Relations Commission has issued 17 Decisions and Orders in a variety of cases. A brief summary of 4 of those cases follows. Of those 17 cases, 11 were unfair labor practice cases, 5 were representation and/or unit clarification cases, and 1 was a motion for reconsideration decision on an unfair labor practice charge. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations' website at [www.michigan.gov/cis](http://www.michigan.gov/cis).

### UNFAIR LABOR PRACTICES.

#### *Teamsters Local 214*

Case No. CU02 L-066 (December 23, 2003) (No Exceptions).

On November 20, 2003, the ALJ issued a Decision and Recommended Order finding that Respondent, Teamsters Local 214, violated its duty to bargain in good faith under PERA. Charging Party, the Lincoln Consolidated Schools, alleged that the Respondent Union refused to meet and negotiate over a successor collective bargaining agreement unless the Employer rescinded its change in the way it configured bus routes for bidding purposes. Charging Party filed a motion for summary disposition. The ALJ found the matter appropriate for summary disposition under Commission Rule R 423.165.

The controversy arose out of the Employer's decision to combine bus runs for bidding purposes. This decision was contrary to past practice. As a result, the Union asserted that the Employer had violated PERA by consolidating the runs without bargaining to impasse. As a result, the Union filed an unfair labor practice charge, alleging that the Employer had unilaterally implemented a change in a mandatory topic without bargaining to impasse. The Employer maintained that the language in the contract permitted it to combine the runs. The ALJ found in that case that the Employer had not committed an unfair labor practice because there was a bona fide dispute over interpretation of the applicable contract language.

After the filing of the Union's unfair labor practice, several correspondences were exchanged between the parties. The Employer requested that the Union return to the table to continue bargaining over unresolved issues. The Union responded that it would return to the table if certain ground rules were agreed to. The Employer responded with its own conditions for returning to the bargaining table. The Union scheduled a membership meeting to vote on whether to return to the bargaining table. The Union membership voted to reject the Employer's offer to return to the table.

The ALJ noted that a party violates its duty to bargain in good faith by insisting on the other party's agreement on a single mandatory subject of bargaining before agreeing to meet on other issues. After considering the briefs and evidence submitted, the ALJ concluded that the Union unlawfully refused to bargain when it conditioned its return to the table on resolution of an issue outside the scope of negotiations. The ALJ noted that the "Union's demand that the Employer capitulate on this issue before it would even agree to meet was inconsistent with its obligation to negotiate with an open mind and a sincere desire to reach agreement. . . ." Therefore, the Employer's motion for summary disposition was granted and the Union was ordered to meet and bargain in good faith over the terms of a new collective bargaining agreement.

#### *Buena Vista Schools*

Case No. C02 B-050 (November 18, 2003).

On January 16, 2003, the ALJ issued a Decision and Recommended Order finding that Respondent, Buena Vista Schools, did not violate its duty to bargain in good faith by refusing to provide a mail order prescription drug program with a zero co-pay for the 2001-02 school year. Charging Party, Buena Vista Education Association, MEA/NEA, filed timely exceptions to the ALJ's Decision and Recommended Order. In its Exceptions, Charging Party contended that the ALJ erred in finding that the co-pay language for mail order prescriptions was ambiguous and that there was no meeting of the minds with respect to the meaning of this language. The Commission adopted the Recommended Order of the ALJ, dismissing the unfair labor practice charge.

The Union and Employer were parties to a collective bargaining agreement for the term 1996 through June 30, 2001. Part of the health insurance coverage under that agreement provided: "Blue Cross/Blue Shield program: . . . prescription drug benefit \$2.00 co-pay (mail order prescription will be subject to \$0 co-pay . . .)." The aforementioned language was deleted during contract negotiations, and the following language was added to the tentative agreement: "Mail order RX up to 90 days supply per co-pay."

In the final draft of the collective bargaining agreement, the Employer included the above language but did not refer to the zero co-pay. The Union refused to sign the agreement because it deleted the language providing for the zero co-pay for mail order prescription drugs. Both the Union and the Employer agreed that the language providing for a zero co-pay for mail order prescriptions was to remain in the agreement. However, the testimony was different as to the meaning of that language.

In agreeing with the ALJ, the Commission found that the parties failed to reach a meeting of the minds on the contract language for the mail order provision. A comparison of the language in the expired contract and the tentative agreement showed ambiguity. Additionally, the parties' differing views as to the meaning of the language established that there was no meeting of the minds with respect to the co-pay for mail order prescriptions. Accordingly, the unfair labor practice charge was dismissed in its entirety.

### UNIT CLARIFICATION AND/OR REPRESENTATION.

#### *Glen Oaks Community College*

Case No. UC02 B-004 (December 15, 2003).

Petitioner, Southwestern Michigan Education Association, MEA/NEA, represents a bargaining unit of faculty employees employed by Glen Oaks Community College. The Union filed a petition for unit clarification seeking to add to its bargaining unit the position of director of Tutoring and Testing Center (hereinafter "TTC"). Petitioner argued that the position shared a community of interest with the faculty teachers and coordinators within its bargaining unit. Additionally, the duties and responsibilities of the TTC director were essentially the same as the former director of the Academic Opportunities Center (hereinafter "AOC") which was a position in Petitioner's bargaining unit.

The Employer opposed the petition on the grounds that the TTC director is a non-faculty position that does not share a community of interest with the bargaining unit of full-time teachers. Additionally, the Employer argued that the TTC director is a dif-

(Continued on page 20)

## MERC UPDATE

(Continued from page 19)

ferent position from the director of the AOC, and the services performed by the TTC director exceeded those performed by the AOC director. Finally, the Employer contended the TTC director should be excluded as a supervisor because the position had the authority to hire, discipline, and direct the work of other employees working at the TTC.

In 1995, the Employer established the AOC to provide testing and tutoring services to its students. The AOC director and her staff administered the testing. Tutoring at the AOC was conducted primarily by peer tutors who were trained by the Office of Student Services.

The director of the AOC was a faculty member in Petitioner's bargaining unit. As the director of the AOC, she created an annual budget, signed purchasing orders, and bought supplies. She also oversaw three part-time paraprofessional employees working at the AOC. The AOC director continued to teach during her tenure in the position. She reported to the Dean of the College. In spring 2001, around the same time that the AOC director tendered her resignation, the Employer began considering a proposal to provide more intensive training to its peer tutors. As a result, the TTC was created. Under this plan, the director of the new center was to be a full-time administrative position excluded from the Petitioner's bargaining unit.

The TTC opened in the same location as the former AOC. Like the AOC, the new facility provided tutoring to students via the use of peer tutors. However, the peer tutors were no longer trained by the Office of Student Services. Rather, the TTC director taught a one credit tutor certification course. The TTC director managed and evaluated the work of the peer tutors and was responsible for their hiring, firing, and discipline. The TTC also provided testing services for students.

The TTC director position was supervised by the Dean of the College. The position prepared the annual budget, signed purchasing orders, and bought supplies. In addition to teaching the tutor certification course, the TTC director was scheduled to teach an introductory education course which was canceled due to insufficient enrollment.

While the Commission found slight differences between the TTC director and the AOC director, the underlying nature of the position had not changed appreciably as a result of the creation of the TTC. The duties that the TTC director performed on a daily basis in connection with the center were essentially identical to those previously performed by the AOC director. The Commission concluded that these duties constituted bargaining unit work. As a result, the position should remain within Petitioner's bargaining unit. The record established that the TTC director performed duties functionally integrated with the College's teaching faculty. The TTC director supported the educational mission of the College by providing testing and tutoring. Additionally, the TTC director taught courses. Finally, the Commission noted that none of the employees under the direction of the TTC director were members of Petitioner's unit. The exercise of supervisory authority over non-unit employees does not require exclusion of a position. Therefore, the Petitioner's bargaining unit was clarified to include the position of director of the TTC.

## City of Adrian

Case No. R03 A-05 (November 17, 2003).

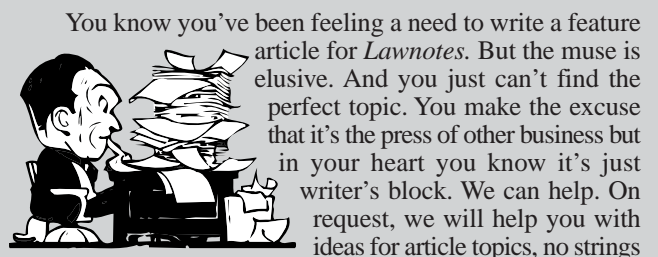
A petition was filed by Petitioner AFSCME, seeking to include in its proposed bargaining unit all regular full-time and part-time secretaries, account clerks, payroll clerks, clerk typists, customer relations clerks, administrative assistants, library assistants, and police cadets, excluding all others. The only issue before the Commission was whether to include the position of library assistant III in the proposed unit. The Employer asserted that the library assistant III was a supervisory position and thus should be excluded from the proposed unit.

The position at issue was a full-time, hourly position. The direct supervisor of the position was the library director. The library assistant III was responsible for the library's computer system and overseeing the circulation desk. The library assistant III worked with the library assistant I, which was included in the proposed unit, in staffing the circulation desk. The library assistant III was responsible for insuring that tasks at the circulation desk were completed each day.

The library assistant III job description provided that the library assistant III scheduled, supervised and trained the library assistants and pages at the circulation desk. The library assistant III did not approve vacation requests or personal leave time. The library assistant III had no authority to discipline beyond verbal reprimands, and also had no authority to hire lower classified library assistants. The library assistant III would sit in on interviews and discuss candidates with the director.

The Commission found that the authority the Employer had delegated to the library assistant III was insufficient to qualify the position as supervisory. The Commission noted possession of supervisory authority and not its exercise is what is determinative. The library assistant III only had the authority to "responsibly direct" other employees. An individual who is in charge of a group of employees is generally not found to be a supervisor unless he or she has an effective role in discipline or in recommending discipline. The authority to give an oral reprimand is not sufficient. Therefore, the Commission concluded that the library assistant III was not a supervisor and thus was not excluded from the Petitioner's proposed bargaining unit. ■

## 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 & Gorchow, P.C., 306 South Washington, Suite 600, Royal Oak, Michigan 48067 or (248) 398-5900 or [israel@martensice.com](mailto:israel@martensice.com).

**AT THE WESTERN  
DISTRICT: COMPANY  
PHYSICIAN NOT  
“EMPLOYER” UNDER CIVIL  
RIGHTS ACT AND STUDENT  
RECRUITERS AT CAREER  
TRAINING SCHOOL ARE  
“EXEMPT” FOR PURPOSES  
OF OVERTIME PAY**

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

**Employer’s Agent, A Physician Who Allegedly Conducted “Retaliatory” Fitness For Duty Exams, The Results Of Which Concluded With Plaintiffs’ Discharges, Is Not Liable As An “Employer” Under The Civil Rights Act, However, Intentional Infliction of Emotional Distress Claim May Go Forward.**

*Denhof, et al v. Dolan, et al*, Case No. 1:02-CV-275 (Dec. 12, 2003) Honorable Wendell A. Miles.

Plaintiffs, two female police officers employed by Grand Rapids Police Department (“GRPD”), filed suit alleging gender based discrimination and harassment. GRPD retained Defendant Dr. Peterson to conduct fitness for duty evaluations of Plaintiffs. Plaintiffs claim GRPD refers workers who complain of sexual harassment to Dr. Peterson for fitness for duty evaluations and Dr. Peterson routinely finds them unfit. Dr. Peterson found Plaintiffs unfit for duty but made no specific diagnosis. Plaintiffs claim that as a result of Dr. Peterson’s findings, co-workers believed Plaintiffs had mental problems, Plaintiffs lost their jobs and the chance to continue working in law enforcement, and they suffered financial losses. Dr. Peterson argued he is not liable under the Civil Rights Act because he was never an “employer” of either Plaintiff. Dr. Peterson, as an agent is an employee of GRPD, however, according to *Jager v Nationwide Truck Brokers*, 252 Mich App 464; 652 NW 2d 503 (2002), an employer’s agent who engages in a prohibited activity may not be held individually liable for violating a plaintiff’s civil rights. Therefore, Judge Miles granted Dr. Peterson’s motion to dismiss Plaintiffs’ civil rights claim against him individually.

Plaintiffs also asserted a claim of intentional infliction of emotional distress against Dr. Peterson. Dr. Peterson tried to dismiss the claim arguing his conduct did not rise to the level of “extreme and outrageous.” The Court found Dr. Peterson held a position which affected Plaintiffs’ interests and Plaintiffs had no control over the situation or any alternatives to avoid any misuse of Dr. Peterson’s position. Assuming Dr. Peterson intentionally found Plaintiffs unfit for duty, knowing his findings were erroneous and would cause each Plaintiff to lose her job, his conduct amounted to more than indignity, annoyance or petty oppression. The Court

found Plaintiffs pled a prima facie case of intentional infliction of emotional harm and denied Dr. Peterson’s motion for summary judgment.

***Student Recruiters At Career-Oriented, Technology-Based For Profit School Of Higher Education Found To Be “Exempt” “Outside Salespeople” Under FLSA And, Thus, Not Entitled To Overtime.***

*Nielsen, et al v. Devry, Inc., a/k/a Devry University, Inc.*, Case No. 4:02-CV-23 (Dec. 17, 2003) Honorable Gordon J. Quist.

Plaintiffs, field representatives for Devry, a for-profit company providing career-oriented technology-based higher education, alleged Devry unlawfully denied overtime compensation in violation of the Fair Labor Standards Act (“FLSA”). Devry asserted Plaintiffs fell within the outside sales exemption to the FLSA’s wage and hour requirements. Overtime compensation provisions do not apply to “any employee . . . in the capacity of outside salesman.” 29 U.S.C. §213(a)(1). The outside sales exemption has three elements: (1) whether the work comprised of sales or obtaining orders or contracts for services; (2) whether plaintiffs were customarily and regularly engaged away from defendant’s place of business; (3) and whether plaintiffs’ non-sales activities did not exceed 20% of the hours worked by the non-exempt employees.

In determining whether Plaintiffs were outside salespersons, the Court looked at the totality of the circumstances. First, unlike most college recruiters, Devry field representatives continue to execute job duties until prospective students actually pay tuition and attend classes. Also, because Devry had strictly objective admissions criteria, the Court reasoned if anyone made a decision pertaining to admissions, it was the field representatives. Devry also based salary enhancements and eligibility for rewards on the number of tuition paying students recruited. While Plaintiffs’ job titles did not include the label “sales,” the actual job duties and actions performed by an employee are dispositive, and the facts showed these Plaintiffs performed outside sales work. Because Plaintiffs consummated sales, directed their efforts toward the consummation of sales, and took orders or obtained commitments, the Court found Plaintiffs met the first requirement of an outside sales exception. The Court also found Plaintiffs customarily and regularly performed work away from Devry’s place of business and performed no non-sales activities, which satisfied the other requirements for exempt status. Therefore, the Court granted Defendant’s motion for summary judgment motion.

**Plaintiff Cannot Sue Individual Members of Union For Breach of Collective Bargaining Agreement.**

*LaSalle, Inc. v. International Brotherhood of Electrical Workers (IBEW) Local No. 665, et al* Case No. 1-03-CV-255 (January 7, 2004) Hon. Gordon J. Quist

Judge Quist granted the individual defendants’ motion to dismiss for lack of subject matter jurisdiction because the Plaintiff could not hold individual defendants liable for a breach of the collective bargaining agreement. The Court cited longstanding law (see *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238; 82 S.Ct. 1318 (1962)), holding the Labor Management Labor Relations Act barred any suit for a money judgment against the individual members of the Defendant, IBEW. Further, the Court dismissed plaintiff’s supplemental state claims against the individual defendants, stating that, in essence, the claims were all really against the Union. ■

## NLRB PRACTICE AND PROCEDURE

**Stephen M. Glasser**  
Regional Director, Region 7  
National Labor Relations Board

On December 26, 2003 President Bush announced the recess appointment of Ronald Edward Meisburg, a labor and employment law attorney, to serve as a Member of the National Labor Relations Board. Under his recess appointment he can serve until the end of the next session of Congress, expected in October 2004.

Mr. Meisburg has been a shareholder with Ogletree, Deakins, Nash, Smoak & Stewart, P.C. in Washington, D.C., since January 2003. He previously was a partner with Heeman, Althen & Roles in Washington, and served at the U.S. Department of Labor in the Office of the Solicitor of Labor. While at the Department of Labor, Mr. Meisburg went on to serve in the Division of Employee Benefits and the Division of Mine Safety and Health. He received a B.A. degree from Carson-Newman College in 1969 and a J.D. from the University of Louisville in 1974.

Mr. Meisburg was president of the Energy and Mineral Law Foundation (1994-1995); a member of the Employment Lawyers Advisory Council of the National Association of Manufacturers (1996-1998); and a member of the Industrial Relations Committee of the U.S. council for International Business (1993-1998).

With the appointment of Mr. Meisburg, the Board is back to its full five-member complement. It had been operating with Chairman Robert J. Battista, and Members Wilson B. Liebman, Dennis P. Walsh and Pete C. Schaubert since August 21, 2003, when Member R. Alexander Acosta resigned to accept a position at the Justice Department.

## Did you miss the 29th Annual Labor and Employment Law Institute!?



It was sponsored by ICLE, the LEL Section, and FMCS on April 1 and 2. We didn't see you there!

Don't worry! You can still get the latest labor and employment law information and updates by buying the ICLE materials.

Institute handbook: \$125  
Institute audiocassette: \$165  
Institute audio CD: \$165

For information contact the Institute of Continuing Legal Education. Visit [www.icle.org/labor](http://www.icle.org/labor) or call toll-free (877) 229-4350.

## MICHIGAN SUPREME COURT UPDATE

**Kurt M. Graham**  
Varnum, Riddering, Schmidt & Howlett LLP

### Employee Who Failed to Establish Causal Connection Between Injury and Job Ineligible for Workers' Compensation Benefits

*Rakestraw v General Dynamics Land Systems, Inc.*, 469 Mich 220 (2003)

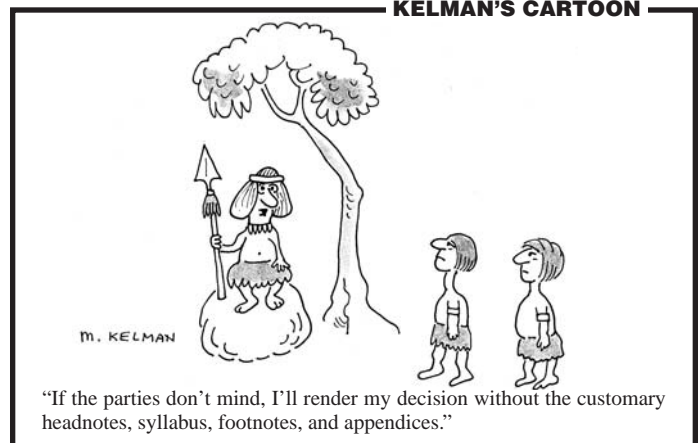
An employee attempting to establish a compensable, work-related injury must prove that the injury is medically distinguishable from a pre-existing nonwork-related condition in order to establish the existence of a "personal injury" under Section 301(1) of the Workers' Disability Compensation Act (WDCA). A symptom, such as pain, is evidence of injury, but does not, standing alone, conclusively establish that the injury arises "out of and in the course of employment." The Supreme Court, per Justice Young, overruled several Court of Appeals opinions which held that the aggravation of symptoms of a pre-existing condition is compensable without finding a work-related injury under § 301(1). The Court also concluded that it was inappropriate to utilize the "liberal construction" standard when the issue being considered is the initial qualifying matter of whether the claimed injury falls within the WDCA. The Supreme Court reversed the Court of Appeals and remanded the case back to the Workers' Compensation Appeals Commission.

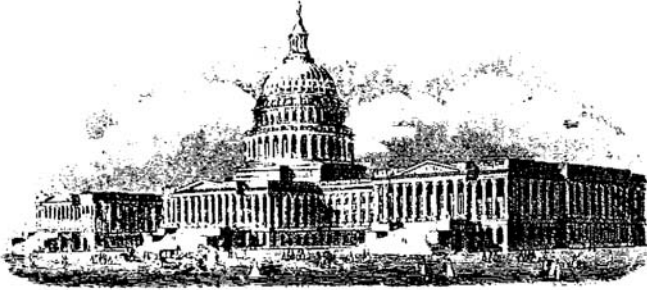
### Supreme Court Weighs In On Calculation of "Average Weekly Wage"

*Schultz v. Troy Metal Concepts, Inc.*, 469 Mich 467 (2003)

The Supreme Court held the average weekly wage that was used to establish entitlement to workers' compensation benefits must be determined at the time of injury, not subsequently recalculated. The Claimant argued that a disabled employee's average weekly wage at the time of injury should be recalculated or redetermined to include discontinued fringe benefits when the employee's subsequent employment produced a partial benefit rate. The Workers' Compensation Appeals Commission properly affirmed the Magistrate's decision rejecting Claimant's proposal that, if the differential benefit entitlement discussed in §§ 361(1) and 301(5)(b) of the WDCA was below two-thirds of the applicable state average weekly wage (\$394.12), his discontinued fringe benefits should be included in his average weekly wage, to the extent that such inclusion does not result in a weekly benefit amount greater than \$394.12. ■

KELMAN'S CARTOON





New *Lawnotes* World Headquarters  
(artist's depiction).

## LAWNOTES WORLD HEADQUARTERS HAS NEW LOCATION

*Lawnotes* editor Stuart M. Israel announced that *Lawnotes* World Headquarters has moved from its long-time Southfield location to new facilities in downtown Royal Oak. "Royal Oak is, of course, *the* 'happenin' burb,'" Israel commented, "which is totally compatible with *Lawnotes*' edgy, outré, avant garde editorial philosophy."

The move was, in part, intended to improve the productivity of the editorial staff, Israel explained. "Now, at the lunch hour, we can step out for a tattoo, a piercing, or leather underwear without the old hassle of having to get in the car."

Although Israel would not confirm this, insiders say that he was referring to productivity problems with *Lawnotes* associate editor John Adam.

Israel assured the LEL Section that the move will not increase annual dues in the immediate future, and that the weekly pajama parties at the *Lawnotes* Mansion will continue without diminution in opulence. Israel added that the plans for the *Lawnotes* Hawaii bureau are not yet final.

Contact the entire *Lawnotes* editorial staff at Martens, Ice, Klass, Legghio, Israel & Gorchow, P.C., 306 South Washington, Suite 600, Royal Oak, MI 48067, (248) 398-5900, or israel@martensice.com.

## UPDATE ON FLSA REGULATIONS

LEL Section members Greg Palmer (*Palmer & Wood*) and Jim Stadler (*Varnum, Riddering, Schmidt & Howlett*) were Michigan's attendees at this year's MidWinter meeting of the American Bar Association's Federal Labor Standards Legislation Committee. They have just returned as this issue of *Lawnotes* is headed off to press. The FLS Committee is the key ABA committee with respect to the March 2003 proposal of the US Department of Labor to revise the Part 541 Overtime Regulations under the Fair Labor Standards Act. (See cover article, Summer 2003 *Lawnotes*). These changes, as many commentators have noted, could prove to be one of the most significant developments in labor law in the past quarter-century.

Because the DOL has not announced a publication date for the revisions, the following information might be of interest if the revisions have not been published by the time we are in print. An Assistant Solicitor of labor at this small group briefing said the final version of the proposed revisions, which should be published in the coming weeks, might contain some substantive changes from the March 2003 proposal. He also advised that a phase-in period has been considered but is not necessarily assured of being in the final draft. Additionally, he noted that the Congressional opposition last year might be revived once the final draft is published, through the Congressional review Act, 5 USC 801, *et seq.* This relatively obscure federal statute was used successfully, many of you will recall, with the recent OSHA ergonomic initiative.

Greg plans to write about the new overtime regulations in our next issue, assuming that they are in place by then. Meantime, there are two important things that the Labor and Employment bar can tell the public now. The first is the reminder that the present regulations are in effect now, and that waiting — with claims or with compliance — could create great risks for both employers and employees. The second is to explain that contacts about the overtime regulations with "hotlines," consultants, call-in shows, "employers associations," accounting firms, and other non-lawyers should be cleared by counsel in advance, since privilege and/or immunity can be lost. Stay tuned for the new regulations!!



## THE JOY OF LABOR LAW

**Resubmit This!** Reading this two-sentence NLRB decision makes me think a warning label should have been posted:

"Counsel for the General Counsel's Response to Respondent's Reply to Resubmission of General Counsel's Brief in Support of the Administrative Law Judge's Decision, in which counsel for the General Counsel asks the board to reject Respondent's Reply, is granted. Respondent's Motion for National Labor Relations Board to Consider Respondent's Reply to Resubmission of Brief of General Counsel and Respondent's Objection to Resubmission of Brief of General Counsel are denied." *Unifirst Corporation*, 341 NLRB No. 1(2004)

Huh? Who won? Who lost? Who cares?

**Red Dawn?** Call me politically incorrect, but why does the EEOC's web site translate the material into Russian, Arabic, Creole? Why not Chinese i.e., Mandarin — the most spoken language in the world? Too many characters for the web site? Why not Hindu? Urdu? What about Aramaic so we can watch Mel Gibson's movies without subtitles? Why select some languages over others?

The EEOC reports on what I call "911-related charges."

Between September 11, 2001 and March 11, 2003, 765 charges were filed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, coded "Process Type Z." This code was created to track charges filed by persons who are, or were perceived to be, Muslim, Arab, Middle Eastern, or South Asian, or filed by persons alleging retaliation relating to the events of September 11. Over 450 charges alleged discharge as the adverse employer action, and over 300 alleged harassment. As of March 11, 2003, 80 individuals aggrieved by September 11-related employment discrimination received close to \$1.2 million in monetary benefits through the EEOC's efforts.

**Justice Scalia denies being "intimate" with VP (not that there would be anything wrong with that).** Supreme Court Justices do not just have summers off, but apparently a long winter break so they can go "duck-hunting" and bond with hunters. In a too revealing opinion on why he would not recuse himself from a case involving Vice President Cheney, Justice Scalia explains the origins of the hunting trip, the original intent of the parties and applying a strict construction, ruled that since he was not in the same "blind" as the VP, recusal is unwarranted. "For five years or so, I have been going to Louisiana during the Court's long December-January recess, to the duck-hunting camp of a friend whom I met through two hunting companions from Baton Rouge, one a dentist and the other a worker in the field of handicapped rehabilitation." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 124 S.Ct. 1391, 1392 (2004). "It was not an intimate setting." "All meals were in common." "Sleeping was in rooms of two or three, except for the Vice President, who had his own quarters." "As it turned out, I never hunted in the same blind with the Vice President." "Of course we said not a word about the present case." Of course.

— John Adam



## INSIDE LAWNOTES

- Rick Haberman advises how employees can protect themselves against the “hidden menace” of the independent reference checker.
- Steve Fox looks at FMLA leave notification policies after *Cavin v. Honda*.
- Larry Betz and Donna Budnick address labor and employment law and Indian tribes.
- Roy Roulhac surveys a year of Court of Appeals decisions in MERC cases.
- Jim Moore profiles Gordon A. Gregory, recipient of the LELS Distinguished Service Award.
- Bob Conte discusses workplace violence and Shel Stark assesses the joys (for lawyers) of (others’) bad judgment.
- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, MDCR and EEOC news, websites to visit, a cartoon by Maurice Kelman, and more.
- Authors John G. Adam, John T. Below, Larry Betz, Donna Budnick, Robert F. Conte, Steven R. Fox, Stephen M. Glasser, Barry Goldman, Jesse Goldstein, Kurt M. Graham, Rick Haberman, Stuart M. Israel, Maurice Kelman, David E. Khorey, Michael K. Lee, Danielle N. Mammel, James M. Moore, Stanley C. Moore, III, Greg Palmer, Roy L. Roulhac, Michael M. Shoudy, John W. Smith, Jim Stakler, Sheldon J. Stark, W. Ann Warner, George Wirth, and more.

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