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EMPLOYMENT LITIGATION AND THE BATTLE OVER ATTORNEY FEE AWARDS: WHAT EVERY ATTORNEY NEEDS TO KNOW.

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Employment attorneys frequently confront the issue of attorney fee awards in litigation because so many employment-related statutory claims include provisions for awarding reasonable attorney fees and costs. Attorney fees and costs in employment litigation frequently exceed $100,000.00 and sometimes, even surpass the verdict amount. Plaintiff's counsel may assert their client's entitlement to attorney fees and costs as an element of damages throughout the litigation including at case evaluation, mediation and trial. All too often defense counsel ignore the issue of reasonable attorney fee and cost awards until the litigation is in its final stages. Plaintiff's and defendant's counsel should focus in this potentially significant element of damages with the same level of concern and vigor as other potential damage claims i.e. lost wages and fringe benefits, mental and emotional distress etc.

Statutes providing for such awards to the prevailing plaintiff include the Elliott-Larsen Civil Rights Act (MCL 37.2802), the Persons with Disabilities Civil Rights Act (MCL 37.1606(3)) and the Whistleblowers' Protection Act (MCL 15.363(3)). In addition, various court rules also provide for reasonable attorney fee awards to either party and those include: MCR 2.403(E), case evaluation sanctions; MCR 2.114(E), bad-faith signature on papers filed with the court; and MCR 2.306(G), discovery sanctions.

Whether pursuant to court rule or statute, a party is entitled to an attorney fee award, attorneys must be immediately prepared to address two questions:

1. What standard, process and/or procedure should be used to determine a "reasonable" attorney fee?

2. What is a "reasonable" attorney fee in this particular case?

This article addresses the critical issues and arguments that every lawyer should consider to effectively and persuasively answer these questions regardless as to whether you are seeking an award or arguing against an award of reasonable attorney fees and costs.

I. THE APPROVED FRAMEWORK FOR ANALYZING AN ATTORNEY FEE REQUEST.

Michigan Courts have developed a basic framework to analyze the reasonableness of an attorney fee request. This framework requires the trial court to do the following:

> Where the amount of attorney fees is in dispute each case must be reviewed in light of its own particular facts. There is no precise formula for computing the reasonableness of an attorney's fee. However, among the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following:
>
> 1. The professional standing and experience of the attorney;
> 2. The skill, time and labor involved;
> 3. The amount in question and results achieved;
> 4. The difficulty of the case;
> 5. The expenses incurred; and
> 6. The nature and length of the professional relationship with the client.

Crawley v Schick, 48 Mich App 728, 737; 211 NW2d 217 (1973) [citations omitted].

The use of this framework has been approved by Michigan Courts in many contexts in which attorney fees are to be determined including, but not limited to, the following: case evaluation, *JC Bldg. Corp. v Parkhurst Homes*, 217 Mich App 421; 552 NW2d 466 (1996); the ELCRA, MCL 37.2802, *Grow v WA Thomas Co.*, 236 Mich App 696, 601 NW2d 426 (1999); the PDCRA, MCL 37.1606, *McAuley v GMC*, 457 Mich 513; 578 NW2d 282 (1998); the WPA, MCL 15.364, *O'Neill v Home IV Care, Inc*., 249 Mich App 606; 643 NW2d 600 (2002).

Further, trial courts may also consider the factors specified in MRPC 1.5(a) in determining the reasonableness of a fee request:

> The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) The fee customarily charged in the locality for similar legal services;
>
> (4) The amount involved and the results obtained;
>
> (5) The time limitations imposed by the client or by the circumstances;

(Continued on page 2)

CONTENTS

Employment Litigation And The Battle Over Attorney Fee Awards: What Every Attorney Needs To Know 1

The New FLSA Overtime Regulations: What They Mean For Employment Lawyers 6

The New FLSA Overtime Regulations: What They Mean For Employers 9

Book Review 10

Individual Supervisor Liability: *Jager* Revisited . . . 12

Jurisdictional Disputes Under 8(b)(4)(D) — The Appetite For More Work 13

U.S. Supreme Court Update 15

For What It's Worth 17

Sixth Circuit Addresses Numerous Title VII Issues, Vacation Of Arbitral Awards, And The Meaning Of An "Adverse Employment Action" 17

Eastern District Update 19

MERC Update 19

NLRB Update 21

View From The Chair 22

The Joy Of Labor Law 23

STATEMENT OF EDITORIAL POLICY

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EMPLOYMENT LITIGATION AND THE BATTLE OVER ATTORNEY FEE AWARDS: WHAT EVERY ATTORNEY NEEDS TO KNOW.

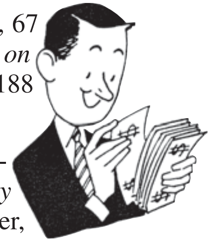
(Continued from page 1)

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) Whether the fee is fixed or contingent.

RCO Eng'g v ACR Indus, 235 Mich App 48, 67 n. 15; 597 NW2d 534 (1999), *vacated in part on other grounds*, 463 Mich 970; 624 NW2d 188 (2001).



"Motion for attorney fees granted!"

There is an obvious and significant overlap as between the factors outlined in *Crawley* and in the rule of professional conduct. Further, the appeals court opinions repeatedly emphasize that these factors and guidelines are "nonexclusive." *Howard v Canteen Corp.*, 192 Mich App 427, 438; 481 NW2d 718 (1991).

Trial courts that ignore or refuse to utilize this framework and to consider the *Crawley* factors in determining a reasonable fee, will likely be reversed. For example, in *Redford House Condominium Association v Mysza*, unpublished Mi App, 2003 WL 22416390 at *1 (2003) the plaintiff sought $4,979 in attorney fees and costs and submitted an itemized record to substantiate its request.. Without providing "any rationale" the trial court awarded plaintiff $25 in fees. *Id.* at *2. The appeals court reversed on this issue finding that the trial court abused its discretion.

In preparing a motion for an attorney fee award or a response to such a motion, attorneys must cite and apply the *Crawley* factors to the specific facts of their case. In two recent unpublished decisions, the Court of Appeals discussed in some detail the proper application of the *Crawley* factors.

In *Mitan Properties VI v Frandorson Properties*, unpublished Mi App, 2003 WL 21519843 (2003), the court awarded attorney fees in the context of a contempt proceeding under MCL 600.1721. The Court first stated that in applying the *Crawley* factors, "[T]he party seeking attorney fees and costs has the burden of providing they are reasonable, i.e. reasonably necessary and reasonably incurred." *Id.* at *11. Further, the Court noted that "[T]he trial judge has the duty to make findings of fact on disputed issues." *Id.* The Appellate Court then examined in some detail the evidence presented as to each of the *Crawley* factors by the parties and considered whether the trial court weighed some factors too heavily (the expertise of the attorney) and while ignoring others (the result achieved). The Court concluded that the trial court properly awarded $316,827.06 in fees and costs.

In *May v City of Detroit*, unpublished Mi App, 2003 WL 21362985 (2003), the appellate court determined that after reviewing the trial court's application of the *Crawley* factors, it properly awarded $213,800 in attorney fees to plaintiff's counsel pursuant to the case evaluation court rule in a personal injury case. The trial court in determining the award, rejected defendant's arguments that

the case was a "garden-variety auto negligence case" and noted the result achieved: a $7 million verdict when defendant only offered $600,000 to settle the case. Finally, defendant did not dispute plaintiff counsel's professional standing and expertise. The appellate court upheld a $600 per hour award to plaintiff's counsel and awards of $250 per hour to two other attorneys who assisted at trial and in discovery noting that, "[R]easonable fees can include fees incurred through representation by multiple lawyers."

II. POINTS TO ARGUE IN APPLYING THE *CRAWLEY* FACTORS.

With few exceptions, Michigan appellate courts almost always uphold a trial court's award of reasonable attorney fee and cost awards. The appeals court reviews a trial court's decision relative to granting a reasonable attorney fee based on an "abuse of discretion" standard. *B & B Inv. Group v Gitler*, 229 Mich App 1, 15; 581 NW2d 17 (1998). "An abuse of discretion exists if an unprejudiced person, considering the facts upon which the trial court acted, would say there is no justification or excuse for the ruling," or if the result is so violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias. *Cleary v Turning Point*, 203 Mich App 208, 210-211; 512 NW2d 9 (1993). In sum, attorneys must be fully prepared to make their most persuasive arguments regarding an attorney fee award to the trial court, understanding that whatever the trial court decides has a very high probability of surviving any appeal.

The Court of Appeals has outlined several basic requirements for a trial court in considering a motion for reasonable attorney fees; every attorney should be prepared to present argument regarding these points.

First, "[T]he party seeking the fees bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *B & B Inv. Group*, 229 Mich App at 16.

Second, "[T]he most useful starting point for determining the amount of a reasonable attorney fee is the number of hours reasonably expended on the case multiplied by a reasonable hourly rate." *Id.* Further, an "…itemized bill in itself was not sufficient to establish the reasonableness of the fee, nor was the trial judge required to accept it on its face." *Petterman v Haverhill Farms, Inc.*, 125 Mich App 30, 33; 335 NW2d 710 (1983). Finally, the trial court "retains the authority to award a reasonable fee, regardless of the actual fee incurred by the plaintiff." *Head v Phillips Camper Sales & Rental, Inc.*, 234 Mich App 94, 114, 593 NW2d 595 (1999).

Third, "…the trial court should determine a reasonable fee based on the particular facts of the case and community legal practice." *Petterman*, 125 Mich App. at 33.

Fourth, "[W]hile the court is not required to detail its findings regarding each specific factor [the *Crawley* factors], it is required to make findings of fact with regard to the attorney fee issue." *B & B Inv.*, 229 Mich App at 16.

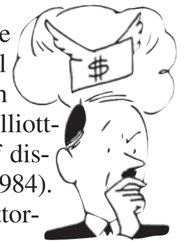
Fifth, when the reasonableness of an attorney fee request is disputed, "…a full-blown trial is not necessary, an evidentiary hearing regarding the reasonableness of the fee request is." *Id.* at 15-16. Nevertheless, "…the trial court should inquire into the services actually rendered prior to approving the bill of costs." *Wilson v General Motors Corp.*, 183 Mich App 21, 42; 454 NW2d 405 (1990). Further, an evidentiary hearing may not be required where "…the parties created a sufficient record to review the issue and the court fully explained the reasons for its decision." *Head*, 234 Mich App at 114.

III. BEYOND THE *CRAWLEY* FACTORS, OTHER ARGUMENTS ATTORNEYS SHOULD CONSIDER.

1. Contingent fee agreements. Courts may consider the existence of a contingent fee agreement "as one of the factors" in determining a reasonable attorney fee. *Phinney v Perlmutter*, 222 Mich App 513, 561; 564 NW2d 534 (1997). In *Phinney*, plaintiff prevailed a claim under the Whistleblowers' Protection Act receiving a verdict in excess of $1.1 million. The trial court denied her request for a reasonable attorney fee under the Act and the appellate court upheld the decision stating: "Because of the private nature of plaintiff's claim, and because of the monetary nature of her damages, this is not a case where it would have been difficult for plaintiff to obtain and compensate competent counsel without some guarantee that her counsel could recover attorney fees and costs if successful." *Id.*

In *Wilson v General Motors, supra*, the Court more fully discussed how a contingent fee arrangement should be considered: "The presence of contingent fee arrangements providing for the plaintiff's attorney fees does not preclude an award of fees under section 802 [of the Civil Rights Act, MCL 37.2101 et seq] but is merely one the factors to be considered in determining a reasonable fee award." 183 Mich App at 42. The plaintiff in *Wilson* ultimately obtained a $373,578 verdict in her discrimination suit. *Id.* at 43. The trial court awarded plaintiff $86,730 in attorney fees and costs and the Court of Appeals remanded the case to the trial court on this issue because the trial court used a 1.5 multiplier in determining the fee amount. The Court of Appeals found that the trial court failed to explain its rationale for the multiplier and that a multiplier could only be applied in an exceptional case.

In *King v General Motors Corp.*, the appeals court reversed the trial court's denial of a reasonable attorney fee in connection with her discrimination claim brought under the Elliott-Larsen Civil Rights Act finding an abuse of discretion. 136 Mich App 301; 356 NW2d 626 (1984). The trial court denied plaintiff's reasonable attorney fee request finding that "attorney fees should be awarded only where plaintiff could not otherwise obtain competent counsel. Since plaintiff's attorney accepted this case on a contingent fee contract, the [trial] court reasoned that plaintiff did not need an attorney fee award under section 802." *Id.* at 307.



"Motion for attorney fees denied!"

These cases make clear that trial courts have broad discretion in how they wish to consider the existence of a contingent fee arrangement. The existence of a contingent fee arrangement opens a broad range of issues for consideration, including whether any attorney fee award is necessary. Beyond that issue, other questions should be explored depending on the verdict amount, the contingent percentage fee applicable and the amount of actual fees plaintiff's counsel has expended per their time records.

2. Local community attorney fee rates. In *Temple v Kelel Distributing Co., Inc.*, the appeals court rejected an attorney fee award based upon a rate of $1,000 per hour finding such a rate to be "patently unreasonable." 183 Mich App 326, 332-333; 454

(Continued on page 4)

EMPLOYMENT LITIGATION AND THE BATTLE OVER ATTORNEY FEE AWARDS: WHAT EVERY ATTORNEY NEEDS TO KNOW.

(Continued from page 3)

NW2d 610 (1990). The trial court granted plaintiff's counsel a $145,000 award in this personal injury case. Plaintiff's attorney represented plaintiff pursuant to contingent fee agreement and the court determined its attorney fee award by applying the contingent fee percentage to the verdict. Significantly, the appeals court noted that the trial court granted the attorney fee award "without explanation." In remanding the case, the appeals court specifically directed the trial court's attention to Economics of the Law Practice Survey published in the *Michigan Bar Journal* and stated: "In determining a reasonable hourly or daily rate for purposes of the mediation rule, the lower court should utilize the empirical data contained in the Law Practice Survey as well a data contained in other reliable studies or surveys." *Id.* at 333.

The *Michigan Bar Journal* periodically publishes a survey of hourly billing rates, the most recent one being entitled: "The 2003 Desktop Reference on the Economics of Law Practice in Michigan." The survey is professionally done and provides a detailed analysis of attorneys' billing rates based on the following factors: office location; size of firm; years in practice; primary sources of income; and practice classification or legal occupation.

How significant local hourly billing rates are in determining a reasonable attorney fee is open to question. In *Bolt v City of Lansing*, the court awarded plaintiffs $174,841.64 in fees and costs in connection with their successful challenge of a tax assessed by Lansing, which violated the Headlee Amendment to the Michigan Constitution. 238 Mich App 37, 61; 604 NW2d 745 (1999). Plaintiff in this case did not receive any monetary award. Defendant argued that the $280 per hour billing rate of plaintiff's most highly paid attorney, "should be reduced by more than $100 an hour, to $174, the average fee charged by attorneys in the city of Lansing [where the case was litigated]…." *Id.* The appeals court rejected this argument: "No authority holds that the average fee charged by attorneys in a particular location must be deemed the only reasonable fee." *Id.* The court noted in upholding the fee award that plaintiff's counsel had worked on this case without any guarantee of payment.

These cases raise a number of interesting questions including the following: Is an award of attorney fees based on a contingent fee arrangement only reasonable if the hourly fee amount falls within the survey guidelines? Should the court consider the element of risk a plaintiff's attorney accepts in handling a case on a contingent fee (they could receive nothing), thereby entitling them to a greater reward beyond the survey guidelines if successful in obtaining a verdict?

3. Lack of time records. Some plaintiff's attorneys do not maintain written time records. While a lack of contemporaneous time records will not automatically preclude a claim for reasonable attorney fees, it will present plaintiff's counsel with a substantial challenge to obtain an award. In *Howard v Canteen Corp., supra*, (a case brought under the Elliott-Larsen Civil Rights Act) the court confronted this issue and noted that, "[W]hile such records are not required to be kept, in demanding a large sum of attorney fees the lack of contemporaneous time records leaves room for doubt regarding the reasonableness of the hours expended." 192 Mich App at 438. Plaintiff's counsel submitted affidavits to substantiate her attorney fee request. However, defendant challenged the reasonableness of plaintiff's attorney fee request and the court granted an award without holding an evidentiary hearing and making findings of fact. The appeals court reversed and instructed the trial court to hold a hearing and to permit defendant the "opportunity to challenge specific hours or rates" and plaintiff's counsel an opportunity "to testify and present any other evidence regarding the reasonableness of her requested fees…." *Id.* at 439.

4. Number of claims on which plaintiff prevailed. Frequently plaintiffs allege multiple legal theories or claims in their complaint and that some number of those claims will be dismissed or rejected. Nevertheless, if plaintiff prevails on only one of several claims asserted, defendant will frequently argue that plaintiff's attorney fee request should be reduced or discounted based upon those claims that were rejected. In *Grow v WA Thomas Co.,* the court confronted this question. 236 Mich App 296. The plaintiff in *Grow* alleged a hostile work environment sexual harassment and his constructive discharge claim was summarily dismissed leaving only a emotional distress damage claim. The jury entered a verdict in plaintiff's favor in the amount of $80,555 and the court entered an attorney fee award in the amount of $43,376. The *Grow* Court rejected defendant's argument that it should "apportion the fee according to the number of claims actually won." *Id.* at 715. The court noted: "…the pretrial cost and effort put forth by plaintiff's counsel would not have been substantially different had plaintiff not raised the constructive discharge claim at all." *Id.* The appeals court ultimately upheld the attorney fee award.

In contrast to *Grow*, the court in *Head v Phillips Camper Sales & Rental, Inc.* granted plaintiff $2,500 in attorney fees, rejecting her request for $23,987 in fees. 234 Mich App 94. Plaintiff in *Head* alleged 12 claims arising out her purchase of what she alleged was a defective camper and those claims included violation of the Michigan Consumer Protection Act, conversion, breach of warranty, etc. *Id.* at 100. The court dismissed a number of plaintiff's claims prior to the jury rendering a verdict on one of two claims presented to it – violation of the Consumer Protection Act. *Id.* In drastically reducing plaintiff's fee request, the court noted that most of plaintiff's claims had been dismissed or rejected. *Id.* at 114. The appeals court, in granting a new trial to plaintiff on one of her rejected claims, also remanded for reconsideration the issue of attorney fees without expressing an opinion on the reasonableness of the fee sought. *Id.* at 115.

Grow and *Head* present contrasting views on how two courts considered the issue of apportioning fees where multiple legal theories were asserted and where plaintiff was ultimately successful on one theory. Significantly in both cases, all of the theories asserted arose out of essentially the same fact situation, an employment discharge (*Grow*) and the purchase of a defective camper (*Head*). In other cases a plaintiff might allege claims arising out of very different factual circumstances and in considering an attorney fee request, a court would have good reason to apportion the fees granted based upon time expended as between the successful and unsuccessful claims.

5. Multiple parties. In *Bien v Venticinque*, plaintiff brought a dram shop action against a bar and intoxicated person, both whom rejected case evaluation. 151 Mich App 229, 231; 390 NW2d 702

(1986). The Plaintiff settled with one party prior to trial and obtained a judgment against the other party at trial. *Id.* Subsequently, Plaintiff sought a reasonable attorney fee as to only party based on the case evaluation rule. *Id.* Plaintiff submitted evidence for a $19,610 attorney fee award and the trial court awarded $10,000 in part because plaintiff's trial preparation was directed against two parties and plaintiff was only entitled to a fee as to one party. *Id.* The appeals court upheld the award finding that the one party who proceeded to trial and became liable for attorney fees under the case evaluation rule, equitably should not be responsible for fees accruing through no fault of its own. *Id* . at 232-233.

6. Case evaluation results. The trial court in *O'Neill v. Home IV Care Inc.* determined that while plaintiff submitted a request for $49,869 in attorney fees and costs, she was only entitled to $7,000 in attorney fees and costs in a Whistleblowers' Protection Act case in which she obtained a $20,245 jury verdict. 249 Mich App at 608-609. Despite plaintiff's objections, the trial court simultaneously considered her motion for a reasonable attorney fee award under the WPA and defendant's motion for sanctions under the case evaluation rule. *Id.* at 609-611. The appeals court found that it was "clear that the trial court based its decision to award only $7,000 in attorney fees on its concern that too large an award would allow plaintiff to avoid mediation sanctions under MCR 2.403(O)." *Id.* at 610. Subsequently, the trial court awarded defendant $48,766 in attorney fees under the case evaluation rule. *Id.* at 611. The appeals court eventually found that the trial court abused its discretion in how it determined plaintiff's attorney fee award.

> We agree with plaintiff that the trial court abused its discretion by taking into consideration the mediation evaluation and sanctions when determining plaintiff's award of attorney fees and costs under MCL 15.364
>
> ***
>
> Here the trial court's focus was on mediation evaluation and sanctions and not on the relevant factors noted in *Grow* [the *Crawley* factors]. Moreover we are of the opinion that the trial court's focus on mediation in determining attorney fees and costs under MCL 15.364 is contrary to the purpose of the WPA as well as the principles pertaining to mediation.

Id. at 612-614)

7. Multiplier. The appeals court reversed the trial court's attorney fee determination in *Wilson v General Motor Corp.,* because it applied a 1.5 multiplier after determining a reasonable hourly fee for plaintiff's attorney. 183 Mich App 21. The appeals court held that "a multiplier is not permitted to enhance a reasonable fee award to compensate for the risk of loss and nonpayment in a contingency fee case except in extraordinary circumstances." *Id.* at 44. Consistent with *Wilson*, the courts in *Howard v Canteen Corp., supra*, and *Bolt v City of East Lansing, supra*, also rejected the concept of applying a multiplier.

> In rejecting a multiplier, the *Howard* Court noted:
>
> The court's discretion to adjust the lodestar upward is limited, though it can be adjusted for quality of representation in those rare circumstances when the attorney's work is so superior and outstanding that it far exceeds client expectations and normal levels of competence and in rare cases or extraordinary circumstances when it is necessary for attracting competent counsel.

192 Mich App at 439.

The appeals court concluded that plaintiff failed to submit any evidence regarding the difficulty of attracting competent counsel in the absence of a multiplier and that while plaintiff's counsel "obtained excellent results, we not view the circumstances of this case as extraordinary or rare." *Id.* at 440.

In *Bolt* the appeals court stated, "Application of such a multiplier is appropriate when the evidence shows that obtaining counsel would have been extremely difficult without the possibility of enhancement of the attorney fee. Plaintiff has made no showing that his ability to obtain competent counsel was contingent on the possibility of fee enhancement." 238 Mich App at 61-62.

8. Purpose of the statute. In *King,* the court specifically considered the ELCRA's remedial purpose in considering plaintiff's attorney fee award request: "First, attorney fee awards are intended to encourage persons deprived of their civil rights to seek legal redress as well as to ensure victims of employment discrimination access to the courts. A second purpose of this allowing attorney fee recovery under the Elliott-Larsen Civil Rights Act is to obtain compliance with the goals of the act and thereby deter discrimination in the work force." (307) The *King* Court reversed the trial court's decision denying plaintiff a reasonable attorney fee award.

Like the ELRCA, the other statutes pursuant to which plaintiffs pursue claims for discrimination and other wrongful conduct also have a "remedial" purpose and plaintiff's counsel should be prepared to argue this point in pursuing a reasonable attorney fee claim.

9. The non-moving parties' attorney fees. Frequently, this issue arises when the non-moving party argues that their hourly fee rate is less than that which the moving party is seeking. The non-moving party asserts that the moving party's hourly rate is unreasonable and should be reduced. This was the argument the court in *Bolt* considered and rejected.

If the non-moving party raise the hourly billing rate issue, counsel should strongly consider subpoenaing the non-moving parties attorney fee records to determine the total amount of fees charged so as to compare that to the amount of their reasonable attorney fee request. In *46th Circuit Trial Court v Crawford County*, unpublished Mi App, 2004 WL 690772 (2004), advised the trial court that in considering plaintiff's motion for reasonable attorney fees, "Some consideration must also be given to the total costs for attorney fees on each side of the litigation as different billing practices might, in effect, partially equalize any difference there may be in hourly rates."

10. Duplicative work/multiple attorneys. In *McAuley,* the Court found that the trial court had "appropriately deducted portions of plaintiff's legal expenditures attributable to…duplicative work made necessary by substitution of plaintiff's counsel." This and related issues regarding whether work was unnecessary or excessive, will frequently and appropriately be raised in disputing the reasonableness of an attorney fee request. In contrast to *McAuley*, the court in *May v City of Detroit*, expressly found that reasonable attorney fees could include the use multiple attorneys working on a case where their work was not duplicative, unnecessary or excessive. ■

THE NEW FLSA OVERTIME REGULATIONS: WHAT THEY MEAN FOR EMPLOYMENT LAWYERS

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This article is a followup to the Summer 2003 *Lawnotes* article, "The Proposed Changes To FLSA Overtime Regulations" and for ease of reading, it is keyed to the earlier article where applicable. We will cover some additional changes to the 2003 proposal as well.

The Final Rule to the U.S. DOL's March 31, 2003 overtime proposal has now been announced in a DOL press release this April, www.dol.gov/fairpay, and was subsequently published in the Federal Register at 69 Fed. Reg. 22122 (April 23, 2004). Although the Final Rule in the April 23 Federal Register contains nearly two dozen major revisions to the 2003 proposal, these proposed revisions are the most extensive in the 65-year history of the Act as noted in the 2003 article; and commentators continue to say that the revisions could be the most far-reaching labor law development in the past 25 years.

The following discussion should serve as an issue-spotting guide for employment relations and employment litigation attorneys. The second article in this issue will focus on Human Resources Department issues; and privilege and immunity issues will be covered in the third article.

As a starting point, you might want to recommend to your clients that they use the Federal Register version that you undoubtedly will be using, as opposed to the "advance" version in the DOL website. The Federal Register pagination is different from that of the DOL's advance version on the website and it could be confusing if you and your clients are reading different versions.

Additionally, the DOL website has various "fact sheets" and video-clip "mini seminar" training sessions, about an hour and 15 minutes total to view; but ironically they have more value to the practitioner than the client since they are in summary form. The DOL website also has an update sign-up feature, with a privacy notice that you should review with your clients before they decide whether to sign up.

Also, *all* employment relations and employment litigation attorneys are urged to spend time with the DOL's Preamble to the new Regulations, as it is nearly four times the length of the Regulations themselves and provides some helpful background into the changes and how they fit with the Act and the case law to date.

The DOL's Objectives

The Department of Labor's lengthy Preamble states that "most of" the 75,280 comments it received during the notice and comment period were "form letters," and that "more than 90%" were "form letters generated by organizations affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) expressing general opposition to the proposal." 69 Fed. Reg. at 22125. Only "approximately 600" comments – less than 1/10th of 1% - contained "substantive analysis," in the DOL's view *Id*. A number of these 600 or so "substantive" comments are from law firms, both plaintiff-side and defense-side, and are noted throughout the Preamble.

Barring any Congressional or court challenges, the Regulations become effective on August 23. There was a Management proposal for a six-month period, but that and a 2-year "amnesty" proposal were rejected. 69 Fed. Reg. at 22126. As with the 2003 proposal, the Final Rule will not have retroactive effect. Thus, counsel whose clients have claims prior to this date, or who are not presently in compliance as of the effective date, will need your advice on both the current *and* new Regulations.

Just as with the 2003 proposal, the new Regulations in the Final Rule do not constitute an across-the-board "victory for Management," despite what some commentators have said. The 2003 proposal contained a mixture of provisions, some of which would likely result in net gains to Employers; but others would benefit plaintiffs and enforcement efforts. You will see that this is even more true in this new Final Rule.

Comments primarily from the Management community over the past three decades have asked for more clarity in the overtime Regulations. The Final Rule, bottom line, gives employer-side lawyers more clarity at the *compliance* stage; and the clarity for plaintiff lawyers and government enforcement authorities is primarily at the *litigation* stage. Thus, the question of "net wins and losses" becomes largely irrelevant. The key now is for lawyers and parties on both sides – employee and employer – to focus on what the new Regulations actually mean on a *job-by-job basis*. This is true whether you are in a law firm practice, government practice, or in a corporate law department or another capacity.

"I'm sure you wouldn't object to a little uncompensated overtime."

Highlights of the Proposed Revisions

Some of the most significant aspects of the new Final Rule appear at this date to be as follows.

1. **More mid-level and lower-level salaried employees would be entitled to overtime**. The new Regulations *nearly triple* the current $155 per week minimum salary level required for exemption, to $455 per week – a $30 per week increase over the 2003 proposal and a $300 per week increase over the existing Regulations. 69 Fed. Reg. at 22123.
2. **The new Regulations would eliminate the distinction between the "core" regulations and the "explanatory" regulations**. As mentioned in the Summer 2003 article, this is an easily-overlooked but potentially significant aspect of the revisions. This change, in the DOL's words, was designed to "eliminate the confusion regarding the appropriate level of deference to be given to the provisions in each subpart." 69 Fed. Reg. at 22126. As with the 2003 proposal, consider the effect on the argument that the subpart B Regulations were "less binding" than the subpart A Regulations. *See, e.g., Sherwood v The Washington Post*, 677 F.Supp. 9, 14 (D. D.C. 1988) (holding newspaper reporters "exempt professionals" on summary judgment), *reversed on other grounds*, 871 F.2d 1184 (D.C. Cir. 1989).
3. **The new regulations would create an "executive" exemption for 20% owners of a business**, as in the 2003 proposal, but would *add* the requirement that the employee to be exempt must be "actively engaged" in the "management" of the enterprise. Proposed § 541.101; 69 Fed. Reg. at 22132. The DOL explains that this change – and an additional requirement that the 20% business owner's equity interest must be "bona fide" (not included in the 2003 proposal) "address commentator concerns that this Section could be subject to abuse." *Id*. Consider the impact on client plans to transfer ownership interests, and disputes in "family" and small businesses.
4. **The DOL has decided not to create a new test for the "administrative" exemption**. The 2003 proposal would have replaced the "discretion and independent judgment" test (current 29 C.F.R. § 541.2) with a new test of whether the employee had a "position of responsibility." Proposed §§ 541.200 and .202;

68 Fed. Reg. at 15566. Under the proposed new standard, there would have been a detailed list of "position of responsibility" examples: to be in a "position of responsibility" would require that the employee customarily and regularly perform work "of a substantial importance," or perform work requiring a high level of skill or training. "Work of substantial importance" was further explained in a detailed list of examples. Proposed § 541.203; 68 Fed. Reg. at 15587. The proposal also would have recognized a high degree of skill as exempt-type work in certain instances. Proposed §§ 541.204 and .205; 68 Fed. Reg. at 15588. (Under the existing 1949 Regulations, if the employee's "primary duty" is "skilled" work, that more often than not will defeat the white collar exemption. 29 C.F.R. § 541.207(c)).

The DOL notes in its Preamble that despite sharp criticism about the current "discretion and independent judgment" requirement and the proposed "position of responsibility" standard, "the comments contained very few suggestions for clear and objective alternative language." The DOL concluded that the proposed "position of responsibility standard" would "do little to bring clarity and certainty to the administrative exemption." 69 Fed. Reg. at 22139. The Final Rule also clarifies that the exercise of "discretion and independent judgment" must be "with respect to matters of significance." *Id.*

The DOL stated that many commentators believed that the proposed "position of responsibility" would greatly expand the scope of the administrative exemption and that this was "a result which the Department did not intend." *Id*.

The inclusion of "work requiring a high level of skill or training," part of the 2003 proposal, has also been deleted. 69 Fed. Reg. at 22139.

The Final Rule also retained, for the most part, the dichotomy between "production" versus "staff" work. 69 Fed. Reg. at 22141. The DOL did add "computer network, internet and database administration, legal and regulatory compliance, and budgeting" to the illustrative list of areas that "generally relate to management and general business operations in connection with the administrative exemption." 69 Fed. Reg. at 22142. The "matters of significance" standard in the new § 541.202(a) comes from the existing subsection 541.207(a). 69 Fed. Reg. at 22143.

In sum, the DOL concludes:

> "as in the existing Regulations, the final administrative exemption regulations establish a two-part inquiry for determining whether an employee performs exempt administrative duties. First, what *type* of work is performed by the employee? Is the employee's primary duty the performance of work directly related to Management or general business operations? Second, what is the *level* or *nature* of the work performed? Does the employee's primary duty include the exercise of discretion and independent judgment with respect to matters of significance?" *Id.*

A new § 541.203 includes illustrations of the application of the administrative duties test to particular occupations. Many of the examples are from existing §§ 541.201, .205, and .207 and other examples reflect existing case law.

For example, final subsection 541.203(a) clarifies that insurance claims adjusters "generally meet the duties requirements for the administrative exemption, if their duties include activities 'such as interviewing insureds, witnesses, and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.'" It was noted that this provision of the proposed rule is consistent with existing § 541.205(c)(5), and a Wage and Hour Administrator Opinion Letter that the court relied on in *Jastremski v SafeCo Ins. Co.*, 243 F.Supp.2d 743, 753 (N.D. Ohio 2003). The DOL provides a caveat, however, that the final subsection 541.203(a) – "like the Opinion Letter and the case law – does not rely on the 'claims adjuster' job title alone. Rather, there must be a case-by-case assessment…." 69 Fed. Reg. at 22144.

Final subsection 541.203(b) was intended, the DOL says, to be "consistent with existing case law that employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption." 69 Fed. Reg. at 22145. *See*, new § 541.203(b).

Final subsection 541.203(c) specifically extends the exemption to an employee "who leads a team of other employees assigned to complete major projects for the employer…[defined]."

Numerous other administrative examples, mainly from existing sections of the Regulations, were also incorporated into the Final Rule. *See*, 69 Fed. Reg. at 22146.

"Academic counselors" have also been added to the list of examples of exempt academic administrative employees in final subsection 541.204(c).

5. **The Final Rule does not contain the proposed exemption for less than 4-year degrees for exempt professionals.** 69 Fed. Reg at 22150. The DOL removed the "equivalent combination" language from the 2003 proposal from the final section of new § 541.301(a), concluding that it was not going to "expand the learned professional exemption to new quasi-professional fields" after all, citing "licensed practical nurses, skilled trade persons, engineering technicians and other occupations that cannot meet all three of the [professional] elements." 69 Fed. Reg. at 22150 (consider whether some LPNs might have exempt "supervisory" status, however). This final version defeats a substantial Management initiative to expand the "professional" exemption to "engineering" fields requiring less than a 4-year degree (remember, however, that some educational institutions offer graduate level degrees in some of the new "quasi-engineering" fields, despite the fact that less than a 4-year undergraduate degree may be obtained). The final § 541.301(d) does, however, retain the concept of the learned professional exemption "available to the occasional lawyer who has not gone to law school or the occasional chemist who is not the possessor of a degree in chemistry." Existing 29 C.F.R. § 541.301(d); 69 Fed. Reg. at 22150.

Similarly, the Final Rule deletes the phrase in the proposed § 541.301(d) that equivalent knowledge may be obtained "through a combination of work experience, training in the Armed Forces, attending a technical school, attending a community college or other intellectual instruction." Instead, final § 541.301(d) provides that the work "customarily" means "that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction."

(Continued on page 8)

THE NEW FLSA OVERTIME REGULATIONS: WHAT THEY MEAN FOR EMPLOYMENT LAWYERS

(Continued from page 7)

6. **The new Regulations will extend the "highly compensated" exemption in the 2003 proposal only to employees who earn at least $100,000 per year, a $35,000 increase over the 2003 proposal**. The Final Rule also makes a number of additional changes to this "21st Century upset test," perhaps most notably that the "salary or fee basis" requirement *will* – contrary to what former Solicitors of Labor and other commentators have speculated with regard to the 2003 proposal – remain intact to a degree. 69 Fed. Reg. at 22172; new § 541.601. The definition of "total annual compensation" ($100,000) has been modified to include "commissions, non-discretionary bonuses and other non-discretionary compensation, even if they are not paid to the employee on a monthly basis; allowing the make-up payment to be paid within one month after the end of the year, and clarifying that such a payment counts toward the prior year's compensation; allowing a similar make-up payment to employees who terminate employment before the end of the year; and deleting the word 'guaranteed' to clarify that compliance with this provision does not create an employment contract." 69 Fed. Reg. at 22172.

   Additionally, the Final Rule modifies the duties requirement to provide that the employee must "customarily and regularly" perform one or more exempt duties.

7. **There are a few modifications to the "salary" requirement.** The 2003 proposal would allow disciplinary time off for otherwise-exempt employees if the time off is in whole-day increments. Proposed § 541.602; 68 Fed. Reg. at 15593. (Under the present Regulations, the only such allowances for whole-day disciplinary time off for violating the "safety rule of major significance," 29 C.F.R. § 541.118(a)(5)). The phrase "of a whole day or more" for disciplinary suspensions under the 2003 proposal has been modified to "one or more full days," in new § 541.602(b)(1), (2), and (5), "to clarify that a deduction of one and one-half days, for example, is impermissible." 69 Fed. Reg. at 22178.

The 2003 proposal to allow "voluntary overtime" to certain otherwise-exempt employees is incorporated in the Final Rule, if it is "beyond the minimum amount that is paid as a guaranteed salary." 69 Fed. Reg. at 22183; new § 541.604.

Also, the 2003 proposal would have changed the existing "window of correction" for inadvertent salary docking under 29 C.F.R. § 541.118(a)(6), to lose the exemption if there were a "pattern and practice of improper deductions, for employees in the same job classification and working for the same manager who is responsible for the improper pay docking or policy." 68 Fed. Reg. at 15572. This language is changed in the Final Rule to "actual practice;" and a 4-part test is included. New § 541.603; 69 Fed. Reg. at 22179. The safe harbor provision, in final § 541.603(d), substitutes "clearly communicated policy" for the proposed "written policy" (although it would be prudent to consider whether to amend employee handbooks to include a written policy, anyway); adds that the policy must include a complaint mechanism; deletes the term "repeatedly;" clarifies that the safe harbor is not available if the employer "willfully violates the policy by continuing to make improper deductions after receiving employee complaints;" and clarifies that if an employer fails to reimburse employees for improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees of the same job classification working for the same manager responsible for the actual improper deductions." 69 Fed. Reg. at 22179.

Some Additional Changes

- The new Section 541.3(a) states that the "white collar"exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. Thus, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, "craftsmen" (in the words of the DOL), operating engineers, construction workers and laborers, "have always been, and will continue to be, entitled to overtime pay," the new version says.

- The new Section 541.3(b) states that the exemptions do *not* apply to police officers, fire fighters, paramedics, emergency medical technicians and similar public safety employees who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; and similar work; and

- A new Section 541.4 attempts to clarify that the Fair Labor Standards Act ("FLSA") provides minimum standards that may be exceeded, but *cannot be waived* or reduced. This new Section 541.4 also attempts to clarify that the FLSA does not bar collective bargaining agreements providing wages higher than the statutory minimum, a shorter workweek than the statutory maximum, or a higher overtime premium (double time, for example).

As You Read the Regulations

The American Bar Association is sponsoring a 2-day Michigan regional seminar on EEO, FLSA and FMLA issues, tentatively set for October 7 and 8, primarily geared toward entry-level lawyers or law department practitioners who want a general understanding of this area. Although it is unlikely that there will be any significant case law developments on the new Regulations at that early date, there may be other developments which the ABA presenters will attempt to include in their presentations. Please call Kevin Kaempf at the ABA, (312) 988-5533, for registration details.

Meanwhile, beyond a mastery of the new Regulations, it cannot be emphasized enough that the practitioner must take leadership with his/her clients to avoid inadvertent waivers of privilege and immunity that might be caused by their compliance efforts with the new changes. You should advise your clients immediately to contact you before communicating with trade associations, employer associations, "consultants," "hotlines," call-in programs, and other non-lawyers. Some of these contacts have some practical value, but they should be coordinated by legal counsel in advance. Even completely "in-house" discussions, without outside consultants, or individual conversations with family, friends or co-workers, could be discoverable and *admissible* if they are not part of a demonstrative custom-tailored plan in advance for getting information from counsel for legal advice, the nascent "self-evaluation 'privilege'" case law notwithstanding! ■

THE NEW FLSA OVERTIME REGULATIONS: WHAT THEY MEAN FOR EMPLOYERS

Sydney R. Turner
Kitch Drutchas Wagner DeNardis & Valitutti

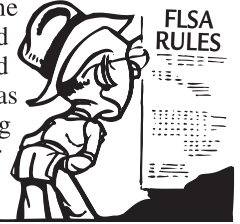
On Tuesday, April 20, 2004 the Department of Labor issued the final regulations regarding changes in overtime exemptions under the Fair Labor Standards Act (FLSA). The final version of the rules pending since March 31, 2003 will require compliance by August 23, 2004. For reference these regulations will be published in the Code of Federal Regulations at 29 CFR Part 541.[1] The principal change to the regulations is the significant increase of the salary level which qualifies employees for exempt status. However, there are several additional changes to the regulations governing exempt status including revisions to the salary basis test and the elimination of the short and long duties tests in favor of the standard duties test. All employers must review their current pay policies and determine whether their employees' exempt status is affected under the new rules.

The salary test under the FLSA sets a new minimum amount an employee may be paid before he are considered exempt under any classification. Previously any employee paid more than $155 per week was considered exempt. However for any employee to be classified as exempt under the new regulations earnings must total at least $455 per week. This final salary level is more than $425 in the proposed regulations and protects all employees making less than $23,660 from being excluded from receiving overtime pay. For highly compensated employees making at least $100,000, they only need to regularly perform one or more of any of the exempt duties identified in the standards tests for executive, administrative or professional exemptions in order to be considered exempt. Employers are also allotted a one month window after the end of the year to issue a final one time payment to a highly compensated employee in order to meet the $100,000 threshold.

The regulations have also modified the duties tests with regards to exempt employees. Gone are the perplexing short and long tests in favor of a "standard" test for all categories of exempt employees. While the classifications of executive, administrative, professional, outside sales and computer have retained their names the regulations also provide clarification as to what types of employees are considered to perform the duties outlined in these categories.

For an employee to be exempt as an Executive, her primary duties must include the management of the enterprise or of a customarily recognized department or subdivision, the supervision of two or more employees, and she must have authority to hire or fire other employees[2]. The term "primary duty" means "the principal, main, major or most important duty that the employee performs." § 541.700. An Executive employee is no longer required to perform exempt work for more than 50% of the time and may retain her exempt status when she concurrently performs non-exempt tasks. As long as the employee's primary duties include those tasks described herein, and she meets the salary level test, she will be considered exempt from payment of overtime wages.

The modified duties test for the Administrative exemption requires employees' main duties to consist of performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, and includes the exercise of discretion and independent judgment with respect to matters of significance. Unlike the test for Executive employees, the test for the administrative employee exemption retained the language of "exercise of discretion and independent judgment," which is defined as "the exercise of comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered." §541.202.



Some of the factors to consider whether an employee exercises discretion and independent judgment are whether the employee has authority to commit the employer in matters that have significant financial impact, whether the employee has authority to formulate management policies or operating practices, and whether the employee is involved in planning long or short term business objectives.

The exemption for Professional employees has been split into two sub categories, "learned" professional and "creative" professional. The duties associated with those categories, respectively, involve performance of work requiring knowledge of an advanced type in a field of science or learning acquired by a prolonged course of specialized intellectual instruction *or* work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor. The language in the learned professional regulations is similar to the old provision but incorporates the phrase "work requiring advanced knowledge." This phrase means work that is predominantly intellectual in character *and* requires the consistent exercise of discretion and judgment. Examples of learned professionals are set forth in the regulations, and include newly recognized employees such as athletic trainers and funeral directors or embalmers. Examples of creative professionals are actors, musicians and journalists. Employees will not qualify for the creative professional exemption when their work product is subject to substantial control by the employer.

While the primary duties for outside sales employees remains that the employee make sales and obtain orders or contracts for services, the new regulations eliminate the 20% test. That test required loss of exempt status if the outside sales employee performed nonexempt work in excess of 20% of exempt work performed. Employees working as "inside" sales employees are still considered nonexempt unless they meet the requirements for another exemption.

The computer employee exemption is the same as in the existing regulations except it is now covered in a separate section. Computer related work was previously considered as a subpart of the professional employee category. The primary duties are the application of systems analysis techniques and procedures, or the design, development and documentation as related to creating or testing computer systems or programs and/or machine operating systems, *or* a combination of these duties. If computer employees are not paid on a salary basis they must be compensated at a rate of at least $27.63 per hour.

Lastly, the regulations set forth changes to the salary basis test which determines the deductions an employer can make without jeopardizing an employee's exempt status. The ability of an

(Continued on page 10)

THE NEW FLSA OVERTIME REGULATIONS: WHAT THEY MEAN FOR EMPLOYERS

(Continued from page 9)

employer to make deductions has been expanded. For instance, an employer may dock an employee's pay for an unpaid disciplinary suspension due to infractions of workplace conduct rules, where before an employer could only dock an employee's pay for disciplinary infractions where there was a "major violation" of safety rules. Also, in the event an improper deduction is made, an employer may remedy the situation by directly reimbursing the affected employee(s) without loss of exemption(s). The regulations provide for this additional protection to employers by way of the "safe harbor" provision which allows an employer to retain exemptions despite improper deductions if there is a clear policy against permitting improper pay deductions in place. However, the safe harbor will not apply and exemptions will be lost when the employer continues to make prohibited deduction after receiving notice of complaints from employees.

Employers should begin the process of reviewing their employees' exempt status now. Some employees may lose exempt status under the new salary level, and those non-exempt employees meeting the new salary level may require reclassification as exempt based on their primary duties. Having a written plan in place to address reclassifications and pay policies will make for a smooth transition. Employers should be aware that although the regulations have been finalized, members of Congress still threaten to block implementation. Therefore, changes based on the new regulations should be put on hold until the final rules are actually implemented.

Employers should also have human resources representatives or legal counsel draft a new policy as addressed in the "safe harbor" provision of the salary basis test. The policy, which will serve as a "good faith" commitment to comply with the new regulations, should put employees on notice that the employer follows the law and prohibits improper deductions, allows for employees to report concerns and/or violations regarding any deductions from their pay, and that employees will be reimbursed for any impermissible deductions. In addition to drafting this policy, current practices regarding deductions from pay should be reviewed for conflicts.

Most importantly, employers must make their human resources department and/or management team an integral part of the implementation process. Given the publicity over these new regulations, employees are likely to be anxious and pose questions regarding their exempt status and how the regulations will affect their entitlement to overtime pay. It is essential that employers disseminate correct information and execute new policies in accordance with the law.

— END NOTES —

[1]The unofficial version of the finalized regulations can be found on the Fair Pay Website of the Department of Labor at http://www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm (accessed May 2, 2004) There is also a power point presentation that can be downloaded and viewed that explains all of the updates.

[2]Employees that own at least a 20% interest in the business may also meet the requirements of an Executive employee where they actively engage in the management of the company, regardless of salary. ■

BOOK REVIEW:
TAKING AND DEFENDING DEPOSITIONS
by STUART M. ISRAEL

Sheldon J. Stark

The esteemed editor of *Labor and Employment Lawnotes* has written an excellent, practical and highly readable book of particular value to employment lawyers. On display throughout is a wry and intelligent wit, keen insight and extensive experience in the challenges of employment litigation.

Why another book on depositions? Few books take on the questions Stuart Israel answers. Depositions are outside the common experience of everyone but litigators, causing acute anxiety and fear in witnesses – and sometimes in their counsel:

> Most people rarely are forced to take an oath and submit to hours of relentless questioning about impossibly precise details of past events, with nit-picking juris doctors around a football-field-sized table listening intently, watching every shift, twitch, and quiver, hanging on every nuance, feverishly underlining secret notes on yellow pads, while a court reporter uses a hieroglyphics-producing machine to record every word for posterity. (p. xxi.)

Taking and Defending Depositions, published by ALI-ABA, is designed to reduce the anxiety and trepidation felt by lawyers and to assist them in preparing their clients to be more secure and persuasive witnesses.

Stuart's book started life as course material for the ICLE seminar "The Art of Witness Preparation – Everything You Need to Know to Prepare Your Witness for Deposition." His article, "Meeting with your Client: Reducing Anxiety and Covering the Right Bases" has been very popular with visitors to the online resources of ICLE's Partnership.

The book, divided into four major segments, extends far beyond meeting with clients. "Part one is about objectives, uses, alternatives, advantages, and drawbacks of depositions. Part two is about fundamental rules, principles, mechanics, practices and ideas that govern depositions and that inform the development, organization, management, and implementation of an effective deposition plan. Part three is about preparing deponents. It addresses the ethics of witness preparation, the complexity of memory, the elusiveness of truth, the reality of anxiety, and, of course, the 162 essential rules that each deponent must always follow, except when it makes sense to ignore them. Finally, part four focuses on doing it: taking and defending depositions." (p. xxii.)

Peppered with succinct and often humorous examples, Stuart's suggestions are time tested and attainable by even the most inexperienced litigator. In dealing with obstructionist tactics by opposing counsel, for example, Stuart recommends self-help before seeking assistance from the judge. He shows how it should be done:

> **Q.** Mr. Collinson, what do you understand the second paragraph of the safety memo to mean?
>
> **[Rambo counsel]:** Objection. Calls for speculation. How does he know what the author intended? He already told you he didn't write the memo and doesn't know who did. He's not a mind reader, counsel. Move on….
>
> **Q.** You can answer, Mr. Collinson. What is your understanding of the second paragraph?

[Rambo counsel]: I already told you, that's an improper question. It's irrelevant. The document speaks for itself. Move on.

Q. You can answer Mr. Collinson. What do you understand the second paragraph to mean?

[Rambo counsel]: Hold it, hold it! Collinson, don't answer. This is a total waste of time. This has gone far enough. Move on to proper questions or this deposition is finished.

[Examining counsel]: Mr. Cheatham, I object to your repeated interruptions and to your comments. As you well know, you are entitled to state objections "concisely and in a non-argumentative and non-suggestive manner." You are not entitled to disrupt, interrupt, obstruct, or make speeches unnecessary to a statement of the basis for your objections. You are not entitled to direct the witness to refuse to answer as you have done. I would appreciate it it you would confine your objections to statements of legal grounds, consistent with Rule 30(d)(1).

Q. Now, Mr. Collinson, what do you understand the second paragraph to mean? (pp. 77-8.)

In Chapter 7, Stuart courageously ventures into what many lawyers consider "the dirty underside" of our business. What are the ethical constraints on preparing witnesses? To what extent are we permitted to engage in what is euphemistically called "coaching?" His approach is practical, ethical and cogent, balancing the competing requirements that we seek the truth while advocating zealously for our clients. How often do we see a book that takes on the notion that sometimes a lawyer may be forced to discredit a witness known to be honest? In Section 7.03 he covers "The Elusiveness of the Truth." In 7.04 the relationship between "Memory and Truth." Provocative and interesting. From the influence of personal bias and the realities of inaccurate memory, Stuart moves to "'Coaching' the Truth" in 7.05. Quoting Oscar Wilde, Stuart concludes that "because truth is rarely pure and never simple, effective coaching is often *essential* to get to the truth." (p. 99.)

> A witness's first account may be incomplete because the witness doesn't know what is important and what is not. Dashiell Hammett wrote of his experience as a Pinkerton detective, getting a description of a suspect "complete even to a mole on his neck" except that the witness "neglected to mention that [the suspect] had only one arm." Coaching may be necessary to get the "whole" truth, the meaningful truth, the truth that determines outcome. (*Id.*)

In 7.07 Stuart balances the competing responsibilities of practicing ethically and appropriately. The advice is not only helpful, it promotes effective advocacy. Stuart's approach demonstrates how a lawyer can be simultaneously ethical and persuasive.

When I was still in practice and preparing witnesses for deposition, I employed a set of seven or eight essential rules my clients needed to shape their answers to questions under oath. Easy to articulate in theory, they were difficult to follow in practice: tell the truth; don't argue; only answer the question you're asked; avoid completing lists, etc. Too many rules, I believed, and the client would be left paralyzed and confused. It is a rare witness able to keep every rule in mind at once and still remember the facts! Having litigated across the "vs." from Stuart Israel, I was curious to see the witness preparation rules he employed. In Chapter 10, my favorite in the book, he lists "The 162 Essential Rules for Deponents." To my shock and delight, all 162 are essential. A few representative samples:

7. Pause, and think as long as necessary before answering.

8. Don't pause *too* long before answering.

33. Don't volunteer.

34. When appropriate, volunteer.

38. Don't ask the questioner questions about the questioner's questions. If you don't understand the question, say you don't understand.

79. You *will* make mistakes. *Everybody* does. You may even forget some of these rules. Don't worry about it. Don't ruminate. Move on. Just don't make any more mistakes.

80. Correct mistakes. If you realize you've been inaccurate or incomplete, say so. ("Excuse me. A few minutes ago you asked me how many times I requested my personnel file and I said three. I just remembered that I asked a fourth time, too.")

96. Be careful of answering with absolutes, like "never" or "always," unless you are *absolutely* sure.

129. Don't bring anything that you don't want to be questioned about.

130. Don't bring anything.

131. Bring what you need: checklists, documents key to your testimony, notes, etc.

132. Bring only what I tell you to bring.

152. Relax, but keep that edge.

153. Don't relax. Keep wary and vigilant. Keep those critical faculties in high gear.

162. Don't screw up.

And so on. Not a single rule on the list can't be justified. Tongue in cheek, Stuart describes the process of reducing the list to a manageable number of rules!

The fourth and final section deals directly with taking and defending depositions. It is full of practical and useful advice clearly drawn from experience. Take transcript awareness, for example, and techniques to enhance clarity:

Q. So you never contacted Mr. Milburn after March 15?

A. Yes.

Q. Meaning, correct?

A. Yes.

Q. Just to be sure this is clear, did you ever contact Mr. Milburn after March 15?

A. No. (p. 187.)

No litigation book today would be complete without a section on professionalism. Stuart's lists five practical reasons for maintaining civility even in the face of provocation. The fifth is pure Stuart Israel but equally true for all of us:

> *Life's too short.* Getting angry about things you can't control wastes time, energy, emotion, and expensive transcript pages. Of course, you wouldn't have gone to law school if you were the kind of person who can *always* turn the other cheek. Still, keep telling yourself, "life's too short, be cool…" (p. 246.)

He concludes the final chapter with "Sixty-Seven Suggestions for Defending Discovery Depositions." The final rule has a familiar ring:

67. Don't screw up. (p. 252.)

Taking and Defending Depositions is an excellent book. If you know Stuart Israel, you can hear his voice and recognize his thoughtful good humor throughout. It will make an excellent addition to your library.

***Taking and Defending Depositions** (2004) (344 pages, hardbound) is published by American Bar Association-American Law Institute. It is available from ALI-ABA at 1-800-CLE-NEWS or www.ali-aba.org/aliaba/BK14.asp.* ■

INDIVIDUAL SUPERVISOR LIABILITY: *JAGER* REVISITED

W. Ann Warner
Michigan Department of Civil Rights

Prior to *Jager v. Nationwide Truck Brokers, Inc.,* 252 Mich. App. 464 (2002), individual managers and supervisors were sometimes named as defendants in cases where they participated in or were aware of acts of discrimination. The court in *Jager* held that an employee's supervisor cannot be held individually liable for alleged sexual harassment. The court relied on the statutory language of the Elliott-Larsen Civil Rights Act (ELCRA), M.C.L.A. §§ 37.2101 et seq. and well-established rules of statutory construction.

The anti-discrimination in employment provisions of ELCRA, specifically 37.2201(a), defines an employer as "a person who has 1 or more employees, and includes an agent of that person." The act states that "[a]n employer shall not do any of the following" and goes on to state what behavior by an employer is prohibited. 37.2102(1). The *Jager* court noted that while Title VII of the Civil Rights Act of 1964, 42 U.S.C. 20009(e) covers employers with fifteen or more employees and ELCRA covers employers with one or more employees:

> We find that the CRA's definition of employer concerning the number of employees does not signal an intent by the Legislature to make individuals as well as employers liable under the act. Rather, we believe that the statutory language that addresses agents of the employer is the key portion of the statute relative to resolving the issue.
>
> ***
>
> We believe that, like Title VII, the language in the definition of 'employer' concerning an 'agent' of the employer was meant merely to denote respondent superior liability, rather than individual liability.

Jager, supra, at 484. The court cited *Meagher v. Wayne State University,* 222 Mich. App. 700 (1997), which stated that defining an employer as including an agent of the employer does not "automatically authorize a claim against an agent." Moreover, *Meagher,* after noting that ELCRA defines prohibited acts of the 'employer,' concluded that "while it is one thing to file a claim against the employing entity under agency principles . . ., it is quite another thing for an employee to file a claim against a particular agent for prohibited acts." *Jager at 486* (internal citations omitted).

Jager is particularly noteworthy because it overruled existing law; courts had previously held that employees could file claims against individuals under ELCRA. *Jenkins v. Southeastern Michigan Chapter, America Red Cross,* 141 Mich. App. 785 (1985); *Hall v. State Farm Ins. Co.,* 18 F. Supp.2d 751 (ED Mich. 1998); *Comiskey v. Automotive Industry Action Group,* 40 Supp.2d 877 (ED Mich. 1999).

However, *Jager* apparently is not the last word on the issue. In a recent decision, *Poches v. Electronic Data Systems Corporation,* 266 F.Supp.2d 623 (ED Mich. 2003), Judge Rosen, distinguishing *Jager* and emphasizing the difference in language between the anti-discrimination and the anti-retaliation provisions of ELCRA, held that an employee could bring a claim against an individual supervisor for acts of retaliation. Judge Rosen stated:

> . . . *Jager* construes a provision of the Elliott-Larsen Act which prohibits discrimination by an "employer." In the present case, by contrast, Plaintiff has appealed both to this provision *and* to Elliott-Larsen's anti-retaliation provision, which prohibits retaliation by a "person."
>
> ***
>
> [I]t is clear that *Jager* forecloses any state-law claim of gender discrimination against Plaintiff's former supervisor. . . . Plaintiff's retaliation claim, in contrast, is brought against both Defendants. The question becomes, then, whether *Jager's* ruling under Elliott-Larsen's anti-discrimination provision carries over to the Act's anti-retaliation provision.

Poches, supra at 624, 626. Judge Rosen began with the "self-evident proposition" that the two provisions of ELCRA do not utilize the exact same language and with "the presumption that this distinction is meaningful rather than merely accidental or incidental." *Id.*

> When it opted to use the broader, unqualified 'person' in the anti-retaliation provision, in contrast to its adoption of the more limited term 'employer' in the Act's anti-discrimination provision, the Michigan Legislature presumably was aware that the former term encompasses the latter, and presumably meant to prohibit a broader class of potential defendants from engaging in acts of retaliation.

Id. at 626. *Poches* also relied on a Sixth Circuit decision which reached the same conclusion when interpreting a Kentucky statute that contained identical language. *Morris v. Oldham County Fiscal Court,* 201 F.3d 784 (CA 6 2000).

In June 2004, the Michigan Court of Appeals was presented with two cases in which individual supervisors were alleged to have retaliated against plaintiffs for engaging in conduct protected by ELCRA. In *Mick v. Lake Orion Community Schools,* 2004 WL 1231944, a 3-0 decision, the court stated that *"Jager* . . . does not foreclose individual liability under the CRA's retaliation provision." Footnote 8 of the decision discusses *Poches.*

In the second decision, *Rymal v. Herman Baergen,* 2004 WL 1260260, the majority agreed with *Poches* and stated that if the Legislature did not intend the result by its use of different terms in the two provisions, "it is up to the Legislature to amend accordingly and not a matter for this Court." Judge Kirsten Frank Kelly wrote an opinion concurring in part and dissenting in part, in which she argued that "the plain language of the CRA, read as a whole, does not provide a cause of action against individuals under either article 2 or article 7." Judge Kelly concluded:

> MCL 37.2701 must be viewed in light of its purpose in relation to the CRA as a whole. It is clear that article 7 operates as an umbrella to protect people in their 'exercise or enjoyment of, any right granted or protected by this act.' Thus, it protects people who are pursuing claims that arise from violations of articles 2 through 5. Employment discrimination is only one of these types of violations. Clearly, article 7 does not use the term 'employer' because it does not serve only to protect people in pursuance of claims that arise only under article 2. Article 7 uses the broader term 'person' because it protects people in pursuance of claims, arising under articles 2 through 5, brought against various entities including employers, places of accommodation, educational institutions, persons engaged in real estate transactions, etc.

The majority opinion, at footnote 4, responded to Judge Kelly by noting that following her analysis, 'person' would not always mean 'person' because sometimes it would mean 'employer.' "Thus analysis is wholly inconsistent with our Supreme Court's

textualist approach and continuing demand that we give meaning to the plain language of statutes and read nothing into them which is not present."

Given the Michigan Supreme Court's recent civil rights decisions, which either overrule existing law *(Lind v. City of Battle Creek,* 470 Mich. App. 426 (1997)), place the evidentiary burden on plaintiff where before it was borne by defendant *(Pedan v. City of Detroit,* 470 Mich. 195 (2004)) or state a narrower interpretation of ELCRA than the Court of Appeals *(Haynie v. State of Michigan,* 468 Mich. 302 (2003) and *Corley v. Detroit Board of Education,* 2004 WL 1354344), it is interesting to speculate as to how the Court will decide this issue when presented with it. Are the individual supervisor liability cases consistent with the Court's "textualist approach?"

For the present, a cause of action against an individual supervisor for retaliation is cognizable. Can individuals be sued for acts other than retaliation? Arguably so, given that the anti-retaliation section of ELCRA clearly prohibits a "person" from engaging in acts other than retaliation. M.C.L.A. 2701 states:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.
>
> (b) Aid, abet, incite, compel, or coerce a person to engage in a violation of this act.
>
> (c) Attempt directly or indirectly to commit an act prohibited by this act.
>
> (d) Willfully interfere with the performance of a duty or the exercise of a power by the commission or 1 of its members or authorized representatives.
>
> (e) Willfully obstruct or prevent a person from complying with this act or an order issued or rule promulgated under this act.
>
> (f) Coerce, intimidate, threaten, or interfere with a person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act.

Under *Mick and Rymal,* if a supervisor coerces an employee to engage in behavior prohibited by ELCRA, or if a landlord instruct a rental agent not to rent to African Americans, the supervisor or the landlord could be held individually liable under §37.2701[1]. If the rental agent abets the landlord by following his/her instruction, can the rental agent, having aided in a prohibited act, also be held individually liable? Can an employee of a bank who follows instruction to deduct points from the loan applications of minorities be held individually liable? What about the human resources manager who tells the receptionist not to give out employment applications to African Americans? There are many scenarios, given the current state of the law, under which individuals can arguably be held liable for violating ELCRA[2].

— END NOTES —

[1]The anti-retaliation provision stands apart from the employment provisions of ELCRA; accordingly, the provision applies in the non-employment context, such as in housing discrimination cases.

[2]The Person's with Disabilities Civil Rights Act, M.C.L.A. 37.1101 et seq., contains an identical anti-retaliation provision, M.C.L.A. 37.1602. Cases which name individual defendants can therefore also be expected under that civil rights statute. ■

JURISDICTIONAL DISPUTES UNDER 8(b)(4)(D) – THE APPETITE FOR MORE WORK

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While salting campaigns by unions leave a bad taste with non-union employers, unions may turn their appetite for more work upon each other in the form of jurisdictional disputes. Tough economic times and growing out-of-work lists are often the recipe for disputes between competing groups of employees, and often their unions, for a larger piece of the job pie.

As a practitioner, it is not always easy to determine if an employer's labor problems may properly be considered a jurisdictional dispute that can be resolved by the processes of the NLRB. This article examines the definition of a jurisdictional dispute, whether an employer's interest in the outcome of the dispute affects the determination, and the exclusion of efforts by unions to preserve unit work from the definition of a jurisdictional dispute.

A. Procedural Overview

Section 8(b)(4)(D) of the National Labor Relations Act (29 U.S.C. 158 (b)(4)(D)) makes it unlawful for a union to engage in coercive conduct with the object of compelling an employer to assign work to one group of employees rather than another group of employees. By enacting Section 8(b)(4)(D), Congress intended to protect employers and the public from the detrimental economic impact of jurisdictional strikes. *NLRB V. Plasterers' Local 79,* 404 U.S. 116, 123-124 (1971) (*"Plasterers"*). Under Section 10(k) of the Act (29 U.S.C. 160(k)), unless all parties to a jurisdictional dispute voluntarily agree to a private resolution of the dispute within 10 days after a charge is filed under Section 8(b)(4)(D), the Board must "hear and determine" the jurisdictional dispute out of which the coercive action arose, and make an award of the work to one of the competing groups.

B. Jurisdictional Dispute Defined

It is settled law that "a dispute between two or more groups of employees over which is entitled to do work for an employer" constitutes a jurisdictional dispute within the meaning of the above sections of the Act. *NLRB v. Radio & Television Broadcast Engineers Local 1212,* 364 U.S. 573, 579, 582 (1961) (*"CBS"*). Accord *New Orleans Typographical Union No. 17 v. NLRB,* 368 F.2d 755, 762, 767 (5th Cir. 1966); *Carpenters v. C.J. Montag & Sons, Inc.* 335 F.2d 216, 220 (9th Cir. 1964), cert. denied, 379 U.S. 999 (1965). The source of the conflict must be competing claims by employees groups as to which has the right to perform the work in question. *Teamsters Local 839 (Shurtleff & Andrews Constructors)*, 249 NLRB 176, 177 (1980), enfd. 695 F.2d 424 (D.C. Cir. 1982). It matters not that the employees work for two different employers. *Teamsters Local 174 (Airborne Express)*, 340 NLRB No. 20 (2003).

Further, it is well established that a jurisdictional dispute may exist within the meaning of Sections 8(b)(4)(D) and 10(k) of the Act where the dispute is between a union and an unrepresented group of employees, rather than between two rival unions. *Longshoremen's Local 62-B v. NLRB,* 781 F.2d 919, 924 (D.C. Cir. 1986) (*"Alaska Timber"*); *Millwrights Local 1026 (Intercounty Con-*

(Continued on page 14)

JURISDICTIONAL DISPUTES UNDER 8(b)(4)(D) – THE APPETITE FOR MORE WORK

(Continued from page 13)

struction), 266 NLRB 1049 1051 (1983). Even where the employees may not have explicitly demanded the work, their performance of the work is evidence of their claim to it. *Alaska Timber,* 781 F.2d at 924; *Operating Engineers Local 926 (Georgia World)*, 254 NLRB 994, 996 (1981).

However, competing claims do not exist where the dispute is not over the assignment of work to one group of employees rather than to another group, but rather involves the question of which union will represent the employees who are currently performing the disputed work. *Missouri & Kansas Bricklayers Local 15 (Jacor Contracting)*, 340 NLRB No. 41 (2003). If none of the parties has raised any objection to the performance of the disputed work by the employer's current employees, and the employer would like to retain its current employees, but prefers that one union represent them rather than another union, then the only dispute is which union should represent the employees currently performing the work. *Carpenters Local 1307 (J & P Bldg. Maintenance),* 331 NLRB 246 (2000). A demand for recognition as bargaining representative for employees doing a particular job, or in a particular department, does not to the slightest degree connote a demand for the assignment of work to particular employees rather than to others. *Laborers Local I (DEL Construction),* 285 NLRB 593, 592 (1987), quoting *Food & Commercial Workers Local 1222 (FedMart Stores),* 262 NLRB 817, 819 (1982).

Similarly, where the union is not seeking to displace unrepresented employees who are assertedly doing unit work, but instead is merely seeking to represent those employees who are doing the work and then apply the contract to them, or alternatively seek damages for unit employees by the employer having unit work performed by non-unit employees, a representational rather a work jurisdictional dispute exists. *Glass & Pottery Workers Local 421 (A-CMI Michigan Casting Center),* 324 NLRB 670 (1997). Likewise, where after competing claims by two unions, the employer assigns work to a composite crew and one union files a grievance alleging a violation of their contract's no-subcontracting clause, the dispute concerns which union should represent the employees, and is not a dispute over assignment of work. *Carpenters Local 275,* 334 NLRB 422 (2001).

The invocation of grievance/arbitration procedures by a union against the employer that controls the work constitutes a demand for the disputed work. See, e.g., *Iron Workers Local 8 (Selmer Co.),* 291 NLRB 222 (1990). This includes the filing of a "pay-in-lieu" grievance since any attempted distinction "between seeking the work and seeking pay for the work is ephemeral." *Local 30, United Slate, Tile & Compensation Roofers v. NLRB,* 1 F.3d 1419, 1427 (3d Cir. 1993). See *Carpenters Los Angeles Council (Swinerton & Walberg),* 298 NLRB 412, 414 (1990). The only exception is presented in *Laborers (Capitol Drilling Supplies),* 318 NLRB 809 (1995), where the Board held that a union's action through a grievance procedure to enforce an arguably meritorious claim against a general contractor in breach of a lawful union signatory clause did not, without more, constitute a claim to the work being performed by a subcontractor's employees. The Board relied on the fact that there were two disputes in that case, one regarding the actions of the general contractor, and one involving the actions of the subcontractor who ultimately had assigned the work to a specific group of employees. The Board quashed the notice of 10(k) hearing, noting that the union, which had filed the grievance against the general contractor on a contractual issue, had not thereby made a competing claim directed at the subcontractor who had assigned the work. Id. at 810-811 fn. 4. The Board noted in *Capitol Drilling* that a 10(k) proceeding would have been appropriate had the union expanded the dispute by making a direct claim to the contractor. Id. at 811. See *Electrical Workers IBEW Local 125 (U.S. Information Systems),* 326 NLRB 1382 (1998). Thus, *Capital Drilling* does not apply where there is only one employer involved and two competing unions have each attempted to establish its rightful claim to the disputed work assigned by that employer by filing a pay-in-lieu of grievance. *Laborers Local 113 (Super Excavators),* 327 NLRB 113 (1998).

C. Employer's Interest in Outcome

The quintessential jurisdictional dispute involves a conflict "between rival groups of employee[s]" where "the employer ordinarily stands aloof," with no particular interest in the outcome. *Alaska Timber,* 781 F.2d at 923-24. See also, *CBS,* 364 U.S. at 579 ("[I]n most instances, [the quarrel] is of so little interest to the employer that he seems perfectly willing to assign work to either [group of employees] if the other will just let him alone.") Thus, the model jurisdictional dispute is one "embod[ying] two characteristics: first, the employer faces a jurisdictional dispute that is not of his own making and in which he has no interest; second, the dispute is between two employee groups." *Alaska Timber,* 781 F.2d at 924.

However, the provisions of Section 10(k) are applicable even if the employer has an economic interest in the outcome of the dispute. As the Supreme Court has recognized, although "in some cases employers have no stake in how a jurisdictional dispute is settled," other employers "are not neutral and have substantial economic interests in the outcome of the 10(k) proceeding." *Plasterers,* 404 U.S. at 124. Likewise, courts have acknowledged that an employer's interest in the outcome of a jurisdictional dispute does not render the dispute non-jurisdictional. *Sea-Land,* 884 F.2d at 1412 n.7. See *Alaska Timber,* 781 F.2d at 925 ("We do not mean to suggest that [a dispute in which the employer is neutral] is the only kind of situation where Section 10(k) is applicable"), quoting *Safeway Stores,* 134 NLRB 1320, 1323 (1961).

Thus, where a wood chip producer made a business decision to build its own chip loading conveyor system, which resulted in its ceasing to sell wood chips to Louisiana-Pacific, which had employed members of the union claiming the work, such did not make the dispute non-jurisdictional. *Longshoremen's Local 14 (Sierra Pacific Industries) v. NLRB,* 85 F.3d 646 (D.C. Cir. 1996) (*"SPI"*). As courts have recognized, virtually all jurisdictional disputes are to some degree created by an employer's business decision. See *Sea-Land,* 884 F.2d at 1444-1412 (true jurisdictional dispute existed even though the employer's business decision was the "casus belli of the dispute"). Thus, "if every action taken, no matter how natural or inevitable a business step . . . disqualified an employer from section 8(b)(4)(D) relief, that section would become a dead letter." *Id.* (jurisdictional disputes are typically "engendered by some change in the business environment that creates new working conditions"). See *Bloomsburg Graphic Communications Union 732-C (Haddon Craftsmen),* 308 NLRB 1190, 1192 fn.4 (1992) (rejecting argument that employer "created the dispute" by moving bookbinding operation to new plant and assigning work to employees of that plant).

Likewise, where an employer changed its business practice from using its own employees to deliver lumber only to the dock, where longshoremen then loaded the lumber onto ships, to a new system whereby its employees transported the lumber to the dock and loaded it onto ships. The employer thereby eliminated the need for longshoremen. In these circumstances, no true jurisdictional dis-

pute may exist. *Alaska Timber,* 781 F.2d at 920. As the D.C. Circuit Court explained, "the Alaska [Timber] employer's shift in business practice seems to have been designed totally to suppliant the Longshoremen with its own employees." *Sea-Land,* 884 F.2d at 1411. In that instance, a dispute can "properly be described as one created by the employer." *Id.* In contrast, in *SPI* there is no contention that the employer's building of its own chip loading operation was "for the very purpose of transferring work from Longshoremen to [its own employees]." *Sea-Land,* 884 F.2d at 1411-1412. Rather, it was undisputed that the employer made a significant capital investment in building its chip loading system because it determined that it was more economical to sell its wood chips directly to a pulp manufacturer.

D. Work Preservation

A "work preservation" dispute between an employer and a union is outside the scope of Section 10(k) and 8(b)(4)(D) of the Act. Thus, a union will not be deemed to have violated Section 8(b)(4)(D) when the object of its allegedly coercive conduct is to preserve work previously performed by employees it represented and is not attempting to expand its work jurisdiction. In those circumstances, an employer creates the dispute by, for example, taking work from a sub-contractor and assigning it to its own employees. *USPC-Wesco, Inc. v. NLRB,* 827 F.2d 581 (9th Cir. 1987); *ILWU Local 8 (Waterways Terminals),* 185 NLRB 186 (1970), vacated and remanded, 467 F.2d 1011 (9th Cir. 1972); *Teamsters Local 331, (Bulletin Co.),* 139 NLRB 1391 (9162).

Typically, this situation occurs where an employer has always had control over who performed the work in dispute and, in exercising that control, reassigned the work from one group of employees to another. For example, in *Highway Truckdrivers & Helpers, Local 107, IBT (Safeway Stores),* 134 NLRB 1320 (1961), Safeway employees, who were members of Highway Truckdrivers & Helpers, Local 107, had performed certain truck driving work for over 10 years. When Safeway suddenly terminated the Local 107 members, and the bargaining relationship, and awarded the same work to other employees who were members of another union, Local 107 protested against Safeway's actions. *Id.* at 1320-1323. The Board there found that there was no jurisdictional dispute because the real dispute was between Local 107 and Safeway, and concerned only Local 107's attempt to retrieve the jobs of its members, which had been secure for over 10 years by their collective bargaining agreement. *Id.* at 1323. The board has followed *Safeway Stores* in other cases where a union was attempting, in essence to enforce a clear and indisputable contract claim to the work in dispute. E.G., *Seafarers (Recon Refractory & Construction),* 339 NLRB No. 97 (2003); *Electrical Workers Local 103 (T Equipment Corp.),* 298 NLRB 937 (1990).

By contrast, in *Teamsters Local 996 (Kapiolani/Children's Medical Center),* 268 NLRB 1071 (1984), The Board found a jurisdictional dispute where the employer reached an agreement assigning work to one union, and then some months later signed a contract with another union, to which it assigned the same work. By filing a grievance and pursuing it to arbitration, the first union regained the work. The second union then threatened to picket the employer, who responded by filing a Section 8(b)(4)(D) charge. Rejecting the argument of the second union that the matter was purely one of contract enforcement, the Board held that it was a jurisdictional dispute subject to resolution in a Section 10(k) hearing. See *Teamsters Local 107 (Reber-Friel Co.),* 336 NLRB 518 (2001).

The views expressed in this article are those of the author and should not be construed as definitive statments of current law by the National Labor Relations Board. ■

U.S. SUPREME COURT UPDATE

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ADEA is not Intended to Prevent Employers From Favoring Older Workers

In July of 2002, the Sixth Circuit issued a decision that troubled many employers and caused them to rethink their understanding of who constitutes an "older worker" protected by the Age Discrimination in Employment Act ("ADEA"). Reversing the Sixth Circuit's decision, the Supreme Court held that the ADEA is not intended to prevent an employer from favoring older employees to the disadvantage of younger employees. *General Dynamics Land Systems, Inc. v. Cline*, 124 S.Ct. 1236 (2004).

In *Cline v. General Dynamics Land Systems*, 296 F.3d 466 (6th Cir. 2002), a class of employees, who were age 40 to 49, argued that their rights under the ADEA were violated by a revised, negotiated collective bargaining agreement provision which provided full retiree health benefits upon retirement only to employees who were at least 50 years of age as of the effective date of the collective bargaining agreement. Although the district court dismissed the case on the grounds that the ADEA does not permit a "reverse discrimination" cause of action, the Sixth Circuit explicitly rejected the district court's conclusion that the ADEA only prohibits discrimination against employees over age 40 who are older than the favored employees. The Sixth Circuit held that the ADEA clearly and unambiguously forbids employers from discriminating against "any individual" in the terms and conditions of employment (including benefits), based solely on the individual's age. According to the Sixth Circuit, because Congress identified the workers it intended to protect under the ADEA as those workers over age 40 and extended the protection of the ADEA to "any individual," any discrimination based upon age against a worker over age 40 violates the ADEA.

In its six to three decision, the Supreme Court reasoned that, if under the ADEA Congress had intended to protect the younger worker against the older worker, it would likely not have ignored workers under the age of 40. According to the Court, Congress intended for the ADEA to protect the relatively older worker from discrimination that works to the advantage to the relatively young. Additionally, stated the Court, it has consistently understood the ADEA as providing a remedy for unfair preference based upon relative youth, stating that, "in a world where younger is better, talk about discrimination because of age is naturally understood to refer to discrimination against the older." Accordingly, concluded the Court, the ADEA is not intended to prevent an employer from favoring an older employee over a younger employee.

Although limited by its facts to a collectively bargained retiree health plan with a frozen age requirement, the principle announced by the Sixth Circuit - that younger workers, age 40 or over, have a cause of action under the ADEA if older workers are

(Continued on page 16)

U.S. SUPREME COURT UPDATE

(Continued from page 15)

provided better terms and conditions of employment based on age - could have been far-reaching had the Supreme Court not held differently. Most retiree health plans, early retirement incentive plans, and other similar programs are available only to workers who, among other requirements, have attained a minimum age. Accordingly, prior to the issuance of the Supreme Court's decision, the Sixth Circuit's holding put such plans at risk for age discrimination challenges by younger employees over age 40 who were not eligible for benefits solely because of their age.

Neutral No-Rehire Policy is Legitimate Non-Discrimination Reason under the ADA

In *Raytheon Co. v Hernandez,* 124 S. Ct. 513 (2003), Hernandez worked for Raytheon's predecessor, Hughes Missile Systems. While at work one day, Hernandez engaged in behavior suggesting he was under the influence of drugs or alcohol. The Company administered a drug test to Hernandez, pursuant to its drug testing policy, and Hernandez tested positive for cocaine. Hernandez subsequently admitted that he had used cocaine the night before the test. The Company permitted Hernandez to resign in lieu of discharge.

Two years after his resignation, Hernandez reapplied with the Company. He attached reference letters from both his pastor and Alcoholics Anonymous to his application. Applying a Company policy prohibiting rehiring employees terminated for workplace misconduct, the Company rejected Hernandez's application.

Hernandez filed suit under the Americans with Disabilities Act. He proceeded through discovery under the theory that the Company either regarded him as disabled or that he had a record of a disability. For the first time in response to the Company's Motion for Summary Judgment, Hernandez also argued in the alternative that the Company's no-rehire policy had a disparate impact on disabled individuals— namely recovering drug addicts.

The District Court granted the Company's Motion for Summary Judgment on the disparate treatment claim but refused to consider the disparate impact claim since Hernandez had not timely raised it. The Ninth Circuit affirmed the District Court's decision regarding the disparate impact claim. Regarding the disparate treatment claim, however, the Ninth Circuit applied the McDonnell-Douglas burden shifting framework and reversed summary judgment for the Company. The Ninth Circuit concluded that the Company's blanket no-rehire policy was not a legitimate, non-discriminatory reason for denying employment to Hernandez, since it could have a disparate impact on recovering drug addicts.

Upon review, the Court concluded that the Ninth Circuit erred by "conflating the analytical framework for disparate-impact and disparate-treatment claims." The Court held that "[h]ad the Ninth Circuit applied the McDonnell-Douglas test properly, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate non-discriminatory reason under the ADA." Accordingly, the only relevant question in front of the Ninth Circuit was whether Hernandez had submitted sufficient evidence of pretext to survive summary judgment.

The Court remanded the case for further proceedings consistent with its opinion.

Actively Employed Business Owners Qualify as "Participants" in an ERISA-Governed Plan

In deciding *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 124 S. Ct. 1330 (2004), the Supreme Court resolved a split among the circuits and held that an actively employed business owner can qualify as a "participant" in an ERISA-governed plan when at least one employee other than the owner and his wife is a participant.

Dr. Yates was the sole shareholder and president of a professional corporation that sponsored a profit sharing plan. In 1989, when the corporation also sponsored a money purchase pension plan (which was later merged into the profit sharing plan), Dr. Yates borrowed $20,000 from the plan but failed to make any of the required monthly payments. In 1996, three weeks before the filing of an involuntary bankruptcy petition against Dr. Yates, Dr. Yates used the proceeds from the sale of his residence to repay the entire $50,467.46 principal and interest due on the plan loan. The bankruptcy trustee filed a complaint, asking the bankruptcy court to avoid as preferential the payment to the plan; the court held for the bankruptcy trustee. According to the bankruptcy court, the plan could not rely on ERISA's anti-alienation provision to prevent the bankruptcy trustee from recovering the loan repayment because, as a self-employed owner of the corporation that sponsored the plan, Dr. Yates could not participate as an employee and thus could not benefit from the protection of the anti-alienation provision. The bankruptcy court's decision was affirmed by the district court, and the Sixth Circuit affirmed the district court's decision.

The Supreme Court reversed the Sixth Circuit, holding that, when a plan covers at least one employee other than the business owner and his spouse, the owner may participate on equal terms with other plan participants and receive the protections afforded by ERISA. The Court relied in part on a 1999 DOL advisory opinion in which the DOL interpreted ERISA and the regulations thereunder as they applied to working owners, and explicitly rejected the Sixth Circuit's interpretation of those regulations. Additionally, the Court rejected the Sixth Circuit's reliance on and interpretation of ERISA's anti-inurement provision, which prohibits plan assets from benefiting owners. According to the Court, the provision does not preclude coverage of working owners as plan participants, rather it protects against self-dealing, imprudent investments, and misappropriation of plan assets by employers and others. Nonetheless, the Court expressed no opinion as to whether Dr. Yates, in handling his loan repayments, engaged in conduct that violated ERISA's anti-inurement provision.

Remanding the case, the Court stated that, given Dr. Yates failure to timely repay his plan loan, it must be determined whether, despite his prior defaults on the loan, the 1996 loan repayment became part of Dr. Yate's interest in the plan and, if it did, whether the loan repayments were beyond the reach of the bankruptcy trustee's power to avoid and recover those amounts as preferential transfers. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Oh Wise and Terrible Arbitrator, we live in fear lest we displease you. Tell us more of the things that cause you unhappiness.

I will devote this column to three things that bother me. We can call them: The Bill Clinton, The Claude Rains and the Chatty Cathy.

The Bill Clinton is more a witness problem than an attorney problem. But attorneys who do not warn their witnesses to stay away from it must share the blame. It consists in splitting hairs that cannot be split, (It depends on what your definition of "is" is). Or in the attempt by an amateur to split hairs that can be split properly only by a professional. The witness who, shown a document with his signature on it, admits only that "it *appears* to be my signature" is using this gimmick. Cuteness of this magnitude can be very dangerous in the wrong hands.

The Claude Rains is best exemplified by the attorney who is "Shocked, shocked!" that his opponent would attempt to introduce *hearsay* evidence into an arbitration. Please. We all know it is hearsay. We all know it is coming in. And we all know that in an hour the attorney who is so shocked will attempt to introduce his own hearsay evidence, if he hasn't already.

The third problem could have been called the Pavlov, but I named it instead after a doll that was popular when I was a kid. You pulled the little plastic ring on her back and Chatty Cathy would say one of, maybe six things.

An attorney with this problem objects to anything that pulls his little objection ring. He will *always* object to the introduction of an excerpt from a lengthy document on the grounds of the Rule of Completeness. He will *always* object to a leading question on direct. It doesn't matter how immense the whole document is or how inconsequential the leading question is. If an objection can be made, the attorney who suffers from Chatty Cathy disease will make it.

What happens when both attorneys have the Chatty Cathy problem is this. Something in the proceeding pulls the little ring on one of them and produces an objection. That objection pulls the little ring on the other one and out comes a canned reply. Neither advocate appears to remember that we just went through this twenty minutes ago and the roles were reversed. It is as if the entire process takes place without mentation of any kind.

Don't do these things. You don't want your presentation to be terminally cute, obviously hypocritical or demented. It makes the arbitrator weary.

SIXTH CIRCUIT ADDRESSES NUMEROUS TITLE VII ISSUES, VACATION OF ARBITRAL AWARDS, AND THE MEANING OF AN "ADVERSE EMPLOYMENT ACTION"

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From February through April of 2004, the Sixth Circuit published about 14 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".

Discrimination – Direct Evidence of Discriminatory Animus

In *DiCarlo v. Potter*, Docket No. 02-4010 (February 20, 2004), the Sixth Circuit reversed the trial court's grant of summary judgment in favor of the employer on an employee's claims of age and national origin discrimination, as well as retaliation. The plaintiff, who was terminated at the end of his probationary period, alleged that his supervisor had called him a "dirty wop," and had complained that there were too many "dirty wops" working at the postal facility. He also alleged that the supervisor told him that he was "no spring chicken" and that he would never be a supervisor because of his age. Because the supervisor recommended and then convinced the plaintiff's second-level manager that the plaintiff be terminated, the court held that he "had decision-making authority with regard to" the plaintiff's employment. Therefore, the remarks constituted "direct evidence of the requisite discriminatory animus," and served to create a genuine issue of material fact as to the reasons for plaintiff's termination.

Disability Discrimination – Effect of Social Security Application

In *Kiely v. Heartland Rehabilitation Services, Inc*., Docket No. 02-2054 (February 26, 2004), the Sixth Circuit vacated a district court's holding that a plaintiff having previously signed a social security disability application in which he swore that his blindness rendered him "disabled" and "unable to work" was estopped from showing that he was capable of performing the essential functions of his job. The court disagreed with the trial court that the statements made in the application barred recovery on a Michigan disability discrimination claim as a matter of law. The court based its decision on the fact that Michigan state courts have held that declarations of disability on such an application "do not necessarily bar a plaintiff from proving a claim of disability discrimination." First, the Social Security Act's definition of "disability" does not take into account the possibility of accommodation. Second, the social security regulations call for the awarding of benefits to any

(Continued on page 18)

SIXTH CIRCUIT ADDRESSES NUMEROUS TITLE VII ISSUES, VACATION OF ARBITRAL AWARDS, AND THE MEANING OF AN "ADVERSE EMPLOYMENT ACTION"

(Continued from page 17)

applicant who is not working and who has a "listed" impairment, "regardless of whether the applicant is actually able to work." Thus, a declaration of disability on a social security application "is not always equivalent to a factual statement that the applicant cannot perform the essential functions of his job."

Arbitration – Vacation of Arbitral Award

In *Bakery v. Truck Drivers Local No. 164*, Docket No. 02-2051 (April 7, 2004), the Sixth Circuit affirmed the district court's refusal to vacate an arbitral award. The case involved an employee who had been terminated for making a racially offensive remark; the arbitrator reduced the discharge to six months unpaid suspension and reinstatement, with five years probation during which any repeat of this conduct would be grounds for immediate discharge. The employer attempted to argue that the arbitrator exceeded his authority because its Equal Employment Opportunity policy (not part of the collective bargaining agreement) *allowed* it to terminate an employee for a policy violation. The court disagreed, holding that the plain language of this policy does not *preclude* discipline less severe than termination. The employer also argued that the arbitral award should be vacated because the order of reinstatement violates public policy, which supports an employer's efforts to comply with Title VII and to "purge the workplace of harassment." The court again disagreed, noting that courts do not possess broad power "to set aside an arbitration award as against public policy." Rather, the court held that the arbitral award does not condone hostile behavior in the workplace; rather, it recognized the seriousness of the misconduct and imposed a serious penalty. The court refused to adopt a public policy which would "flatly prohibit the reinstatement of a worker who makes a racially offensive remark."

Title VII – Adverse Employment Action

In *White v. Burlington Northern & Santa Fe RR Co.*, Docket Nos. 00-6780/01-5024 (April 14, 2004), the Sixth Circuit, in an *en banc* decision, held that "a thirty-seven day suspension without pay constitutes an adverse employment action regardless of whether the suspension is followed by a reinstatement with back pay." In so holding, the Sixth Circuit joined a majority of federal circuits in rejecting the so-called "ultimate employment decision" standard, which cautions that Title VII applies only to "ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating." The court held that "the adverse-employment-action element is a warranted judicial interpretation of Title VII intended to deter discrimination lawsuits based on trivial employment actions," but that "taking away an employee's paycheck for over a month is not trivial, and if motivated by discriminatory intent, it violates Title VII." The court, however, was careful to note that "a suspension with pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action." The court also rejected the definition of "adverse employment action" contained in the EEOC Guidelines, which seeks to define such action as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity."

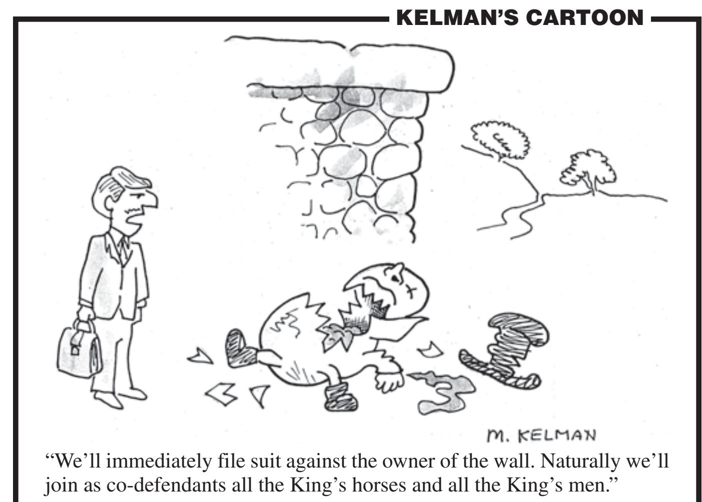
ERISA – Remand as Final Decision

In *Bowers v. Sheet Metal Workers' National Pension Fund*, Docket No. 02-6290 (April 16, 2004), the Sixth Circuit dismissed a case due to a lack of appellate jurisdiction, holding that an order by a district court remanding the case to the plan administrator for a determination of the claimant's eligibility was not a final decision under 28 U.S.C. § 1291. The district court had ruled that the plan administrator's decision was arbitrary and capricious because it did not apply the definition of "disability" specified in the plan. The Sixth Circuit ruled that the district court's order "merely vacated" the administrator's eligibility determination, and thus "did not resolve the ultimate question" of whether the claimant was, in fact, eligible for benefits. The administrator was not entitled to appeal at this time because "an order remanding a claim to a plan administrator for a determination of the merits of the claim does not constitute a final decision."

Discrimination – Order of Instatement Upheld

In *Fuhr v. School District of the City of Hazel Park*, Docket Nos. 01-2215/2606; 02-1367 (March 24, 2004), the Sixth Circuit affirmed a jury verdict in favor of a female plaintiff who claimed that she had been discriminatorily denied being hired as head coach of the school's varsity male basketball team because of her gender. The court also affirmed the trial court's subsequent injunctive order requiring the school district to hire the plaintiff for this position, even though this required "bumping" an innocent third party (the current coach) in order to so reinstate the plaintiff. The trial court had made specific mention of the fact that it had considered this party's status as an innocent incumbent. Nonetheless, the court recognized that denying plaintiff this equitable remedy "would perpetuate the effects of the discrimination proved" by the plaintiff. This order was upheld under an abuse of discretion standard. ■

KELMAN'S CARTOON



"We'll immediately file suit against the owner of the wall. Naturally we'll join as co-defendants all the King's horses and all the King's men."

EASTERN DISTRICT UPDATE

Jeffrey Steele
Brady Hathaway

Union Representatives Cannot Be Held Individually Liable

Judge Gadola ruled in *Wickham v Ford Motor Co,* ___ F Supp 2d ___; 2004 WL 572354 (ED Mich), that a union member cannot maintain an action for monetary damages against union officials, in their individual capacities, for conduct in which they engaged on the union's behalf. "Since individual employees cannot be held liable for damages resulting from their actions, it would seem *a fortiori* union representatives should not be held liable in their individual capacity for actions done on behalf of the union."

Failure to Designate Leave as FMLA-Qualifying Does Not Extend 12-Week Period

Although the employer in *Thompson v Diocese of Saginaw,* 2004 WL 45519 (ED Mich), failed to designate the plaintiff's pregnancy-related absence as FMLA qualifying, the plaintiff could not sustain a claim because she was unable to work within 12 weeks. Judge Lawson ruled that the Sixth Circuit's opinion in *Plant v Morton Int'l, Inc,* 212 F3d 929 (6th Cir. 2000), which held that employees are protected by the FMLA if they return to work within 12 weeks of the date the employer designates a leave as FMLA-qualifying, was "undercut" by the Supreme Court's holding in *Ragsdale v Wolverine World Wide, Inc,* 535 US 81 (2002). Accordingly, an employee such as the plaintiff "who does not return to work within the 12-week period specified by the FMLA may not claim the protection provided by the Act." Judge Lawson also dismissed the plaintiff's pregnancy discrimination claim because the plaintiff failed to show that her pregnancy, as opposed to employer's proffered legitimate business explanation, inspired the contested reassignment.

Older Worker May Have Been Replaced By a Younger Man Whose Job Title Never Changed

In *Moradian v Semco Energy Gas Co,* ___ F Supp 2d ___; 2004 WL 904469 (ED Mich), Judge Feikens found a genuine issue of material fact as to whether the protected-age plaintiff, who was purportedly terminated during a reduction in force, was replaced by a lesser-qualified younger employee. Although the younger employee was not promoted and retained the same job title, there was evidence that the younger employee took on greater responsibilities and that his "position changed to mirror those of plaintiff's former position...." This evidence, coupled with three alleged age-based statements shortly before and immediately after the RIF was sufficient to raise a factual question whether age motivated the employer's decision to terminate the plaintiff.

Mere Existence of Affirmative Action Plan Insufficient to Prove "Reverse" Race Discrimination

Judge Lawson ruled in *Pilon v Saginaw Valley State University,* Case No. 03-10006-BC (ED Mich), that the employer's adoption of an affirmative action plain, by itself, is neither direct nor circumstantial evidence of race discrimination. "[U]nless there is some evidence that the plan was actually implemented, or that it held sway over the decision maker, it cannot give rise to the suspicion of intentional discrimination." ■

MERC UPDATE

Michael M. Shoudy
White, Schneider, Young & Chiodini, P.C.

Since the previous issue of *Lawnotes,* the Michigan Employment Relations Commission has issued 8 Decisions and Orders in a variety of cases. A brief summary of 4 of those cases follows. Of the 8 cases, 5 were unfair labor practice cases, 1 was an unfair labor practice/representation case, 1 was a unit clarification case, and 1 was a motion for reconsideration decision in a unit clarification case. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/cis.

UNFAIR LABOR PRACTICES

Eastern Michigan University

Case No. C02 G-162 (February 17, 2004) (No Exceptions).

Charging Party alleged the Respondent violated its duty to bargain under PERA by reneging on an agreement reached regarding the termination of a faculty member. In brief, the ALJ found that Respondent and Charging Party had not reached complete agreement on the terms of the purported agreement. Therefore, Respondent was not guilty of repudiating the collective bargaining agreement. The ALJ also concluded that Respondent did not violate its obligation to bargain in good faith by failing to respond to Charging Party's counter-settlement proposal.

Charging Party represented a bargaining unit of tenured and tenure-track faculty members employed by Eastern Michigan University. The controversy arose when the employer held a meeting to present a faculty member with written charges of sexual harassment received from a student. The faculty member was notified that Respondent was contemplating his termination.

The parties' collective bargaining agreement contained a four-step grievance procedure culminating in binding arbitration. At the third step of the grievance procedure, a Review Board consisting of an equal number of representatives of both the faculty and the employer would attempt to resolve the grievance before arbitration. The contract required the Review Board to meet and discuss the grievance, and if the grievance was adjusted to the mutual satisfaction of the parties, the adjustment was to be reduced to writing and signed by the parties within 15 days of the completion of the discussion. The contract stated that the adjustments shall be final and binding upon all parties.

The contract also set forth procedures which Respondent must follow before it could terminate a faculty member. The termination procedure required a meeting of the Review Board to discuss the contemplated action.

The Review Board convened regarding the sexual harassment issue. During the meeting of the Review Board the parties were able to reach substantial agreement regarding resolution of the issue. Drafts of a settlement agreement were exchanged between the parties. After agreement could not be reached on all of the issues in the settlement agreement, Respondent sent Charging Party a letter stating that since final resolution had not been met, the employer would be proceeding with the contractual procedure for termination. Charging Party responded by insisting that the Review Board had reached agreement.

Charging Party asserted that Respondent repudiated the parties' collective bargaining agreement by reneging on the Review Board's agreement not to terminate the faculty member at issue. The Commission has held that in order to find a repudiation, the contract breach must be substantial, the contract breach must have a significant impact on the bargaining unit, and there must be

(Continued on page 20)

MERC UPDATE

(Continued from page 19)

no bona fide dispute over interpretation of the contract. The employer asserted that the Review Board was convened under the termination procedure in the contract and not the grievance procedure. The termination procedure did not contain the same final and binding adjustment language. As a result, the ALJ concluded that the parties had a bona fide dispute over interpretation of the collective bargaining agreement which would best be resolved by an arbitrator or subsequent contract negotiations. Therefore the ALJ concluded that Respondent did not repudiate the collective bargaining agreement.

As to the argument that Respondent failed to bargain in good faith, the ALJ concluded that the parties did not reach complete agreement on the terms of the settlement. Therefore, Respondent had no obligation under PERA to engage in further discussion over the terms of the pre-termination settlement. As a result, the ALJ recommended that the charges be dismissed in their entirety.

City of Detroit

Case No. C02 F-133 (January 27, 2004) (No Exceptions).

Charging Party filed an unfair labor practice charge alleging that Respondent discriminated against one of its members. The charge also alleged that Respondent violated Section 10(1)(a) of PERA due to comments made by one of its managers. The charge was later amended to include allegations that Respondent violated its duty to bargain in good faith by unilaterally imposing several changes in conditions of employment. In brief, the ALJ found there was no evidence that Respondent discriminated against Charging Party's member based on union activity or his status as a member of Charging Party's unit. Further, the ALJ found Respondent violated PERA when its manager told Charging Party that it did not have to bargain with its representatives, that the members had no bargaining representative, and that the employer could act unilaterally. Finally, the ALJ found that Respondent altered certain existing terms and conditions of employment through its unilateral modification of the employee handbook.

Charging Party represented a bargaining unit of housing inspectors employed by the City of Detroit. Charging Party succeeded another union. At the time of the hearing, Charging Party and Respondent had not yet entered into a collective bargaining agreement.

The initial charge, as amended, alleged that Respondent unlawfully discriminated against one of Charging Party's members when Respondent's manager changed his mind about rescinding a reprimand. Further, Charging Party alleged that Respondent's manager repeatedly told Charging Party's members that they did not have a union, that they had no representation, and that Respondent could do what it wanted.

As to these charges, the ALJ found that there was no evidence that Charging Party's member was reprimanded for conduct protected by the Act. Therefore, the ALJ found no evidence to support the assertion that Respondent had discriminated against Charging Party's member.

As to the comments made by Respondent's manager, the ALJ credited Charging Party's witnesses. Relying on *The Becker Group,* 329 NLRB 103 (1999), the ALJ found that the manager's statements had a chilling effect on the bargaining unit and its leadership. Therefore, Respondent violated Section 10(1)(a) of the Act.

The third amended charges alleged that Respondent violated its duty to bargain under the Act by unilaterally implementing numerous changes in conditions of employment. The ALJ considered the numerous alleged changes and found that Respondent did not unilaterally alter its existing compensatory leave policies or its definition of seniority. Further, the email policy was an existing policy which had been previously distributed to unit employees. However, the ALJ found Respondent altered terms and conditions of employment for Charging Party's members by promulgating an employee handbook that altered Respondent's policy regarding breaks, temporary assignment of inspectors to other jobs within the department, and eliminating seniority preference in the granting of vacation leave. The ALJ also found the handbook created a new requirement that unit employees report their outside employment or business ownership interests, a new policy imposing financial liability on employees for damages to city property, and new categories of conduct for which unit employees could be subject to discipline. With regard to these changes, the ALJ concluded Respondent violated its duty to bargain and ordered Respondent to cease and desist from making unilateral changes without bargaining in good faith.

UNFAIR LABOR PRACTICE/REPRESENTATION

South Haven Public Schools

Case Nos. C02 L-260, C03 D-088, and R03 A-019 (February 12, 3004) (No Exceptions).

Teamsters Local 214 filed an unfair labor practice charge alleging that the South Haven Public Schools violated PERA by failing to collect union dues in accordance with the parties' collective bargaining agreement. Petitioner, South Haven Bus Drivers Association, filed a petition seeking certification as the bargaining representative of the bus drivers and bus aides. Teamsters Local 214 filed a second charge, alleging that Respondent violated PERA by treating the union's chief steward differently than an active supporter of the South Haven Bus Drivers Association.

The unfair labor practice charges and the petition for election were consolidated, and the petition for representation election was held in abeyance pending the outcome of the unfair labor practice charges. During the hearing, Teamsters Local 214 withdrew its initial charge. In brief, the ALJ found that Charging Party had failed to prove that Respondent's actions were in retaliation for the steward's union activities. Further, the ALJ ordered that an election be conducted regarding the representation of the bus drivers and bus aides.

The charges before the ALJ related to multiple instances of employee discipline. Teamsters Local 214 alleged that its union steward was disciplined more harshly than an employee who was a supporter of the South Haven Bus Drivers Association. Specifically, Charging Party alleged that its steward was disciplined more harshly regarding her tardiness and an issue regarding falsification of student conduct records.

The ALJ found that there was no merit to Charging Party's claims. Charging Party failed to prove that the Respondent's actions were in retaliation for the steward's activities on behalf of Teamsters Local 214. Although anti-union animus may be established by indirect evidence, more suspicion will not suffice. Therefore, the ALJ concluded that the charges should be dismissed and an election ordered regarding the representation petition.

UNIT CLARIFICATION

Lake Superior State University

Case No. UC02 E-016 (February 24, 2004).

Petitioner, the Lake Superior State University ESP, filed a unit clarification petition regarding the newly-created position of Administrative Assistant to the Athletic Department. The employer argued that the petition should be dismissed because the Administrative Assistant did not share a community of interest with the

support employees in Petitioner's unit. The position was administrative and therefore excluded under the parties' contract, and the position was supervisory as defined by MERC. In brief, the Commission found that the administrative assistant position shared a community of interest with Petitioner's bargaining unit, and the defenses raised by the employer were without merit.

Petitioner represented a bargaining unit of non-supervisory support employees employed by Lake Superior State University. Petitioner maintained that the Administrative Assistant to the Athletic Department shared a community of interest with the support employees in the ESP unit, and the duties and responsibilities of the position were identical to those previously performed by the Special Clerk III to the Athletic Department, a bargaining unit position. In February 2002, the employer met with Petitioner in a special conference and announced it was eliminating the position of Special Clerk III to the Athletic Department and creating the position of Administrative Assistant to the Athletic Department, Over Petitioner's objection, the University reclassified the position as "administrative" and outside of the ESP unit. The same employee who served as the Special Clerk III to the Athletic Department was selected to fill the Administrative Assistant position.

The Administrative Assistant position worked for the same supervisor, the same hours, in the same location, and received the same fringe benefits and similar pay. Additionally, the duties performed by the Administrative Assistant were essentially identical to the duties performed by the Special Clerk III.

One month prior to the hearing, the employer reorganized its ticket office from the Office of Facilities Manager to the Athletic Department. After the ticket office was transferred to the Athletic Department, the employer alleged that the Administrative Assistant would be supervising the Data Account II, a member of Petitioner's bargaining unit. In defense of the petition, the employer argued that the Administrative Assistant was a supervisory position excluded by the administrative exemption contained in the parties' collective bargaining agreement.

The Commission found a clear community of interest between the Administrative Assistant position and the Petitioner's bargaining unit. The Administrative Assistant continued to work in the same office, under the identical supervision, and for substantially similar wages and fringe benefits. The Commission noted that "[a]n employer cannot change the composition of a bargaining unit during the term of a contract by contending that a new classification should be excluded from the unit 'where that new classification includes the same functions performed by the eliminated classification'."

As to the administrative exemption argument, the Commission noted that no administrative exclusion is recognized under PERA. However, the Commission has permitted the exclusion of administrative positions where there was prior agreement between the parties to keep such employees out of the unit. Here, the recognition clause in the parties' contract specifically excluded "administrative personnel." However, the contract did not define the exclusion, and there was nothing in the record that established any explicit or implicit agreement of the parties under which the position would be excluded as "administrative."

As to the supervisory issue, the Commission noted that an individual is not a supervisor under PERA if his/her authority is limited to merely directing the daily work of other employees or making work assignments of a routine nature. The Commission found insufficient evidence in this case of any real and effective supervisory authority to justify depriving the position of the right to be represented under PERA. Therefore, Petitioner's unit was clarified to include the position of Administrative Assistant to the Athletic Department. ■

NLRB UPDATE

George M. Mesrey
The Dow Chemical Company
and
Jack VanHoorelbeke
Dickinson Wright PLLC

OBJECTIONABLE CONDUCT

The Lamar Co., LLC d/b/a Lamar Advertising of Janesville 340 NLRB No. 114. The Board overruled the Employer's objections to the election, alleging that the Painters Local 802 or its agents interfered with the election by promising an employee a leather jacket if the Union won the election, engaging in electioneering, misrepresenting the election bar rule, and threatening an employee with loss of benefits.

Allen's Electric Co., Inc. 340 NLRB No. 119. The Board held that the Union's promises and payments to voters to reimburse them for wages lost while they voted did not influence the voters' free choice in the election.

SECTION 8(a)(2)

Music Express East, Inc. 340 NLRB No. 129. The Board held that the Respondent violated the Act by dominating and interfering with the formation and administration of, and rending unlawful assistance and support to the Chauffeurs Committee as a means of drawing support away from the Teamsters.

SECTION 8(b)(4)

Operating Engineers Local 3 (Cross-Link Inc. d/b/a Westar Marine Services) 340 NLRB No. 127. The Board held that the Respondent violated the Act by threatening to cause a work stoppage, with an object to force or require the Joint Venture to cease doing business with the employer.

BARGAINING UNITS

St Luke's Health System, Inc. 340 NLRB No. 139. The Board found that the Employer has rebutted the single-facility presumption and held that the petitioned-for single-facility unit of professional employees, excluding the physicians at the Employer's Sunnybrook facility in Sioux City, Iowa, is inappropriate.

WITHDRAWAL OF RECOGNITION

CAB Associates 340 NLRB No. 171. The Board found that the Respondent violated the Act by withdrawing recognition from Teamsters Local 282 and by refusing to adhere to the terms of a collective-bargaining agreement.

INTERFERENCE

Air 2, LLC 341 NLRB No. 23. Chairman Battista and Member Schaumber, with Member Liebman concurring, found that the respondent violated the by promising an apprenticeship program to employees in an effort to dissuade them from voting for Electrical Workers IBEW Local 222, and telling employees that the Company's pilots would refuse to fly with union linemen.

REFUSAL TO HIRE

CCC Group, Inc. 341 NLRB No. 15. The Board found that the Respondent violated the Act by refusing to consider for hire and refusing to hire an applicant because he joined, supported, and assisted Operating Engineers Local 925.

Smucker Co. 341 NLRB No. 10. The Board found that the Respondent violated the Act by failing to hire and consider for hire union representatives because of their union affiliation. Although finding a violation, instatement and full backpay was denied because they cheated on the Respondent's pre-employment skills test. ■

VIEW FROM THE CHAIR

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

IN PRAISE OF ARBITRATORS

For years now there has been a move toward ADR, in many instances specifically toward arbitration as an alternative to conventional litigation of labor and employment law disputes.

Thus we have seen a move toward expansion of the venerable notion of the role of the labor arbitrator at the same time we have seen a corresponding move away from federal and state juries and judges.

There are of course many reasons for this movement. My intent is not to argue the validity or merits of it. Rather, I want to point out an often overlooked aspect of it: the fact that such a movement would not have been possible or even conceivable without an existing cadre of credible, respected, and efficient arbitrators who could not only respond to an increased demand for their services but also serve as examples for others who might aspire to follow them into the field.

Commentators often posit the avoidance of unpredictable or unfriendly juries and the reduction of burdensome litigation discovery expenses as reasons for seeking ADR including arbitration. Another reason few mention, a dirty little secret if you will, is that lawyers and clients often, and I believe increasingly, want to avoid a judge they regard as unpredictable, unfriendly, or as more of a burden on procedural matters than not. This latter sentiment is exacerbated in a partisan judicial appointment atmosphere on the federal side, and a politicized election atmosphere on the state side. All too often these days lawyers first ask "who's the judge" in reference to any complaint filed by or against them, almost as if that inquiry would not only be dispositive of the entire matter but also predict how exactly the case would proceed to that inevitable end as well.

Clients – our clients, anyway – used to voice similar qualms about arbitrators. A system based on mutual selection by the parties, often through ranking arbitrators against their peers in a process that drives the parties to a middle choice rejected by neither but preferred by neither, has not eliminated these misgivings, but has at least mitigated them. This can be a ruthless system that arbitrators are subjected to repeatedly in the course of their careers. Few of us would like to have our livelihood depend on rankings conducted with no input from us save whatever past experience or reputation we had conveyed by whatever means. I think this system works, viewed over time certainly, and mostly case to case as well. I think it is fair to say that while clients may disagree with or be upset about a result in either court or arbitration, where that occurs they are far less likely to complain about the *process* of reaching that result if it came about in arbitration.

Arbitrators deserve some credit for that. Lawyers, on both sides now, keep talking about arbitrating more and litigating less. Surely that would not be a topic of interest if litigation was in general viewed favorably. But it would also not be a topic of interest unless the *alternative* – arbitration, for example – was realistically seen as preferred. The proof that arbitration is the preferred alternative is in the pudding, and we have first to credit Michigan's experienced cohort of arbitrators with making that alternative one lawyers could identify, utilize, and develop, and one that courts could entertain the possibility of accepting as binding.

Perhaps it is just my impression, but there seems to me to be a growing comfort level about the professional arbitrator class at the same time there is growing unease about the courts. Note the related sad contrast between the entrepreneurial enthusiasm and optimism of those who aspire to be arbitrators and the long lonesome march of those who seek elected judicial office or worse, those stuck in the purgatorial federal appointment process.

Our section is unique in the State Bar because we count so many arbitrators within our ranks. These men and women are in many ways the glue that holds the section together. They are a bastion of a social compact that affirms that disputes can be efficiently and effectively resolved by lawyers in a civil and timely manner.

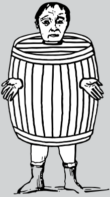
If we did not have the work and the influence of arbitrators as part of our section – or, and perhaps more significantly, if they executed their responsibilities less well, and with less aplomb, and with less humor – then our Section would undoubtedly be less cohesive, less vital, and less fun. Let's toast the arbitrators, and hope our Section can continue to include and produce resolvers of disputes who are worthy of being called a "Michigan arbitrator."

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, P.C., 1400 North Park Plaza, 306 South Washington, Royal Oak, Michigan 48067 or (248) 398-5900 or israel@martensice.com.



THE JOY OF LABOR LAW

Electronic Filing (EF) in Federal Court. Ten years from now you will be telling a new associate about the good old days, when attorneys read briefs and decisions on a thing called "paper." Paper filings would be linked to the bygone era of carbon paper, white out, Clinton, Bushes, and pencils. For those attorneys not yet computer literate, you better toss out your pen, start composing on the keyboard, surfing the web, and learning the detail of Adobe Acrobat Reader because it will be a term and condition of employment, subject to bargaining to impasse and/or any management rights clause. Law schools will teach EF 101.

The U.S. District Court for the Eastern District of Michigan is now open for electronic filing (EF). See *www.mied.uscourts.gov/ECF/default.cfm.* I have been using electronic in another federal district and it is great. Once you get used to PDF, Pacer, log-in numbers, attaching pleadings, scanning your exhibits, transcripts and exhibits via the internet, etc., filing is better and easier. You file instantly (until midnight) and the court serves it instantly on all attorneys who are EF registered. Now if only I could get the judge to rule instantly, at least when the ruling is in my favor!

I recommend the training course, which I literally stumbled across as I left a status conference with Judge Friedman, who told me about the training. Call CM/ECF Help Desk at 313-234-5042. But you need to know how to use a computer before you can even begin to do EF.

Except for attaching a recent draft of *Lawnotes* to one of my motions to compel, my electronic filings have been error-free. Well, "error-free" if you do not include $1,210.43 sanction for filing the wrong exhibits in the wrong case, the one judge who forced me to attend three earlier EF training seminars, as well as the dismissal of two of my complaints, denial of two motions for using wrong word format, and my having name posted on a federal court web in another state, listing me as a "Serial Electronic Filing Violator" (appeal to EF Review Board pending). Only Kidding.

Just be careful you don't file in the wrong case, attach your trial notes, attach a picture of yourself up north, because once you press the send button, it is filed!

It Can't Hurt to Ask. In the twisted version of the military policy of "Don't Ask, Don't Tell," the NLRB recently adopted a policy of "OK to Ask, Don't Accept" as it relates to mail ballot elections. Contrary to the position I advocated in the case, the NLRB ruled, by a definitive 2 to 2 vote, that it was not *per se* objectionable conduct for a union official (two unions were fighting it out in runoff election) to ask a voter for his or her mail ballot as long as the union was not successful in getting the ballot. *Fessler & Bowman, Inc.,* 341 NLRB No. 122 (May 12, 2004).

The NLRB, however, announced "a new rule that any party's collection of mail ballots constitutes objectionable conduct that may warrant setting aside an election." Two Board members noted that "[a]lthough we hold that a party's non-coercive solicitation of mail ballots does not constitute objectionable conduct, we express our disapproval of this practice. We are confident that our holding today, which prohibits parties from collecting or handling mail ballots, removes any incentive for parties to engage in ballot solicitation."

Perhaps the military will reverse its policy and announce a new rule: "OK to Ask But Not Listen to Answer."

Mail Ballots and Lance. Talk about mail problems, the United States Postal Service announced in June, just before Lance Armstrong began his quest to be the first person to win the Tour De France six times, that it will not sponsor Lance's professional bike team after this season. For reasons I never understood, the USPS has sponsored the team, enjoying the great luck of sponsoring Lance during his first five victories, beginning in 1999. Lance has truly given a new and good meaning to the term Going Postal.

NLRB Reverses Precedent that Reversed Precedent. Speaking of precedent, in *IBM Corp.,* 341 NLRB No. 148 (6/09/2004), the NLRB ruled 3 to 2 that employees in a nonunionized workplace are *not* entitled to representation at a disciplinary interview, thus reversing *Epilepsy Foundation,* 331 NLRB 676 (2000), which by a 3 to 2 vote, had reversed *E. I. DuPont,* 289 NLRB 627 (1988).

Of course, a lot has changed in *four* years — like *four* Board members! *IBM Board: Chairman Battista and Members Liebman, Schaumber, Walsh, and Meisburg v. Epilepsy Board: Chairman Truesdale and Members Fox, Liebman, Hurtgen, and Brame.*

The Board does not seem to be too worried about *stare decisis.* As the Supreme Court recently noted: "In a contest between the dictionary and the doctrine of *stare decisis,* the latter clearly wins." *Hibbs v. Winn,* 2004 WL 1300130, *13 (2004). Not so "clearly" at the NLRB.

Change of Address Not Enough! I am however thankful for small victories. Take, for example, a recent court decision that noted that "an employer cannot escape its contractual commitments to a union merely by changing its address." *Stanford Hosp. v. N.L.R.B.,* 2004 WL 1300143, *3 (D.C. Cir, 2004). I still have to deal with union employers who think that by changing the name of the business from Joe's Concrete to Joe Concrete that they can claim to be non-union. Those missing letters have ne significane.

– John Adam

INSIDE *LAWNOTES*

- Dan Swanson presents what every employment lawyer needs to know about attorney fee awards.
- Greg Palmer and Sydney Turner assess the new FLSA overtime regulations and what they portend for employers and employment lawyers.
- Arbitrator Barry Goldman defines three types of unproductive lawyer behavior: the Bill Clinton, the Claude Rains, and the Chatty Cathy. You know who you are.
- Shel Stark reviews *Lawnotes* editor Stuart Israel's new book on depositions (and gives the book high praise, which is why the review is published in *Lawnotes*).
- Ann Warner writes about the state of supervisor liability for Civil Rights Act violations.
- Joe Barker addresses employers, union, and jurisdictional disputes under the NLRA (or, to those in the know, 8(b)(4)(D) issues).
- 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, Joseph A. Barker, Regan K. Dahle, Barry Goldman, Jesse Goldstein, Nancy G. Itnyre, Stuart M. Israel, Maurice Kelman, David E. Khorey, George M. Mesrey, Gregory M. Palmer, Michael M. Shoudy, Daniel D. Swanson, Sheldon J. Stark, Sydney R. Turner, Jeffrey Steele, Jack VanHoorelbeke, W. Ann Warner, and more.

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