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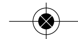

LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

Volume 21, No. 4 Winter 2012

COLLECTIVE BARGAINING AT A CROSSROADS?

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Is collective bargaining at a crossroads? It is unquestionably under enormous pressure, as are the parties themselves. The economic storm that has visited this country and much of the world over the past three years has severely strained countless U.S. employers, employees, and labor organizations. Simultaneously, the modern electronics and communications revolution has enabled services and capital to flow to the corners of the globe with increasing facility and has resulted in the outsourcing of tens of thousands of jobs overseas. Under such circumstances, not surprisingly, a "Lord of the Flies" mentality has emerged out of basic, primal fear. In that novel, of course, castaway children forsake cooperation and, like jackals, turn upon one another in the struggle for diminishing resources.

In our case, this economic storm has stimulated a strong reaction especially against public employees and their labor organizations in some pretty startling ways. In turn, governors and legislators in many states, including our own, have responded by fundamentally altering the collective bargaining rights of public employees and especially of teachers.

It was 100 years ago last March that the Triangle Shirtwaist factory fire killed 146 garment workers — mostly Jewish and Italian immigrant women aged 16 to 23 who died when they could not escape the building because the managers had locked the doors to the stairwells and exits. This catastrophe spurred the growth of the International Ladies' Garment Workers Union and, in many ways, the modern labor movement. It also graphically highlighted the imbalance of power between capital and labor and the need for a re-balancing of that relationship.

> Thus, in 1935 Congress wrote in the Preamble to the Wagner Act that:
>
> The inequality of bargaining power between employees...and employers...substantially burdens...the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rate and the purchasing power of wage earners in industry...

Based on this, Congress concluded:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

The Taft-Hartley and Landrum-Griffin amendments, of course, modified the view that collective bargaining should be encouraged, and established a more neutral view, no longer embracing the idea that collective bargaining should be favored as a matter of national policy. The government would remain above the fray, taking no position as to the desirability of collective bargaining.

By the 1960s and 1970s, national labor policy again turned away from collective bargaining and collective rights and toward a policy of individual statutory rights, beginning with Title VII of the Civil Rights Act of 1964 and followed by a spate of similar laws — OSHA, ADEA, ADA, FMLA, and the like, granting employees certain individual rights. At the same time, the Supreme Court interpreted the National Labor Relations Act in ways that effectively subverted organized labor's interests to those of capital. *Borg-Warner, H.K. Porter,* and later, *First National Maintenance,* are especially vivid examples of this idea. In those cases, the Court made it clear that labor's role in corporate decision-making was presumptively limited, and that even the remedies for employers' illegal acts would be diminished.

Today, under the twin stresses of rapid globalization of production and services, as well as the remarkable communications revolution of the first decade of this century, a substantial part of the electorate believes that labor organizations are not only not socially beneficial, but that they are objectionable and should be discouraged. There were some 13 right-to-work states when I was in law school, and there are now 22. And the percentage of U.S. employees represented by labor organizations in the U.S. has been declining steadily since the 1950s. In today's environment, the Employee Free Choice Act introduced in both houses of Congress just a few years ago seems fanciful.

I recently attended a meeting of the National Academy of Arbitrators where Jim Moore and Craig Lange described recent Michigan legislation, and I learned not only that Michigan law no longer requires the showing of just and proper cause before a tenured teacher may be terminated, but that "decisions about a 'performance evaluation system' " and policies for "discharging or disciplining employees" are now *prohibited* subjects of bargaining. These statutory measures evidence antipathy toward collective bargaining in very basic ways.

Why has it come to pass that we have turned away from collective bargaining? First, I should say that this country has long been ambivalent about collective bargaining and collectivism generally. Indeed, the "rugged individual" ideal, and antipathy toward collective action generally, is a deeply felt American sentiment. And, of course, concerted opposition and economic pressures have weakened unions generally. At the same time, however, organized labor has, it seems to me, been losing the contest for the "hearts and minds" of the American people for some time now.

I recently had the pleasure of reading Richard and Susan Bloch's interview of Ted St. Antoine for the National Academy of Arbitrators and was struck by one excerpt in particular — Ted's

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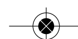

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STATEMENT OF EDITORIAL POLICY

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

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COLLECTIVE BARGAINING AT A CROSSROADS?

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reasons for going into labor law. By way of background, his father's business failings had convinced Ted to become a Wall Street lawyer, of all things.

> I was going to make $100,000 a year...And in pursuit of that, I got into the clutches of the Jesuits at Fordham College. I can remember very well sitting in class one morning. This zealous Jesuit, a young guy, full of ideals, presented the class with a mimeo. Remember those, some of you, mimeos? This one had three columns. One column, excerpts from the papal encyclicals on social justice by Leo XIII and Pius XI; in the second column, excerpts from the speeches of Walter Reuther; third column, excerpts from the speeches of the then-president of the U.S. Chamber of Commerce. The Popes and Walter Reuther could have had the same ghostwriter...
>
> In a way it was like Saul on the road to Damascus. I was struck by lightning right then and there. I said, Ted, you've been headed down the wrong path. When I grow up, I'm going to be a union lawyer and work for Walter Reuther and try to promote the papal encyclicals' high ideals of social justice.

Like Ted, my own introduction to this wonderful field of work came during college at MSU when I took a class from Charles Larrowe in the history of the U.S. labor movement. Mind you, I was the son of a Wayne State University English professor, and had no personal or family experience with labor unions or collective bargaining, but I learned about Eugene Debs, David Dubinsky, Walter Reuther, Philip Murray, Arthur Goldberg, and countless others who seemed courageous, virtuous, and at the vanguard of progress. Then I went to law school in Ann Arbor where I took classes from Ted and Harry Edwards during a golden era of labor law in the American legal academy and learned more about the role of organized labor in the civil rights movement and in worldwide efforts to alleviate suffering.

I say this because the young people I teach now know virtually nothing about labor unions, their many good causes, and the critical role they have played in civilizing work and society generally. Unlike Ted and me, current law students do not generally look upon organized labor as an important force for good. In part, that is because labor, unlike capital, has failed to use the power of the media and public relations opportunities to burnish its image. The other night I saw on CNBC that before Katrina hit New Orleans, the Wal-Mart Corporation had one of the worst public images in all of corporate America. But after Katrina struck, Wal-Mart — at the behest of local employees — provided food, water, and other essential supplies to the devastated region, and thereafter, the Company's public image rose to the very top among U.S. corporations. Where was organized labor? To the extent they were there, why wasn't that known? Obviously, the resources available to labor and capital are different, and just as plainly, local and national unions are fighting for their very survival, so waging a public relations campaign may fall to the bottom of their priorities. But without restoring their image by demonstrating to the public the positive influence they have, unions will continue to struggle in the political arena.

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To be sure, organized labor is innovating in many ways of late — turning campaign finance rulings to their advantage, and utilizing social media to connect with members during organizing and bargaining — but these facts are little known and fail to touch people in visceral ways. Until organized labor can recapture the hearts and minds of people, especially of young people, I fear that antipathy toward unions and collective action, together with ignorance about unions' many contributions to working life in America, will only push labor organizations into a greater struggle for survival. In such an environment, collective bargaining will neither thrive nor remain a constructive means to solving important workplace and other social problems. I am sure that many of today's labor leaders are fine men and women doing difficult work on behalf of their members. They do not, however, touch the young people of our country through their good works in the ways that their predecessors affected previous generations, and without that effect, the built-in head winds against them will continue to blow. That would be most unfortunate because the power of capital and organized labor to solve problems together has been great, and a revitalization of healthy collective bargaining could do much to address the many grave and complex challenges our employers, employees, labor organizations, and indeed, the American people face today.

— EDITOR'S NOTE —

Professor McCormick delivered these remarks at the 19th Annual Bernard Gottfried Memorial Labor Law Symposium on October 13, 2011. ■

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LAMONS GASKET: THE NLRB CORRECTS COURSE

Darlene Haas Awada,
Field Attorney, National Labor Relations Board, Region 7

On August 26, 2011, the NLRB, at the end of Chairman Wilma Liebman's term, issued a number of decisions, some which sparked controversy. Included among these decisions was *Lamons Gasket,* 357 NLRB No. 72 (2011), which overruled the Battista Board's modifications to the voluntary recognition bar doctrine set forth in *Dana Corp.*, 351 NLRB 434 (2007). In overruling *Dana*, the Obama Board under Chairman Wilma Liebman ("Liebman Board") returned to the NLRB's historical view that the purpose of the NLRA ("the Act") is to encourage the "the practice and procedure of collective bargaining." In addition, examination of the decision in context suggests that, by its incorporation of empirical evidence and subjective experience, the Liebman Board was attempting to respond to criticism that the *Dana* decision and its dissent exhibited policymaking by adjudication packaged as questions of law without any grounding in factual analysis.

Prior to *Dana*, the voluntary recognition bar doctrine stood as established Board law since 1966, with the approval of several courts of appeals. Under the pre-*Dana* doctrine, an employer's voluntary recognition of a union, based on a showing of uncoerced majority support for representation, barred the processing of an election petition for a reasonable period of time, in order to permit the employees' chosen representative to serve in that capacity and seek to negotiate a collective-bargaining agreement with the employer.

The *Dana* Board "modified" the voluntary recognition bar doctrine to provide that there would be no bar to an election following a grant of voluntary recognition unless: (1) affected unit employees received adequate notice of the recognition and of their opportunity to file a Board election petition within 45 days, and (2) 45 days passed from the date of notice without the filing of a validly supported petition (i.e., a showing of interest from 30 % of bargaining unit). This lack of a bar to petitions applied notwithstanding the execution of a collective bargaining agreement following voluntary recognition (i.e., no contract bar to an election). The *Dana* majority opined that, although Section 9 of the Act "permits" employees to choose union representation through the voluntary recognition process, this "does not require" that Board policy treat voluntary recognition the same as choice expressed in Board elections. Board members Liebman and Walsh vigorously dissented. To implement the *Dana* ruling, the NLRB established new procedures for processing voluntary recognition notifications ("VR" cases), and for issuing a standardized notice for employers to post.

Congress responded to the *Dana* decision, along with other controversial decisions issued by the Bush II Board under Chairman Robert Battista ("Battista Board"), with hearings during which Liebman and Battista were questioned regarding, among other things, their views of the purpose of the Act. Liebman stated her view, consistently expressed by the Board and courts, that the purpose of the Act is to encourage the "the practice and procedure of collective bargaining," as set forth in Section 1 of the Act, and maintained when the Taft-Hartley amendments were enacted in 1947. Conversely, Battista expressed his view that the "fundamental principle of the Act is to provide for employees to decide for themselves whether they wish to be represented by a union or otherwise act

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LAMONS GASKET: THE NLRB CORRECTS COURSE

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concertedly in dealing with their employer." See *The National Labor Relations Board: Recent Decisions and Their Impact on Workers' Rights*. Joint Hearing before the House Subcommittee on Health, Employment, Labor and Pensions, and Senate Employment and Workplace Safety Subcommittee, December 13, 2007. Although the Board historically sought to balance the competing statutory policies of promoting collective bargaining and safeguarding the right to refrain from engaging in protected activities, the Battista Board took the unprecedented view that the right to refrain from union activities was the prevailing policy goal of the Act.

In addition, *Dana* was criticized by academia, notably Catherine L. Fisk and Deborah C. Malamud in their article *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 Duke L. J. 2013 (2009). The *Dana* decision, noted Malamud and Fisk, failed to rely on empirical data to justify either the majority's reasoning or the dissent's assertions. The *Dana* Board's modification of the voluntary recognition bar doctrine, they criticized, was an exercise in policy judgment unsupported by factual analysis.

On August 27, 2010, the Board granted review in *Lamons Gasket*¸ 355 No. 157 (2010), soliciting the experience of employees, unions, and employers under *Dana*. Interestingly, Chairman Liebman wrote a separate concurrence, referring extensively to the criticisms and suggestions set forth in the Fisk and Malamud article. Liebman quoted the article, "the 'Dana rule rests on a number of factual and policy premises, none of which are clearly stated or actually defended in the [majority] opinion,' while the 'dissenting opinion rests on diametrically opposed policy preferences and factual premises,' and also 'suffers from a lack of unchallenged support for its positions.'" Liebman cited with approval Fisk and Malamud's recognition that since the Board does not have within its agency staff any social science experts, and has no capacity to conduct studies on actual labor conditions (for example, Section 4(a) of the Act bars the Board from employing economic analysts), the Board's only access to social science data or factual research is through solicitation of briefs. Liebman stated that without objective information, there is only "partisan" argument and "academic" speculation.

Liebman's concurrence also solicited information that empirical statistics would not show, such as information on hypothetical recognition agreements which were not consummated because of concerns about *Dana*, and the impact of *Dana* on the course of collective bargaining after recognition. Liebman noted the available statistics regarding the rarity of *Dana* elections, and the greater rarity of cases where employees rejected the recognized union, raising the question of whether *Dana* in practice was worth its cost. Thus, in granting review, the Liebman Board appeared to be setting the stage to improve the quality of the Board's decision-making in light of the criticisms and suggestions leveled at the *Dana* decision and dissent.

The *Lamons Gasket* Board made good on the intention suggested in its grant of review to incorporate data beyond partisan policy concerns in its decision. The decision reinstated the long-standing voluntary recognition bar doctrine, defined benchmarks for determining a "reasonable period of time" for which the bar would apply using the multifactor test set forth in *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 402 (2001), enfd. 310 F.3d 209 (D.C.Cir. 2002)., and overturned the short-lived *Dana* modifications and VR procedure. In doing so, the Board reasoned that it ascertained no empirical evidence to support *Dana's* "suspicion" that employee choice in voluntary recognition situations is often "not free" and uncoerced. It further stated that the evidence, as a result of administering the *Dana* decision with an extraordinary notice requirement, demonstrated that the suspicion underlying *Dana* was unfounded. In reaching these conclusions, the Board reviewed statistics showing that under the *Dana* procedures employees decertified voluntarily recognized unions in only 1.2 percent of the cases in which notices were requested.

The *Lamons Gasket* Board also reasoned that the *Dana* decision undermined employees' free choice by calling into official question and by refusing to honor it for a significant period of time, without sound justification. In addition, the Board noted that *Dana* was a departure from the long-standing principle expressed by the Supreme Court: "[A] bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944). The *Lamons Gasket* Board noted that this well-established principle was recognized in *Brooks v. NLRB*, 348 U.S. 96, 100 (1954), where the Supreme Court noted that a "union should be given ample time for carrying out its mandate on behalf of its members, and should not be under exigent pressure to produce hothouse results or be turned out."

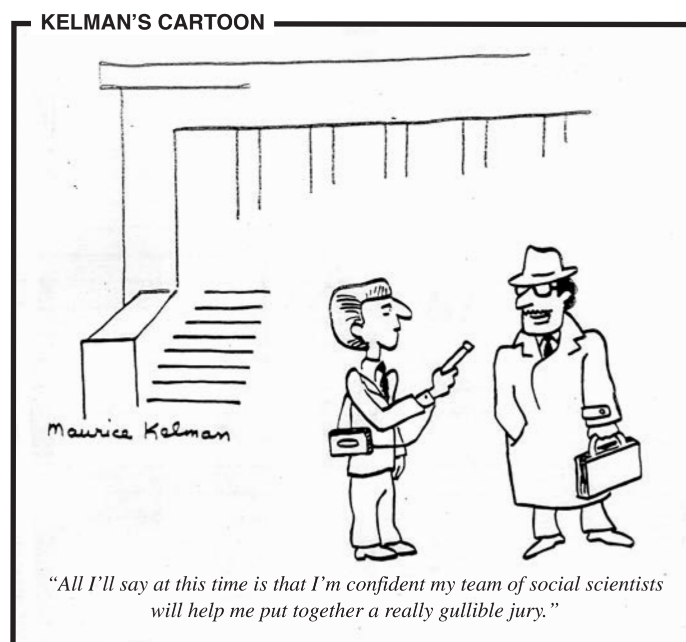
Moreover, the Board noted that sufficient protection against coercion is already present in the Act: the Board and courts have long-held that voluntary recognition based on support that was induced by either union or employer coercion is unlawful, as is the coercion.

In sum, rather than being a radical decision, examination of the *Lamons Gasket* decision in context shows that the Liebman Board returned to long-established legal principles, supported by experience and empirical data, which recently had been abandoned by the Battista Board based on flawed and unsupported assumptions.

— END NOTE —

Opinions in this article are the author's, and are not intended to express the views of the NLRB, Region 7, or the Acting General Counsel. This article is based on material by presented by the author the 19th Annual Bernard Gottfried Memorial Labor Law Symposium on October 13, 2011 ■

KELMAN'S CARTOON



"All I'll say at this time is that I'm confident my team of social scientists will help me put together a really gullible jury."

Editor's note: This Kelman Cartoon originally appeared in *Legal Times* and is reprinted with permission.

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SOCIAL MEDIA AND DISCOVERY: NEW TECHNOLOGY, BUT THE OLD RULES STILL APPLY

Adam S. Forman and David G. King
***Miller, Canfield, Paddock and Stone, P.L.C.*[1]**

I. SOCIAL MEDIA INFORMATION IS GENERALLY DISCOVERABLE

Social media has dramatically changed how humans interact with each other and the digital footprint left by individuals on sites like Facebook, Twitter, LinkedIn, and YouTube must not be discounted when formulating discovery plans. Rather, attorneys must embrace social media as part of the "new normal." Discovery through the lens of social media should not be viewed as new and unfamiliar territory. Posts on social media are just additional ways for individuals to document their lives like diaries, letters, photo albums, or emails. An individual's posts may document things that are seemingly innocuous at the time but could literally make or break a case later. Consider how valuable a time-stamped post on Facebook documenting an individual's mood — including as expressed in pictures — may be to either buttressing or undermining that individual's claim for emotional distress damages.[2] Attorneys would be remiss to not at least probe to see whether an individual's social media site contains discoverable material or confirm that broad discovery requests — like those seeking all communications about the individual's claims – include communications via social media. Such discovery is exactly the type of discovery contemplated by Rule 2.302 of the Michigan Court Rules and Rule 34 of the Federal Rules of Civil Procedure, both of which expressly include "electronically stored information" in the scope of permissible discovery.[3]

A. Content Must be Relevant

Whereas courts[4] and attorneys[5] are just now grappling with social media, it is clear that courts are applying traditional discovery rules to social media content. One of the leading cases in this developing area of the law is *EEOC v. Simply Storage Management LLC*.[6] In *Simply Storage*, the EEOC filed a sexual harassment complaint against the employer and the employer's attorneys served document requests seeking the content of the complaining employees' social networking sites to obtain information about the employees' emotional health. They requested:

> Request No. 1: All photographs or videos posted by [employee] or anyone on her behalf on Facebook or MySpace from April 23, 2007 to the present
>
> Request No. 2: Electronic copies of [employee]'s complete profile on Facebook and MySpace (including all updates, changes, or modifications to [employee]'s profile) and all status updates, messages, wall comments, causes joined, activity streams, blog entries, details, blurbs, comments, and applications . . . .

The EEOC objected, and upon the employer's motion to compel, the court rejected the idea that discovery of social media or other electronically stored information is unique. "Rather," the court stated, "the challenge is to define appropriately broad limits – but limits nevertheless – on the discoverability of social communications in light of a subject as amorphous as emotional and mental health . . . ."[7] The court detailed some general guiding principles before discussing the specific requests at issue.

First, the court rejected the argument that since the social media profiles were "locked" or "private," they were not discoverable due to privacy concerns as such concerns could be "addressed by an appropriate protective order . . . ."[8] Additionally, privacy arguments by those attempting to prevent the discoverability of social media are undermined "by the fact that the production . . . would be of information that the claimants have already shared with at least one other person through private messages or a larger number of people through postings."[9] The very purpose of social media undercuts such an argument: "Facebook is not used as a means by which account holders carry on monologues with themselves."[10]

Second, the court emphasized that the material requested must be relevant to a claim or defense in the case. The employer had requested access to the employees' entire Facebook and MySpace accounts, but according to the court did not show why such broad access was relevant to the employees' claims for emotional damages. "[T]he simple fact that a claimant has *had* social communications is not necessarily probative of the particular mental and emotional health matters at issue in this case."[11]

Third, when an employee makes claims for emotional damages, "[i]t is reasonable to expect severe emotional or mental injury to manifest itself in some [social media] content, and an examination of that content might reveal whether onset occurred, when, and the degree of distress. Further, information that evidences other stressors that could have produced the alleged emotional distress is also relevant."[12] The discoverability of social media information should be broader, according to the court, than just "communications that directly reference the matters alleged in the complaint" as argued by EEOC.[13]

Turning to the case at hand, the court narrowed the employers' requests, while still allowing significant social media discovery:

> [T]he court determines that the appropriate scope of relevance is any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and [social media] applications for [the employees] . . . that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state.[14]

As for the employer's request for pictures on social media pages:

> The same test set forth above can be used to determine whether particular pictures should be produced. For example, pictures of the claimant taken during the relevant time period and posted on a claimant's profile will generally be discoverable because the context of the

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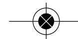

SOCIAL MEDIA AND DISCOVERY: NEW TECHNOLOGY, BUT THE OLD RULES STILL APPLY

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> picture and the claimant's appearance may reveal the claimant's emotional or mental status. On the other hand, a picture posted on a third party's profile in which a claimant is merely 'tagged' is less likely to be relevant.[15]

Such a holding provides the framework for litigators who seek to discover (or prevent the discovery of) social media information. "The court's determination of relevant material is crafted to capture all arguably relevant materials, in accord with the liberal discovery standard of Rule 26. In carrying out this Order, the EEOC should err in favor of production."[16]

Also applicable is the case of *Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*[17] In *Mackelprang*, the plaintiff alleged sexual harassment and other claims against her employer. At issue was the employer's motion to compel private communications on plaintiff's MySpace page after subpoenas to MySpace resulted in the production of only public information. The employer claimed that such communications would show that the plaintiff "was a willing participant who condoned and actively encouraged the alleged sexual communications . . . and sexual conduct" at the basis of her claims. Rejecting this argument, the court found that the employer was "engaging in a fishing expedition since . . . it has nothing more than suspicion or speculation as to what information might be contained in the private messages."[18] It did so, relying upon Federal Rule of Evidence 412(a), because there was not "a sufficiently relevant connection between . . . plaintiff's non-work related sexual activity and the allegation that . . . she was subjected to unwelcome and offensive sexual advancements in the workplace."[19] Even if such evidence were relevant, the court continued, "its probative value as to either liability or damages is not substantial enough to outweigh the unfair prejudice that its admission would cause."[20]

WRITER'S BLOCK?

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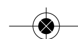
The employer in *Mackelprang* also argued that plaintiff should produce all of her email communications via MySpace in order to review for plaintiff's admissions or for impeachment purposes. While the court rejected this argument on similar relevance and overbreadth concerns,[21] it did not preclude the employer from obtaining *some* of the private messages. Instead, it suggested that the employer "serve upon [p]laintiff properly limited requests for production of *relevant* email communications."[22] The court stressed that it was not preventing the employer from "serving such discovery requests on [p]laintiff to produce her Myspace.com private messages that contain information regarding her sexual harassment allegations . . . or which discuss her alleged emotional distress and the cause(s) thereof."[23]

In sum, the *Simply Storage* and *Mackelprang* decisions find a balance between producing *all* social media information and *no* social media information. Instead, they dictate that social media information is discoverable when adequately tailored to satisfy the relevance standard.[24]

B. May a Social Media User Limit Discovery Based Upon a Privacy Objection?

As noted in *Simply Storage*, it is difficult for an objecting party to successfully object to producing social media information on privacy grounds. Social media users affirmatively place information about themselves on sites to be shared with other users. A few recent state courts outside of Michigan have found individuals have *no* privacy protections even when individuals take affirmative steps to limit who can view their social media sites. *Romano v. Steelcase Inc*, for example, is a personal injury case with the plaintiff claiming "permanent injuries" resulting from the defendant's conduct.[25] After portions of the plaintiff's publicly available social media site revealed plaintiff still maintained an active lifestyle and traveled during the relevant time period, the defendant served discovery requests accordingly. The court rejected the plaintiff's argument that the defendant's attempt to secure access to the "non-public" portions of her site, stating "[t]o deny [d]efendant an opportunity [to] access . . . these sites not only would go against the liberal discovery policies of New York favoring pre-trial disclosure, but would condone [p]laintiff's attempt to hide relevant information behind self-regulated privacy settings."[26] Further, the very fact that the social media sites at issue – Facebook and MySpace – remind users that postings are not private when plaintiff signed up are evidence that "she consented to the fact that her personal information would be shared with others, *not withstanding her privacy settings.*"[27] Even assuming plaintiff had a privacy interest in her "non-public" site, the court concluded that such an interest was outweighed by the defendant's need for the information.[28]

A similar holding occurred in *McMillen v. Hummingbird Speedway Inc.*, another personal injury case with the defendants seeking information to disprove plaintiff's injuries.[29] In *McMillen*, the defendants sought and successfully obtained plaintiff's login and password information. The court specifically relied upon the terms of use for Facebook and MySpace to dismiss plaintiff's privacy objections: "[R]eading their terms and privacy policies should dispel any notion that information one chooses to share, even if only with one friend, will not be disclosed to anybody else." This is because both sites reserve the right to collect and disclose information. Regardless of the steps users take to limit the information flow on social media sites, "their communications could nonetheless be disseminated by the friends with whom they share it, or even by Facebook at its discretion." The court then



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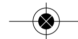

ordered plaintiff to provide his login and password information to the defendants for their review.[30]

II. SUBPOENAS TO SOCIAL MEDIA SITES LIKELY WILL NOT WORK

In addition to seeking discovery from party participants, may a party seek to enforce third party subpoenas to social media sites? Facebook, for instance, will not disclose "user content (such as messages, Wall posts, photos, etc.) in response to a civil subpoena."[31] Instead, it will only provide "basic subscriber information . . . 'where: 1) the requested information is indispensable to the case and not within the party's possession; and 2) you personally serve a valid California or federal subpoena on Facebook. Out-of-state civil subpoenas must be domesticated in California and personally served on Facebook's registered agent.'"[32]

A recent decision from a California federal court supports Facebook's policy that subpoenas to social media sites are generally not enforceable to the extent they seek private user content. In *Crispin v. Christian Audigier, Inc*, an artist sued several licensees and the defendants subpoenaed several social media sites seeking plaintiff's "basic subscriber information" as well as a communications, in part, about the defendants.[33] The plaintiff filed a motion to quash arguing, in part, that the Stored Communications Act ("SCA")[34] prohibited such disclosure. Generally, the SCA prohibits the disclosure of "private communications to certain entities and individuals." The court quashed the subpoenas on SCA grounds.

Crispin has several significant holdings. First, the plaintiff had standing to quash the subpoenas.[35] The court reasoned that "an individual has a personal right in information in his or her profile and inbox on a social networking site and his or her webmail inbox in the same way that an individual has a personal right in employment and bank records."[36] Second, the court found that the social media providers at issue – including Facebook and MySpace – constituted electronic communication service ("ECS") providers under the SCA.[37] Under the SCA, ECS providers are prohibited from disclosing information contained in "electronic storage."[38]

Most significantly, the court determined that the information sought by the defendants was "electronic storage" and thus quashed the subpoenas to the extent that they sought "private messaging" not readily accessible to the public.[39]

While *Crispin* is likely not the last word on whether the SCA prohibits subpoenas directed at third-party providers like Facebook and MySpace,[40] its lesson appears to be that parties should alternatively craft appropriate discovery requests within the parameters discussed in the prior section.[41] Indeed, Facebook suggests as much:

> Parties to civil litigation may satisfy discovery requirements relating to their Facebook accounts by producing and authenticating contents of their accounts and by using Facebook's "Download Your Information" tool, which is accessible through the "Account Settings" drop down menu.
>
> If a user cannot access content because he or she disables or deleted his or her account, Facebook will, to the extent possible, restore access to allow the user to collect and produce the account's content. Facebook preserves user content only in response to a valid law enforcement request.[42]

III. DUTY TO PRESERVE

There is currently no published court decision discussing the duty to preserve evidence maintained on social media sites.[43] Given the possible relevance of material contained within social media websites and an individual user's ability to control information on social media — including altering, restricting, or deleting information[44] — this area is likely to be confronted by the courts in short order. That said, it appears logical and fairly straight-forward, that a party has an affirmative duty to maintain data stored on social media given recent e-discovery decisions.[45] At the very least, employers have an obligation to maintain documentation about the process and information obtained in making employment decisions and this would presumably include, for example, solicitations for and applications received via social media.

IV. CONCLUSION

One of the unique aspects of social media posts is its potential permanence, given that it can be stored indefinitely somewhere on the Internet, regardless of the initial site on which it was posted and the user's intent. Take for example the well-publicized "tweet" that was sent from Chrysler's official Twitter account by an employee of a social media agency: "I find it ironic that Detroit is known as the motor-city and yet no one here knows how to (expletive) drive." Chrysler deleted the tweet almost immediately, but it remains forever available on the Internet as it was re-tweeted several times before being deleted.

Regardless of whether one is propounding or receiving discovery requests, such permanence, combined with the exponential growth of social media across all demographics, makes discovery of social media information inevitable. While courts have provided limited guidance so far, all indications are that courts do not view social media discovery any differently than traditional discovery. At the end of the day, information contained on social media sites is likely discoverable assuming it passes the relevancy threshold.

— END NOTES —

1 This article also appeared in The Oakland County Bar Association's LACHES, Aug. 2011.

2 *Cf. Zimmerman v Weis Markets*, No. CV-09-1535 (Pa Ct Com Pl May 19, 2011) (ordering Plaintiff to provide "passwords, user names and log in names for any and all MySpace and Facebook accounts to Defendant" where pictures on Plaintiff's publicly available MySpace and Facebook pages contradicted his deposition testimony); *BM v DM,* No. 50333/2007, 2011 WL 1420917, at *5 (NY Sup Ct April 7, 2007) (postings made by wife in a divorce action reflecting her belly dancing activities "contradict[ed] her claims that she is unable to work due to injuries sustained in the Accident, rarely leaves home, and socializes only onc per month")

3 MCR 2.302 and Fed R Civ P 34.

4 One example of how courts are struggling with social media is the case of *Barnes v CUS Nashville, LLC*. No. 3:09-cv-00764, 2010 WL 2265668 (MD Tenn June 3, 2010). There the magistrate judge offered to expedite the discovery dispute by creating a Facebook account and then "friending" two individuals "for the sole purpose of reviewing photographs and related comments *in camera* . . . ." *Id.* at *1. He then would "properly review and disseminate any relevant information to the parties . . . [and would] then close this Facebook account." *Id. See also Offenback v LM Bowman, Inc.*, No. 1:10-CV-1789, 2011 WL 2491371 (MD Pa June 22, 2011) (similar); *Anderson v. MG Trucking, Inc*, 11-000165-NI (Mich App Dec. 14, 2011) (vacating the lower court's order that plaintiff's social media information was irrelevant and remanding to allow trial court to further consider the issue as the record was unclear as to why the lower court denied access to plaintiff's records and instructing the court to "list the information provided by plaintiff in general terms such as those described in *Offenback v. LM Bowman, Inc.*").

5 *See Piccolo v Paterson*, No. 2009-04979 (Pa Ct Com Pl May 5, 2011) (denying defendant's motion to compel plaintiff to accept a "neutral friend request" from defense counsel in order to review the Facebook postings she testified about during her deposition).

6 270 FRD 430 (SD Ind 2010).

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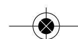

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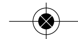

SOCIAL MEDIA AND DISCOVERY: NEW TECHNOLOGY, BUT THE OLD RULES STILL APPLY

(Continued from page 7)

7 *Id.* at 434.
8 *Id.*
9 *Id.* at 437.
10 *Id.* (citations omitted).
11 *Id.* at 435.
12 *Id.*
13 *Id.* at 435-36.
14 *Id.* at 436.
15 *Id.*
16 *Id.*
17 No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149 (D Nev Jan 9, 2007).
18 *Id.* at *2.
19 *Id.* at *6.
20 *Id.*
21 *Id.* at *6-7.
22 *Id.* at *8.
23 *Id.*
24 *See also Held v Ferrellgas, Inc*, No. 10-2393-EFM, 2011 WL 3896513 (D Kan Aug 31, 2011) (granting employer's motion to compel information from Plaintiff's Facebook page in employment discrimination case, stating "Defendant is attempting to mitigate Plaintiff's privacy concerns by allowing Plaintiff to download and produce the information himself, rather than providing login information. Indeed, Defendant itself notes that it is not seeking unfettered or unlimited access to Plaintiff's Facebook, but rather limited access during the relevant time frame"); *Debord v Mercy Health Sys of Kan*, No. 5:10-cv-04055-WEB-KMH (D Kan Aug 8, 2011) (employer's request for post-termination Facebook postings were not related to basis of employee's termination and thus not relevant); *Muniz v United Parcel Serv, Inc.*, No. C-09-01987-CW (DMR), 2011 WL 311374, at *9 (ND Cal Jan 28, 2011) (defendant's request for postings on social media sites by plaintiff's attorneys relating to "work" and "effort" for use in determining attorneys' fees was "not appropriately geared toward revealing information relevant to the fee dispute . . . ."); *Bass ex rel Bass v Miss Porter's Sch*, 3:08cv1807 (JBA), 2009 WL 3724968, at *1 (D Conn Oct 27, 2009) (employer's document request for information on Facebook related to plaintiff's complaint was relevant as it "depicts a snapshot of the user's relationship and state of mind at the time of the content's posting."); *Arcq v Fields*, No. 2008-2430 (Pa Ct Com Pl Dec 7, 2011) (denying defendant's motion to compel access to Plaintiff's social networking website profiles because defendant "has not alleged any basis for believing that Plaintiff's profiles contain any information relevant to the pending matter. . . . While it is not an absolute necessity that a plaintiff have a public profile before a defendant can be given access to the private portion, it is necessary that the defendant have *some* good faith belief that the private profile may contain information."); *Patterson v Turner Constr*, 88 AD3d 617 (NY App Div 2011) (remanding lower court's granting of motion to compel an authorization for all of plaintiff's Facebook records "for more specific identification of plaintiff's Facebook information that is relevant, in that it contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims"); *McCann v Harleysville Ins Co of New York*, 78 AD3d 1524 (NY App Div 2010) (denying defendant's motion to compel plaintiff to turn over "authorization for plaintiff's Facebook account information . . . [because] defendant essentially sought permission to conduct 'a fishing expedition' into plaintiff's Facebook account based on the mere hope of finding relevant evidence"); *but see Gallion v Gallion*, FA114116955S (Conn Super Ct Sept. 30, 2011) (court ordered counsel in a divorce action dealing with custody issues to "exchange the password(s) of their clients' Facebook and dating website passwords" and that "[t]he parties themselves shall not be given the passwords of the other"); *Largent v Reed*, 2011 WL 5632688 (Pa Ct Com Pl Nov 8, 2011) (requiring plaintiff in personal injury action to turn over her Facebook login information to defense counsel finding that access to her Facebook account would not cause "unreasonable embarrassment" or "unreasonable annoyance" to plaintiff because "Facebook posts are not truly private and there is litte harm in disclosing that information in discovery.").
25 907 NYS2d 650, 653 (NY App Div 2010).
26 *Id.* at 655. *See also Beye v Horizon Blue Cross Blue Shield of New Jersey*, No. 06-5337 (FSH), 2007 WL 7393489, at *2 n.3 (DNJ Dec 14, 2007) ("The Court will require production of entries on webpages such as 'MySpace' or 'Facebook' that the beneficiaries shared with others. The privacy concerns are far less where the beneficiary herself chose to disclose the information."); *Dexter v. Dexter*, 2007 WL 1532084, at *6 (Ohio Ct App May 25, 2007) (rejecting a claim of privacy to MySpace postings where "appellant admitted in open court that she wrote these on-line blogs and that these writings were open to the public to view").
27 *Romano,* 907 NYS2d at 657 (emphasis added).
28 *Id.* An interesting side note to the court's order – the court granted access to plaintiff's *entire* Facebook and MySpace pages without engaging in the detailed relevance analysis conducted by the *Simply Storage* court. *Id.*
29 No. 113-2010 CD (Pa Ct Com Pl Sept 9, 2010).
30 *See also Zimmerman v. Weis Markets*, No. CV-09-1535 (Pa Ct Com Pl May 19, 2011) (ordering Plaintiff to provide "passwords, user names and log-in names for any and all MySpace and Facebook accounts to Defendant" where pictures on Plaintiff's publicly available MySpace and Facebook pages contradicted his deposition testimony); *Largent*, 2011 WL 5632688 ("There is no reasonable expectation of privacy in material posted of Facebook. Almost all information on Facebook is shared with third parties, and there is no reasonable privacy expectation in such information.").
31 May I obtain contents of a user's account from Facebook using a civil subpoena?, http://www.facebook.com/help/?faq=17158 (last visited Jan 11, 2012).
32 May I obtain any information about a user's account using a civil subpoena?, http://www.facebook.com/help/?faq=17159 (last visited Jan 11, 2012).
33 717 F Supp 2d 965, 968-69 (CD Cal 2010).
34 *See* 18 USC 2701 *et seq.*
35 *Id.* at 976. *See also Mancuso v Fla Metro Univ*, No. 09-61984-CIV, 2011 WL 310726, at *1-2 (SD Fla Jan 28, 2011) (plaintiff in FLSA action had standing to quash subpoena directed to social media sites, but refusing to do so on jurisdictional grounds).
36 *Id.* at 974.
37 *Id.* at 980. The court did so in large part by analogizing to private electronic bulletin board services due to the private messaging capabilities of the social media sites, including the ability to restrict access to only certain users.
38 18 U.S.C. § 2701(a).
39 *Crispin*, 717 F Supp 2d at 987-88, 991. The court also found on alternative grounds that "Facebook and MySpace are RCS providers" for the purposes of "wall postings and comments" because individuals may limit accessibility to select users. *Id.* at 990.
40 *See also O'Grady v Superior Court*, 139 Cal App 4th 1423, 1447 (2006) (third-party subpoenas require consent from owner of information, not the transmitter's or service provider's).
41 *But see Ledbetter v Wal-Mart Stores, Inc*, No. 06-cv-01958-WYD-MJW, 2009 WL 1067018, at *2 (D Colo April 21, 2009) (enforcing subpoena to Facebook, MySpace, and Meetup.com, without discussing the SCA); *Largent,* 2011 WL 5632688 (holding that the SCA did not apply to plaintiff because she was "not an entity regulated by the SCA" and thus the SCA did "not protect her Facebook profile from discovery.").
42 May I obtain contents of a user's account from Facebook using a civil subpoena?, http://www.facebook.com/help/?faq=17158 (last visited Jan 11, 2012).
43 Part of the Order in *Zimmerman v. Weis Markets, Inc*, *supra*, stated that "Plaintiff shall not take steps to delete or alter existing information and posts of his MySpace or Facebook accounts." No. CV-09-1535.
44 Consider the recent spoliation case from a Virginia state court. In *Lester v Allied Concrete Company*, the plaintiff brought a wrongful death case against his wife's former employer. Case Nos. CL08-150, CL09-223 (Va Cir Ct). Defendants sought discovery regarding plaintiff's Facebook page upon discovering a picture of the allegedly distressed widower holding a beer can while wearing a t-shirt emblazoned with "I hot moms." Plaintiff's attorney then instructed plaintiff through his paralegal to "clean up" his Facebook and MySpace pages prior to responding to defendant's discovery requests because "we don't want blowups of this stuff at trial" and plaintiff deleted sixteen pictures from his Facebook page. He also, at his attorney's request, deactivated his Facebook page. After trial, the court sanctioned plaintiff and his attorney for this spoliation, requiring them to pay a total of $722,000 in fees. *See also Patel v. Havana Bar, Rest and Catering*, 2011 WL 6029983 (ED Pa Dec 5, 2011) (allowing an adverse inference instruction, the redeposition of several witnesses at plaintiff's cost, and awarding attorneys fees and costs where plaintiff failed to produce witness statements made on Facebook).
45 *See, eg, Zubulake v UBS Warburg LLC*, 220 FRD 212, 217-18 (SDNY 2003) ("Zubulake IV"). ■

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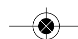

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RECENT ACTIVITY UNDER THE AMERICANS WITH DISABILITIES ACT

Jay C. Boger
Kienbaum Opperwall Hardy & Pelton, P.L.C.

Disability cases have been on the rise since the passage of the ADA Amendments Act in 2008 (effective 2009). Here are some recent items of interest.

EEOC Lawsuits And Settlements Show Increased Focus On Disabilities. The ADA Amendments Act (ADAAA) broadened the scope of covered disabilities, and the EEOC regulations and comments confirm a heightened emphasis on disability claims. EEOC reasonable cause findings for ADA charges increased almost 20 percent in 2010, and the Commission has been boasting about several significant settlements of disability claims in recent months. With the focus now less on the threshold issue whether an employee meets the statutory definition of "disabled," employers must look more closely at the interactive process with employees who indicate a need for accommodation, determining reasonable accommodations, and avoid decision-making processes that could be deemed discriminatory.

EEOC Explains "Shy Bladder Syndrome" Can Be A Covered Disability. The EEOC recently issued a discussion letter concerning employees with paruresis ("shy" or "bashful" bladder syndrome). EEOC Informal Discussion Letter, dated August 12, 2011. The condition is generally considered an anxiety disorder and often treated with cognitive-behavioral therapy. An employer raised the question whether employees with this syndrome may sue under the ADA if subjected to adverse employment actions based on their inability to provide a urine specimen for drug tests or who are denied alternative testing that does not involve urination. The EEOC noted the significantly broadened definition of "disability" under the ADAAA. Major life activities now include major bodily functions including bladder and brain functions, and the "substantially limits" standard is not a demanding one. The EEOC opined that paruresis can, depending on individual circumstances, constitute a covered disability. Thus, a person suffering from "shy bladder syndrome" may be entitled to reasonable accommodation such as being permitted to provide hair or saliva for drug testing rather than urine.

Bridge Worker With Fear Of Heights Can Proceed To Trial On Disability Claims. In *Miller v. Illinois Dep't of Transportation*, 2011 U.S. App. Lexis 9534 (7th Cir. 2011), the U.S. Court of Appeals for the Seventh Circuit reversed summary judgment for the employer, holding that the plaintiff, a bridge-crew worker, was substantially limited in the major life activity of working because of his agoraphobia (fear of heights). The court rejected the employer's argument that working above 25 feet was an essential function of the plaintiff's job where there was a history of job swapping among crew members based on their strengths and limitations. The court also held that there were fact issues regarding whether the plaintiff was fired in retaliation for his accommodation request.

Pregnancy-Related Complications Can Be A Disability. In *Serendnyj v. Beverly Health Care, LLC,* 2011 U.S. App. Lexis 17810 (7th Cir. 2011), the Seventh Circuit cited an EEOC interpretive guidance in holding that pregnancy complications can rise to the level of an ADA-qualifying disability if they are the product of a physiological disorder. The court was careful to point out, however, that because pregnancy is of limited duration – and any complications that arise dissipate once a woman gives birth – an ADA plaintiff asserting substantial limitation of a major life activity under these circumstances faces "a tough hurdle." The court affirmed summary judgment for the employer because the plaintiff was not substantially limited in any major life activity where her pregnancy-related complications did not last throughout her pregnancy or beyond. Thus, the conditions were too temporary to constitute a disability.

No Duty To Accommodate Under ADA's Association Provision. The U.S. Court of Appeals for the Sixth Circuit recently decided an issue of first impression concerning a claim of discrimination based on the plaintiff's association with a disabled person. In *Stansberry v. Air Wisconsin Airlines Corp,* 2011 U.S. App. Lexis 13659 (6th Cir. 2011), the plaintiff's wife suffered from an auto-immune disorder that caused a stroke and other lasting health problems. Her condition worsened and required a series of treatments. During the treatment period, the airline disciplined Stansberry for various performance problems and ultimately fired him. Stansberry sued, claiming violation of the ADA provision prohibiting denial of equal job benefits to a person because of a known disability of an individual with whom the person is related or has an association. Stansberry alleged that his wife's condition caused a distraction of which his employer wanted to rid itself. The Sixth Circuit held that employers are not required to accommodate non-disabled workers under the associational provision. Consequently, while Stansberry's poor performance was likely due to his wife's illness, that fact was irrelevant. Moreover, Stansberry failed to show that his wife's disability was in any way connected with the airline's decision to discharge him.

Employee With Cerebral Palsy Fails To Prove Disability Discrimination. In *Whitfield v. State of Tennessee, et al.*, 2011 U.S. App. Lexis 6204 (6th Cir. 2011), the Sixth Circuit affirmed summary judgment for the employer where there was overwhelming evidence of poor job performance unrelated to the plaintiff's disability. Whitfield worked as an administrative assistant for the State Department of Mental Health and Developmental Disabilities. Due to her blindness in one eye and cerebral palsy, the employer accommodated her with a special computer keyboard, a larger computer monitor, and a printer-scanner near her desk. Whitfield made numerous basic clerical errors, admitting in an email to her superiors: "Sorry about my Grammar and English never have done complete sentences very well Thanks." Her direct supervisor began doing more of Whitfield's work herself and assigning it to other staff members. Soon after, Whitfield was fired and she sued claiming ADA violations. She argued that the accommodations she had been given were insufficient, but the employer asserted that it was never notified of a need for additional accommodation. The Sixth Circuit held there was no genuine issue of fact as to whether the discharge was due to Whitfield's poor performance – there was overwhelming evidence establishing that. While some of Whitfield's performance problems

(Continued on page 10)

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RECENT ACTIVITY UNDER THE AMERICANS WITH DISABILITIES ACT

(Continued from page 9)

could be attributed to her disability and the employer's failure to implement successful accommodations, many of her problems were completely unrelated to her disabilities.

Worker Fired At End Of Paid Disability Leave Unable To Show Discrimination. The U.S. Court of Appeals for the Ninth Circuit, in *Dep't of Fair Employment and Housing v. Lucent Technologies, Inc*, 642 F.3d 728 (9th Cir. 2011), affirmed summary judgment for the employer where an employee returning from a 52-week disability leave could not perform essential lifting duties. The employee, Steven Carauddo, had originally worked as a telecommunications installer, a largely physical job running cables and wiring electronic components. It required lifting and maneuvering various items that often weighed over 30 pounds. Carauddo suffered a back injury and went out on leave pursuant to Lucent's disability benefit plan. The plan provided that if an employee did not return to work after 52 weeks, he would be terminated from Lucent's active payroll. After a year on leave, Carauddo's physicians confirmed his ability to return to work, but with significant lifting restrictions. Lucent determined that no accommodation of that nature was feasible, and Carauddo was discharged pursuant to the disability plan. The Ninth Circuit held that Lucent asserted a legitimate non-discriminatory reason for the discharge because Carauddo could not perform the essential functions of his job upon his return to work. The court rejected the argument that Lucent failed to individually evaluate Carauddo, noting that Lucent regularly attempted to accommodate him by assessing him with its own medical treaters. The court also rejected the claim that Lucent failed to interact with Carauddo concerning any potential accommodation since the evidence showed that Carauddo had not brought alternative accommodations to Lucent's attention. The court finally concluded that Lucent was not required, as an accommodation, to indefinitely extend Carauddo's disability period. ■

Art Imitates Life

Judge Haller: Mr. Gambini.

Vinny Gambini: Yes, sir?

Judge Haller: That is a lucid, intelligent, well thought-out objection.

Vinny Gambini: Thank you, your honor.

Judge Haller: Overruled!

My Cousin Vinny (1992)

EMPLOYMENT DECISIONS OF THE U.S. SUPREME COURT 2010-2011 TERM

William M. Saxton
Butzel Long

Thompson v. North American Stainless, 131 S.Ct. 863 (2011)

Thompson and his fiancée were both employed by North American Stainless (NAS). His fiancée filed a sex discrimination charge with the EEOC. Three weeks after the EEOC notified NAS of the filing of the sex discrimination charge, NAS fired Thompson.

Thompson filed an EEOC charge and sued NAS under Title VII, claiming that NAS unlawfully fired him to retaliate against his fiancée for filing her sex discrimination charge with the EEOC. The district court and the 6th Circuit Court of Appeals held that because he did not personally engage in any Title VII protected activity, he had no standing to maintain an action for retaliation. The Supreme Court reversed.

The Supreme Court stated that the case posed two questions. If the facts alleged by Thompson are true, does NAS's firing him constitute unlawful retaliation under Title VII? Secondly, can Thompson maintain an action for retaliation under Title VII?

The Court noted that in *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53 (2006), it held that the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e 3(a), prohibits any employer actions that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Id. at 68.

The Court said that if Thompson's fiancée knew that Thompson would be fired, she would clearly be dissuaded from filing an EEOC charge. Firing Thompson was an act of retaliation directed at his fiancée.

Since Thompson was not retaliated against, could he sue NAS for alleged violation of Title VII? The Court answered "yes," noting that Title VII provides that "a civil action may be brought…by the person claiming to be aggrieved…by the alleged unlawful employment practice." 2000e-5(b), (f) (1). Since Thompson was "a person claiming to be aggrieved" by an unlawful employment action, he had standing to sue under Title VII.

Employers should be aware that taking an adverse employment action against an employee closely related to or associated with another employee who has engaged in protected activity may give rise to a third party retaliation claim.

Kasten v. Saint-Gobain Performance Plastics Corp, 131 S.Ct. 1325 (2011)

The Fair Labor Standards Act ("FLSA") contains an anti-retaliation provision that forbids employers to discharge or discriminate against any employee because the employee "has filed any

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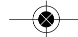

complaint" under or related to the FLSA. 29 U.S.C. § 215(a)(3).

Kasten alleged that he was discharged because he had orally complained to his supervisor, a Human Resources Manager and an operations manager, about the location of company time clocks. He complained that the company placed the time clocks in a location that prevented workers from receiving credit for time spent donning and doffing work related protective clothing. The district court granted summary judgment for the employer on the ground that the FLSA does not afford protection for "oral" complaints, and the Seventh Circuit affirmed.

The Supreme Court reversed, holding that the anti-retaliation provision of the FLSA covers oral complaints. The Court reasoned that excluding oral complaints from the category of protected activity would inhibit the effective enforcement of the FLSA. To interpret the FLSA to exclude protection for lodging oral complaints would undermine the FLSA's basic objectives, the Court said.

Justice Scalia, joined by Justice Thomas, dissented on the ground that the anti-retaliation provision of the FLSA "does not cover complaints to the employer at all." He asserted, in accord with some Circuit Courts of Appeals decisions, that the anti-retaliation provision applies only with respect to complaints to the Department of Labor or a court. The decision does not address this issue.

Straub v. Proctor Hospital, 131 S.Ct. 1186 (2011)

While this case implicates the Uniformed Service Employment and Reemployment Rights Act (the "Act"), the Court's decision would appear to be applicable to all federal laws prohibiting employment discrimination.

This case considers the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of a supervisor who influenced but did not make the ultimate employment decision. The so-called "cat's paw" theory of liability.

Straub worked for Proctor Hospital as an angiography technician. He was a member of the U.S. Army Reserve which required that his work schedule be adapted to enable him to meet the requirement to attend drills one week a month and train two or three weeks a year. His immediate supervisors were openly hostile to Straub's military obligations.

One of his immediate supervisors gave him a disciplinary warning for allegedly failing to stay in his work area. Subsequently, the supervisor told the Vice President for Human Resources that Straub had left his work area without notice in violation of the disciplinary warning, which Straub denied. After reviewing Straub's personnel file, the Vice President for Human Resources relied on the supervisor's accusation and discharged Straub.

A jury found in favor of Straub. The Seventh Circuit Court of Appeals reversed, holding that since the Vice President for Human Resources reviewed Straub's personnel file in arriving at his decision, it could not be said that the biased supervisor exercised a "singular influence" over the decision to terminate Straub.

The Supreme Court reversed holding that an employer can be held liable for discrimination if a supervisor's discriminatory animus was a proximate cause of the adverse employment action, even if the ultimate decision maker was not motivated by discrimination.

This decision sends a message to employers that having an HR or higher level manager review an adverse employment decision will not necessarily absolve the employer of liability for the discriminatory animus of a subordinate.

An employer should have the ultimate decision maker interview the targeted employee and make sure that the subordinate supervisor's account and recommendation are well supported.

AT&T Mobility v. Concepcion, 131 S.Ct. 1740 (2011)

The Court held that California law prohibiting a class arbitration waiver in a consumer contract was preempted by the Federal Arbitration Act (the "Act") 9 U.S.C. § 2. While this case involved a consumer dispute, since the decision is premised on the preemptive effect of the Act, it clearly implicates the scope of mandating arbitration agreements in the employment context.

AT&T advertised a cell phone service contract which included a free cell phone. But, after entering the service contract, AT&T charged the Concepcions $30.22 for sales tax on the retail value of the advertised free cell phone. The Concepcions sued AT&T for false advertising and fraud in representing that the cell phone was free.

The cell phone service agreement provided for arbitration of all disputes but required that a customer must pursue any claim in an "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." The district court, affirmed by the Ninth Circuit Court of Appeals, held that the service agreement was unconscionable under California law because it required consumers to waive the right to file class arbitration claims.

The Supreme Court reversed (a 5-4 decision) holding that the California law is in conflict with the dual goals of the Federal Arbitration Act: (1) encouraging speedy dispute resolution and (2) enforcing private arbitration agreements according to their terms.

The Court noted that the California rule would upend the Act's goal of speedy dispute resolution because class arbitration leads to a much longer process. Further, the Court said, arbitrators are not likely to be familiar with the procedural requirements for class certification.

Employers who want to avoid the risk of employee class arbitrations should include appropriate language in employment agreements.

Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011)

In 2001, several current and former women employees of Wal-Mart brought a class action alleging that Wal-Mart discriminated against women employees by denying them equal pay

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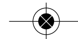


EMPLOYMENT DECISIONS OF THE U.S. SUPREME COURT 2010-2011 TERM

(Continued from page 11)

and promotions on the basis of their sex in violation of Title VII of the Civil Rights Act of 1964.

The plaintiffs sought to represent a class comprised of all women employed by Wal-Mart at any time since December 28, 1998 at any of Wal-Mart's 3,400 stores in the 50 states, who had allegedly experienced gender discrimination in the areas of pay and promotions – a class of over 1.5 million women.

Plaintiffs did not allege that Wal-Mart had any express practice or policy fostering gender discrimination. Rather, they claimed that the broad discretionary authority Wal-Mart gave to local store managers over pay and promotion decisions was exercised disproportionately in favor of men, resulting in an unlawful disparate impact on women employees. Further, plaintiffs claimed that Wal-Mart was aware of the disparate impact on women employees, and its tolerance of the local store managers' decisions amounted to disparate treatment of women employees.

Plaintiffs sought declaratory relief, injunctive relief, punitive damages and billions of dollars in back pay. In 2004, the federal district court in California certified the class. In 2010, the Ninth Circuit Court of Appeals affirmed the class certification in a 6 to 5 en banc ruling. The Supreme Court reversed holding (in a 5 to 4 decision) that plaintiffs did not satisfy the so-called "commonality" requirement of Rule 23(a)(2) and (in a unanimous decision) that class certification under Rule 23(b)(2) is inappropriate where, in addition to injunctive relief, plaintiffs seek individual awards of money damages for back pay.

Rule 23(a)(2) provides that one or more members of a class may sue as representative parties only if "there are questions of law or fact common to the class." The Court stated that this is not a mere pleading standard. Alleging that all class members suffered a violation of the same law does not establish commonality. Whether the commonality requirement is met turns on the evidence and plaintiff "must be prepared to prove" that there are "in fact" common questions of law or fact.

The alleged common question in Wal-Mart was whether Wal-Mart engaged in a company-wide pattern or practice of gender discrimination. The only evidence of a general policy of discrimination offered by plaintiffs was the purported expert opinion of a sociologist that, based on his social analysis, Wal-Mart had "a strong corporate structure" that makes it "vulnerable" to "gender bias."

Plaintiff's basic theory was that a strong "corporate culture" permitted a bias against women to infect, perhaps subconsciously, the discretionary decision making of each one of Wal-Mart's thousands of managers, thereby making every woman employee the victim of a common discriminatory practice.

The Court stated that the commonality requirement of Rule 23(a)(2) requires a common question that can be resolved by a common answer, such that each one of the claims of the class is resolved "in one stroke." The Court said that it is quite "unbelievable" that thousands of Wal-Mart local store managers, some male, some female, exercised their broad discretion in a common way without some common corporate direction.

Accordingly, demonstrating that one local store manager was influenced by gender bias in exercising his broad grant of discretion does nothing to show that another store manager was influenced by gender bias. So, the Court concluded that the plaintiffs "have little in common but their sex and this lawsuit."

While a majority of the Court ruled that plaintiffs could not maintain any type of class action because of failure to meet the commonality requirement of Rule 23(a)(2), in a unanimous decision the Court held that in any event, plaintiffs could not maintain a class action under Rule 23(b)(2).

Rule 23(b)(2) permits a class action when the party opposing the class (i.e., Wal-Mart) has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

The critical element of a Rule 23(b)(2) class action is the indivisible nature of the declaratory or injunctive relief sought which provides relief to the entire class at once. In Wal-Mart, plaintiffs not only sought declaratory and injunctive relief for the class as a whole, but also an individualized award of money damages for back pay. The Court held that Rule 23(b)(2) does not authorize class certification when each class member seeks an individualized award of money damages.

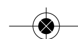
Several aspects of the Court's decision should be given particular note.

(1) Commonality is more than a pleading requirement. Alleging that putative class members have suffered a violation of the same law does not establish commonality.

(2) Common questions of fact or law do not qualify a class action unless those questions have common answers for all class members. If individual circumstances are likely to produce different answers, commonality is not satisfied.

(3) Trial courts should make a "rigorous analysis" to determine if the prerequisites of Rule 23 are met and this will frequently entail analysis of the merits and the evidence plaintiffs will rely on.

(4) Expert testimony offered in connection with class certification should meet the reliability standard under *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579. ■



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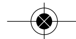


LMRDA SECTION 203 PERSUADER RULES AND THE UNITED STATES DEPARTMENT OF LABOR'S PROPOSED RULE NARROWING THE "ADVICE" EXEMPTION

Richard A. Hooker
Varnum LLP

On June 21, 2011, USDOL published a proposed rule, *76 Fed. Reg. No. 119*, in which it purports to significantly redefine "persuader activity" under Section 203 of the Labor-Management Reporting and Disclosure Act, 29 USC 433, by narrowing the exemption from that term for "advice" to employers in union organizational, representation election and other labor dispute settings. The time period for comments closed September 21, and the labor relations community now awaits issuance of a Final Rule.

Essentially, the Proposed Rule debunks the long-held interpretation of Section 203 that to constitute persuader activity, a legal or other advisor's activity has to involve *direct* communication with a client's "employees," as the term "employee" is defined under the National Labor Relations Act, 20 USC 150 *et seq*. Under the proposed rule, each of the following activities currently subject to the advice exception would or might become persuader activity:

- preparation of campaign materials and speeches used by the employer in defending an organizational campaign;
- Editing of such campaign materials and speeches;
- Supervisor training in the course of the employer's defense of an organizational campaign;
- meetings with managers and supervisors during the course of the campaign in an effort to determine the legality of the campaign and whether the employer's campaign message is getting through to or resonating with the employees; and
- all work with employers on communications with Unions and their members regarding strikes, lockouts, the decision of the employer to operate its facility during a labor dispute, and the decision of the employer to hire replacement workers.

Once the existence of persuader activity is established, both the employer and the consultant are then required to complete and file Forms LM-10 and LM-20 with DOL. In addition to disclosing the existence and terms of their engagement agreement, the parties would also be required to indicate the specific persuader activities performed by the attorney or consultant and the fees charged for those activities. Also, the attorney or consultant would be required to disclose, as a matter of public record, all fees received from clients for all labor relations advice to clients *and the identity of those clients*. All of these requirements and indeed, the Proposed Rule itself, seem premised on the often questionable notion employees do not currently know how much and with whom their employers are spending for campaign defense.[1]

The American Bar Association's Labor & Employment Law Section has submitted commentary objecting to the breadth of the Proposed Rule and expressing serious concern that it conflicts with the employer's "fundamental right to counsel." The Section went on to opine:

> The scope of this disclosure requirement compels the disclosure of a great deal of confidential financial information about clients that has no reasonable nexus to the 'persuader activities' that the Act seems to monitor.

The Section concluded with an observation the Proposed Rule would discourage lawyers from representing employers in such settings, thereby increasing the likelihood employers would engage, unwittingly or otherwise, in greater numbers of unlawful acts while defending organizational campaigns, the chief complaint of Unions and union lawyers everywhere.

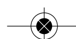
While the reader is left to formulate his or her own conclusions regarding this Proposed Rule while the labor relations community awaits the Final Rule, it is virtually certain to be good news for aggressive labor consultants, who have not been particularly daunted by the reporting requirement in the past. Also, the management legal community, anxious to avoid required disclosure of client fees and financial information, may be left to parse some very difficult questions under the new Rule:

- When does training, designed to educate managers and supervisors on the legal basis for the right to organize,[2] representation election procedure and the dos and don'ts of their own daily behavior, become persuader activity?
- Can the labor lawyer meet with managers and supervisors during the pendency of an election petition and, if so, what are the permissible bounds of the advice exemption?
- At what point does the labor lawyer's editing of either campaign material or speeches to assure lawful content become persuader activity?
- How far may the labor lawyer go in working with clients on the operation of their businesses during a pending labor dispute without crossing the line over into persuader activity?
- Can involvement in collective bargaining, particularly during a pending labor dispute, ever constitute persuader activity?
- If our non-labor partners have the predictable objections to the financial disclosure requirements, is our position in our law firm all that secure if we choose to continue advising our clients in organizational and labor dispute settings?

—END NOTES —

1 The author asserts, for himself and his law firm, that in virtually every organizational campaign of recent vintage, the organizing union has done a very thorough job of educating employees about the employer's attorneys and consultants, almost from the inception of that campaign.

2 As well as the companion Section 7 right to refrain from organizational and union activity. ■



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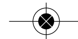


MERC UPDATE

Nicole M. Cowell
White, Schneider, Young & Chiodini, P.C.

A brief summary of two recent decisions issued by the Michigan Employment Relations Commission follows. Recent decisions of the Commission may be reviewed on the Bureau of Employment Relations' website at www.michigan.gov/merc.

***Traverse City Power and Light – and – Utility Workers of America, Local 285,* Case No. C11 D-086 (November 15, 2011)**

On October 7, 2011, the Administrative Law Judge ("ALJ") issued her Decision and Recommended Order finding the Respondent-Employer, Traverse City Power and Light, did not violate Section 10 of the Public Employment Relations Act ("PERA"), 1965 PA 379, and accordingly the unfair labor practice ("ULP") charge filed by Charging Party, Utility Workers of America, should be dismissed. Neither party filed exceptions to the Recommended Decision and Order of the ALJ. Accordingly the Commission adopted the decision as its final order on November 15, 2011.

The crux of the ULP charge alleged that Respondent violated its duty to bargain by unilaterally altering certain employee benefits, including pension, as set forth in the collective bargaining agreement ("CBA") between the parties. Specifically, the charge stated that Respondent "elected to put a self imposed moratorium on the MERS program." Charging Party asserted that it filed a grievance over this alleged contractual violation, but the parties agreed to hold the grievance in abeyance pending a decision by Respondent on whether or not to reinstate the program. In April of 2011 Respondent notified Charging Party that it would not reinstate the program and stated it was denying the grievance over this issue. Thereafter, Charging Party filed the instant ULP alleging "Respondent's actions unilaterally violated the language of the current contract and disregarded negotiated contract language."

On August 4, 2011, Respondent filed a motion for summary disposition alleging that Charging Party did not state a claim for which relief could be granted under PERA. In response to this motion the ALJ issued a show cause order to Charging Party asking why the charge should not be dismissed. Charging Party failed to respond to the show cause order.

As a result of Charging Party's failure to respond to the order, the ALJ made the following findings:

Where the parties have negotiated a CBA and included in its terms a provision for a grievance procedure, the enforceability and jurisdiction of resolving conflicts under it are generally left to an arbitrator. "The Commission does not generally find a violation of the duty to bargaining in good faith based on a party's violation or violations of a [CBA]… unless the facts indicate that the party has repudiated the agreement." The ALJ went on to state that "repudiation" is "an attempt to rewrite the parties' contract, a refusal to acknowledge its existence, or a complete disregard for the contract as written." Further, "repudiation" must involve a "substantial" contract breach and have a "significant impact on the bargaining unit," and further there cannot be a bona fide contractual interpretation dispute.

The ALJ ultimately ruled that the charge should be dismissed for the following reasons: (1) Charging Party did not specifically allege that Respondent repudiated the CBA; (2) Charging Party failed to respond to the show cause order; (3) the alleged violation occurred more than six months prior to the filing of the charges in the instant case and therefore this was beyond the statute of limitations.

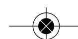
Southfield Public Schools – and – Michigan Educational Support Personnel Association (MESPA) – and – Educational Secretaries of Southfield (ESOS)
Case Nos. C09 B-017 and C09 B-019 (November 15, 2011)

On July 22, 2010, the Administrative Law Judge ("ALJ") issued her Decision and Recommended Order finding that Respondent-Employer, Southfield Public Schools, violated Section 10(1)(e) of the Public Employment Relations Act ("PERA"), by failing to bargain in good faith when it unilaterally eliminated its practice of paying employees for association release time. The ALJ determined that these payments had become and established past practice and therefore a term and condition of employment for the members of the bargaining unit. The ALJ further stated that Respondent had a duty to bargaining in good faith with Charging Party before eliminating this practice and that it failed to give Charging Party an opportunity to bargain over the unilateral elimination. The Decision and Recommended Order was served on the parties and Respondent filed exceptions while Charging Party filed a brief in support of the Recommended Order. The Commission reviewed Respondent's exceptions and found them without merit.

The paid association release time had occurred from no less than 1986 to 2008. Further there was contractual language to support the proposition that release time was to be paid for by Respondent. Respondent did not dispute that this was the established practice prior to October of 2008 when it terminated this practice. Respondent instead stated that it is not a binding past practice because the CBA only provided for paid release time for the association president and therefore payment to any other members for association release time was contrary to the express language of the contract. The ALJ disagreed with this assertion stating that the contract was silent as to whether or not other individuals would be paid for the time so the past practice of paying members other than the president was not contrary to the contract and therefore binding.

Respondent also argued that it had a right to discontinue the past practice of paying for association release time at the expiration of the CBA. The ALJ again disagreed with this assertion stating that this was an established term and condition of employment and therefore could not be unilaterally discontinued during negotiations for a new contract absent impasse.

Respondent raised several exceptions to the ALJ's Recommended Order. Among Respondent's exceptions was to the finding that the Employer had breached its duty to bargain in good faith with respect to the change to payments for association leave time. Respondent also alleged that the collective bargaining agreement was ambiguous with respect to pay for release time. The Commission discussed Respondent's exceptions and found that the payment for association leave time was an established practice prior to its unilateral elimination and thus Respondent was obligated to bargain in good faith over its elimination. The Commission further stated, "An employer who notifies the union of its decision only after the decision becomes a *fait accompli* violates its obligation to bargain in good faith." In coming to these findings, the Commission upheld the ALJ's Decision and Recommended order. ■



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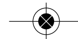


FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

In his 2009 Presidential Address to the National Academy of Arbitrators, the great Canadian arbitrator Michel Picher said:

> It is an extremely great honor to be president of this Academy, but I want to share with you the fact that it is not the greatest honor that I have ever had. The greatest professional honor that I have ever had is one that I share with each and every member of this Academy. It happens every time I receive a phone call or a letter that says "Dear Mr. Arbitrator: We, the following parties, have been unable to resolve our differences in respect of a grievance and we would request your services to hear our arguments and render a decision that will be final and binding upon us."

I am proud to have received that honor many times in the past twenty years. It is both gratifying and humbling to be entrusted with the responsibility of arbitrating labor disputes. I am also grateful because I like writing decisions. I enjoy the process of thinking through the arguments and crafting an award. I am one of the lucky people who loves what he does. Even so, I write arbitration decisions with reluctance.

I sometimes tell the story of the 1971 Robert Altman movie *McCabe and Mrs. Miller* to make this point. Warren Beatty plays McCabe. He has a nice little whorehouse and saloon operation, and the evil mining company wants to buy him out. They make an offer and he turns them down. They increase their offer. He turns them down again. The company decides it can't reason with McCabe, and they send some bad guys to kill him instead.

When the bad guys arrive McCabe tries to talk business with them, but the head bad guy says, "I don't make deals." McCabe says, "You don't work for Harrison Shaughnessy?" The bad guy says, "Sometimes. But only when they can't make a deal."

Arbitrators are like that. We don't make deals. We read the contract, listen to the testimony, analyze the arguments, and make a decision. Sometimes there is no other way to get to resolution, but an arbitration award is a blunt instrument. Deals are better.

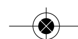
There are arguments against settlement. "It just encourages the bastards" is the most common. But there are equally valid arguments against adjudication. Yes, arbitrators try to rule without fear or favor and to decide each case as if it were our last. We aspire to objectivity. Justice, as we know, is blind. But the other side of that coin is that Justice CAN'T SEE WHAT SHE'S DOING! Arbitrators rule without understanding the context of their rulings and without having to live with the result. We are susceptible to making mistakes that the parties themselves would never make.

"Someone needs to teach those bastards a lesson" is another argument against settlement. But there are at least two problems with it. First, outcomes are never certain. Even if an arbitrator agrees that your opponent is a loathsome creep and deserves to be taught a lesson, he may find that the contract requires the opposite result. Second, there is this troublesome thing about bastards. It is fiendishly difficult to teach them anything.

Finally, those who oppose making deals to settle grievances say it is the principle of the thing. Never negotiate with terrorists. Millions for defense, not a penny for tribute. Better to die on your feet than live on your knees. That kind of thing.

Very inspiring. And it provides plenty of work for labor lawyers. But this kind of hyperventilating is as out of place in an ordinary labor grievance as it would be in an argument with your wife. In a relationship where the parties have to live together, winning can be worse than losing.

So I will write you a decision if you insist. I'm honored to be asked, I like writing decisions, it's an honest living, and it supports my habits. But deals are better. ■



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OVERVIEW OF TWO MAJOR CHANGES IN MICHIGAN PUBLIC SECTOR LABOR LAW

Steven H. Schwartz and John A. Schipper
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The Michigan Legislature recently enacted two major changes to Michigan labor law that will significantly impact collective bargaining over health insurance in the public sector. Although other legislative amendments passed in 2011 affect specific classifications of public employees (such as teachers, police officers, and firefighters), the two legislative changes discussed in this article affect virtually all public sector employees, including those who are not represented in collective bargaining.[1]

AMENDMENTS TO PERA

P.A. 54 of 2011 amends the Public Employment Relations Act ("PERA") by changing three aspects of bargaining in the public sector.[2] First, unions and public employers are prohibited from agreeing to retroactive increases in wages and benefits after the expiration date of the prior collective bargaining agreement. Arbitration panels under Act 312 similarly are barred from ordering any such retroactive increase.[3] Second, "step" increases may not be implemented after a collective bargaining agreement expires. "Step" increases, which are common in public school and municipal contracts, provide for automatic wage increases based upon the employee's service with the public employer.[4]

These first two changes are not dramatic, particularly because few public employers are agreeing to significant wage or benefit increases. Rather, most public employers are seeking economic concessions from their employees in response to the severe decline in revenues.

In contrast, the third change to PERA is significant to both the negotiating process and the bargaining position of the public employer. Under this amendment, a public employer is required to charge 100% of all increases in any insurance benefit — health, prescription drugs, dental, vision, life, disability — to the employee immediately after the collective bargaining agreement expires, until a successor agreement is reached.[5] The public employer may collect this payment by payroll deduction, without the prior written consent of the employee.[6]

The practical effect of this third change is profound on the process of public sector bargaining. In private sector labor relations, if the employer and union are unable to reach agreement before their contract expires, the usual result is that either the employees strike or the employer locks them out. Since this creates an actual deadline, contract negotiations usually are completed before the expiration date of the collective bargaining agreement.

Until now, the public sector had no such deadline, and contracts were rarely negotiated prior to the expiration of the collective bargaining agreement. If the public employer demanded concessions on benefits, particularly health insurance, it would lose potential cost savings while negotiations dragged on for months after the nominal expiration of the collective bargaining agreement.

Under the amendment, public employees and the unions that represent them have a strong incentive to settle prior to the expiration of the old collective bargaining agreement, even if some concessions are demanded. Health insurance premiums are typically increasing by 9 - 13% per year. Translated to typical public sector contracts, this increase frequently means a public employee would have to pay $230 to $290 per month in health insurance costs, in addition to the employee's existing contribution. As a result, the pressure to avoid this type of increased contribution has already, and will likely to continue, to encourage settlements prior to the expiration of collective bargaining agreements.

Public sector bargainers will need to adjust their bargaining strategies, and their calendars, to respond to this newly created deadline.

PUBLICLY FUNDED HEATH INSURANCE CONTRIBUTION ACT

Public employers are now starting to evaluate how to comply with the new Publicly Funded Health Insurance Contribution Act ("PFHIC"), which contains many ambiguities and will likely result in significant litigation in the appellate courts.[7] PFHIC requires "public employers" (a broadly defined term which includes the State of Michigan, local units of government, political subdivisions, school districts, community colleges, public sector universities, and various intergovernmental agencies) to share the cost of health insurance premiums with their current unionized and non-unionized employees (subject to the "opt-out" provision discussed below).[8] Retirees are exempted from the PFHIC.[9]

EFFECTIVE DATE

Public employers subject to PFHIC must comply with its provisions on or after January 1, 2012, depending on when their "medical benefit plan coverage year" begins.[10] This term is subject to at least two interpretations. It either means the twelve-month period starting when annual deductibles and copayments are retriggered under the "medical benefits plan", or it means the twelve-month period starting when the annual increases in premiums become effective.[11] For many public employers, these twelve-month periods are not identical.

The sole exception is that employees covered by collective bargaining agreements "executed" prior to September 15, 2011, are grandfathered until their agreement expires. At that point, those employees lose their grandfather status and their benefits must come into compliance with PFHIC.[12]

Thus, many public employers will be faced with charging their non-union employees, typically key management and administrative officials, with contributions months or years before the unionized employees they supervise.

DEFAULT OPTION

If a public employer takes no action to elect another option, it will automatically default to the "hard dollar cap".[13] Under this option, two calculations are required. First, the employer must calculate the number of employees enrolled in single, two-person and family coverage. Then the public employer must calculate the total of: $5,500 for each employee enrolled in single coverage, $11,000 for each employee enrolled in two-person coverage and

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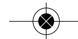


$15,000 for each employee enrolled in family coverage.[14] The sum of this formula is the total amount the public employer may annually spend on health insurance coverage. Costs are inclusive of actual or illustrative premiums, reimbursements for prescription drugs, deductibles or co-payments, or employer payments into health savings or flexible spending accounts.[15]

Within the hard dollar cap, the public employer is allowed to "allocate its payments for medical benefit plan costs among its employees and elected public officials as it sees fit".[16] The ability to allocate total dollars within the hard cap raises several issues. First, in most situations, the cost of two-person coverage is much closer to the cost of family coverage; it is typically more than double the cost of single coverage. Thus, assuming the employer does not want two-person plan participants to pay disproportionate share of their costs, the employer will have no choice but to make allocation adjustments within its hard dollar cap.

Second, there is considerable controversy in the labor relations community regarding whether public employers have to, or even may, collectively bargain with unions, over such an allocation. Many management-side labor lawyers believe that public employers are prohibited from bargaining with unions about this allocation and must make this allocation unilaterally. Many union-side labor lawyers believe that this allocation is either a mandatory or, at least, permissive subject of bargaining. Mandatory subjects of bargaining are conditions that unions and public employers must bargain about, either to resolution or impasse; permissive subjects of bargaining are conditions that unions and public employers may agree to bargain about, or may lawfully refuse to bargain about.

Third, the allocation will likely encourage employees to change their levels of coverage, such as dropping a child from coverage, in order to move from family to two person coverage, or dropping a spouse from coverage, in order to move to single coverage. These types of individual changes will make it impossible for a public employer to actually ascertain the amount they will charge employees, until all coverage selections have been made.

80-20 OPTION

By a majority vote of its governing body, a local public employer may elect to adopt the "80-20" option.[17] As with the allocation of costs described in the previous section, there is considerable controversy in the labor relations community whether the choice between the Default Option, the 80-20 Option or the Opt-out Option (discussed below) is subject to bargaining, and if so, is it a mandatory or permissive subject of bargaining.

Under the 80-20 option, the public employer may not pay more than 80% of its total, aggregate costs for all medical plans it offers to employees and elected officials. The remaining 20% must be borne by the employees and elected officials. As in the case of the Default Option, the public employer "may allocate the employees' share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit".[18] Under this option, elected officials must be charged at least 20% of the cost.

OPT-OUT OPTION

Some, but not all, "public employers" may elect a third option, to completely opt out of the PFHIC requirements. An entity falling within the definition of "local unit of government" may, with a 2/3 vote of its governing body, elect to exempt itself from the cost-sharing requirements of PFHIC.[19] Cities and counties with "strong mayor"/county executive forms of government may only opt out with the consent of that elected administrator.[20] "Local unit of government" include cities, villages, townships, county and several unique public authorities.[21] Significantly, institutions of higher education, school districts, and intergovernmental authorities do not fall within this definition; therefore, those public entities may not elect to opt out.[22] This distinction between public entities may come under constitutional attack in the courts.

The decision to opt out must be made annually by the governing body. It is problematical if a governing body opts out in the first year of a collective bargaining agreement, but later elects not to opt out in subsequent years of that agreement. It is unclear, in that event, whether the public employer would have to negotiate at least the impact of that decision and allow unionized employees to bargain over the level and types of coverage offered to them under the collective bargaining agreement.

CONCLUSION

Both statutes discussed in this article create profound changes in the nature and process of public sector collective bargaining. Given the inherent ambiguities and the likely legal attacks on their constitutionality and interpretation, it will likely be years before the full meaning of these statutes is resolved.

— END NOTES —

1 P.A. 103 of 2011 amends Section 15 of PERA, by expanding the list of prohibited subjects of bargaining for unionized school district employees. P.A. 116 of 2011 amends Act 312, which provides for binding arbitration of contractual disputes for police officers, firefighters and emergency dispatchers, by changing criteria the arbitration panel must apply and the arbitration process.

2 M.C.L. 423.201 et seq,

3 M.C.L. 423.215b.

4 Id,

5 Id.

6 Id.

7 P.A. 152 of 2011.

8 Section 2(f).

9 Section 2(e).

10 Sections 3, 4(2).

11 Section 2(e).

12 Section 5(1), (2).

13 Section 3.

14 Id.

15 Sections 3, 4(2).

16 Id.

17 Section 4. State employees are subject to the decision of the specified State officials.

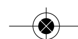
18 Section 4(2).

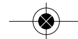
19 Section 8.

20 Section 8(2).

21 Section 1(d).

22 Section 2(f). ■





COLLECTIVELY-BARGAINED RETIREMENT HEALTHCARE LITIGATION AND THE "TRADITIONAL RULES FOR CONTRACTUAL INTERPRETATION"

Stuart M. Israel
Legghio & Israel, P.C.

Collectively-bargained retirement healthcare promises are enforceable under Labor-Management Relations Act (LMRA) Section 301, 29 U.S.C. §185. *UAW v. Yard-Man, Inc.,* 716 F.2d 1476 (6th Cir. 1983), *cert. denied* 465 U.S. 1007 (1984) and *Yolton v. El Paso Tennessee Pipeline Co.,* 435 F.3d 571, 574 (6th Cir. 2006), *cert. denied* 549 U.S. 1019 (2006). Collectively-bargained retirement healthcare promises are also "welfare benefit" plans, enforceable under Employee Retirement Income Security Act (ERISA) Section 502(a), 29 U.S.C. §1132(a). *Schreiber v. Philips Display Components Co.,* 580 F.3d 355, 363 (6th Cir. 2009), citing *Maurer v. Joy Tech., Inc.*, 212 F.3d 907, 914 (6th Cir. 2000) (where "the parties intended to vest benefits and the agreement establishing this is breached, there is an ERISA violation as well as a LMRA violation") and *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1298 (6th Cir. 1991) (broken retirement healthcare promises are CBA breaches and also "a violation of ERISA").

In addressing collectively-bargained retirement healthcare promises, the courts apply "traditional rules for contractual interpretation." *Yard-Man*, 716 F.2d at 1479. See *Reese v. CNH America LLC*, 574 F.3d 315, 321, *reh. denied*, 583 F.3d 955 (6th Cir. 2009) ("ordinary principles of contract interpretation"). The rules are set out in *Yard-Man*. The "court should first look to the explicit language of the collective bargaining agreement for clear manifestations of intent." Where "ambiguities exist, the court may look to other words and phrases in the collective bargaining agreement for guidance." The court may consider the contractual "context" and "interpret each provision in question as part of the integrated whole" and "consistently with the entire document and the relative positions and purposes of the parties." 726 F.2d at 1479-1480. Accord: *Cole v. ArvinMeritor, Inc.,* 549 F.3d 1064, 1069-1070 (6th Cir. 2008); *Yolton,* 435 F.3d at 579; *McCoy v. Meridian Automotive Systems, Inc.,* 390 F.3d 417, 422 (6th Cir. 2004); and *Golden v. Kelsey-Hayes Co.,* 73 F.3d 648, 654-655 (6th Cir. 1996).

"A court may find vested rights 'under a CBA even if the intent to vest has not been explicitly set out in the agreement.'" *Noe v. PolyOne Corp.,* 520 F.3d 548, 552 (6th Cir. 2008), quoting *Maurer*, 212 F.3d at 915. *Maurer* recognizes, too, that: "CBAs may contain implied terms, and the parties' practice, usage, and custom can be considered." *Id.*

If CBA analysis does not resolve ambiguities, the court may consider "extrinsic" evidence of the contracting parties' intent, like collective bargaining history and course of conduct. See *Yard-Man*, 716 F.2d at 1479-1480 and *Cole*, 549 F.3d at 1070, 1075.

Some courts, mistakenly in my view, consider the contracting employer's statements and course of conduct—the employer's post-CBA words and deeds—as evidence "extrinsic" to the CBA and, therefore, appropriate for consideration only if the CBA is ambiguous. I believe, however, that what the employer said and did often ought to be considered as Fed. R. Evid. 801(d)(2) admissions about CBA meaning. This is particularly so where the admissions are offered only to "bolster," and not to "contradict," the "plain language of the contract." See *Meyer v. AmerisourceBergen Drug Corp.,* 264 Fed.Appx. 470, 476 n.3 (6th Cir. 2008) (while the "agreement at issue…is not ambiguous," the district court "did not improperly consult" plaintiff's "parol" deposition statements because those statements "were not used to contradict or alter the terms of a written agreement, but rather were simply used to bolster the clear conclusion from the plain language" of an employment contract).

Admissions by parties include: "a party's own statement"; a statement which "the party has manifested that it adopted or believed to be true"; a statement "made by a person whom the party authorized to make a statement on the subject"; and a statement "made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(A)-(D). A "statement" may be oral or written or "nonverbal conduct, if the person intended it as an assertion." Fed. R. Evid. 801(a). Where the question is whether CBA-promised retirement healthcare was intended to include family coverage and, for example, the employer's unilaterally-issued summary plan description specifies that coverage includes retirees, spouses, dependent children, and surviving spouses, that SPD ought to be considered as a FRE Rule 801(d)(2) party admission, and not excluded as "extrinsic."

I am not aware of retirement healthcare decisions that have directly addressed the distinction between "extrinsic" evidence and admissions. I believe this is because in most cases the issues of contractual unambiguity/ambiguity and extrinsic evidence are not bifurcated, so the distinction does not get court attention. For example, in *Cole v. ArvinMeritor,* 515 F.Supp.2d 791 (E.D. Mich. 2006), the district court rejected company efforts "to argue away *its admissions and extrinsic evidence* of the intent to provide retirees with lifetime health benefits" reflected in, among other things, "oral 'lifetime' assurances" made by company representatives. At 804, 807 (emphasis added). While not providing analysis, the italicized language recognizes the distinction between admissions and extrinsic evidence. Affirming the district court, the Sixth Circuit did not address the "admissions" or the "extrinsic" evidence beyond making the observations that because "the language of the CBAs creates an unambiguous promise for lifetime healthcare benefits, we need not consider extrinsic evidence of the parties' intentions" and "that such evidence, had we considered it, weighs heavily in favor of the plaintiffs and indicates the defendants' intention to provide lifetime retiree healthcare benefits." *Cole*, 549 F.3d at 1074.

Where retirement healthcare promises are collectively-bargained, there is an inference that the contracting parties intended lifetime healthcare; the inference applies if the court "can find either 'explicit contractual language or extrinsic evidence indicating' an intent to vest benefits." *Reese*, 574 F.3d at 321, citing *Yolton*, 435 F.3d at 580 and *Yard-Man*, 716 F.2d at 1482. *Reese* affirmed that "to the extent we put a thumb on the scales in this setting, it favors vesting" and that the *Yard-Man* inference provides "a nudge in favor of vesting in close cases." 574 F.3d at 321.

Once vested, promised retirement healthcare benefits may not be unilaterally altered. See *Allied Chemical Workers v. PPG Co.,* 404 U.S. 157, 182 n.20 (1971) ("[u]nder established contract principles, vested retirement rights may not be altered without the pensioner's consent"; a retiree has "a federal remedy" under LMRA Section 301 "for breach of contract if his benefits were unilaterally changed"); *Yolton*, 435 F.3d at 578 (citation omitted) (once healthcare benefits are vested, "the employer's unilateral modification or reduction of those benefits constitutes a LMRA violation"); *Schreiber*, 580 F.3d at 364 (quoting *Yolton*, "If the parties vested health benefits, an 'employer's unilateral modification or reduction of those benefits'" is an LMRA violation); *Winnett v. Caterpillar, Inc.,* 553 F.3d 1000, 1009, n.5 (6th Cir. 2009) ("once benefits vest, an employer's unilateral modification or reduction of benefits constitutes a Section 301 violation"

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and "an ERISA violation as well"); *UAW v. Loral Corp.*, 107 F.3d 11 (6th Cir. 1997) (table), 1997 WL 49077 at *3 (once vested, retiree healthcare benefits cannot be reduced "unilaterally by the employer or the courts"); *Yard-Man*, 716 F.2d at 1482, n.8 (union and employer "may not…bargain away retiree benefits which have already vested").

See also *Bender v. Newell Window Furnishings, Inc.,* 725 F. Supp. 2d 642, 660 (W.D. Mich. 2010), citing *Wood v. Detroit Diesel Corp.,* 607 F.3d 427, 433-434 (6th Cir. 2010) and *Prater v. OEA*, 505 F.3d 437, 444 (6th Cir. 2007) ("no subsequent agreement" between the union and the employer "could lawfully permit" the employer "to amend or terminate the benefits that had already vested to the retirees") and *Maurer,* 212 F.3d at 918 ("If benefits have vested, then retirees must agree before the benefits can be modified, even by a subsequent CBA between the employer and active employees").

Employers sometimes mistakenly assert an inherent right to modify vested retirement healthcare so long as the modifications are "reasonable," relying on *Reese v. CNH America, LLC,* 574 F.3d 315, *reh'g denied* 583 F.3d 995 (6th Cir. 2009). As Judge Duggan explained in *Reese* on remand, however, whether an employer "should be allowed to make reasonable modifications" depends on "whether, in the context of [each] case, the parties intended to allow [the employer] to make reasonable modifications to retiree health care benefits and, if so, what modifications are reasonable." 2011 WL 824585 (E.D. Mich. 3/3/11) (cited as *Reese on rem'd*) at *6-7. See also *Harps v. TRW Automotive U.S., LLC*, 351 Fed.Appx. 52, 56 (6th Cir. 2009), summarizing *Reese* as "holding" that the CBA "did not resolve the scope" of the promised "lifetime health-care benefits upon retirement" because "the relevant CBA provisions suggest[ed] that the parties contemplated reasonable modifications."

In short, vesting *and* scope issues depend on the CBAs and the parties' intent. Judge Duggan explained how those issues are resolved (*Reese on rem'd* at *7):

> [T]he rules for determining whether the parties to a CBA intended to permit modifications to vested welfare benefits and, if so, the extent of the changes permitted, are no different than the rules for deciding in the first instance whether the parties intended those benefits to vest.

Those rules are the "traditional rules for contractual interpretation." *Yard-Man*, 715 F.2d at 1479-1480.

In addition, employers sometimes try to justify unilateral diminution or elimination of retirement healthcare by chronicling their financial burdens associated with medical cost inflation. While these same employers may champion the sanctity of contract when it suits their purposes, they succumb to buyer's remorse when confronted with their collectively-bargained retirement healthcare promises, often made a decade or more in the past. For these employers, that was then, this is now; so much for promises.

For the moment, however, American jurisprudence continues to recognize that a promise is a promise, even if it is inconvenient to keep. See *Noe v. PolyOne Corp.*, 520 F.3d 548, 564 (6th Cir. 2008) (citation omitted), reversing the district court finding against vested collectively-bargained retirement healthcare, concluding:

> We are cognizant of the overall climate in which this case reaches the court; rising healthcare costs and foreign competition have certainly placed corporations such as PolyOne in a difficult economic position. However, in the absence of impossibility of performance, it is not the prerogative of the judiciary to rewrite contracts in order to rescue parties from "their improvident commitments." ■

HOW WORKERS AND LAWYERS ORGANIZE CLASS ACTIONS IN THE ELECTRONIC AGE

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I. Introduction

In the Web 2.0-governed world, individuals routinely communicate using text-messaging, blogs, Facebook pages, web forums and Twitter accounts. Inevitably, disgruntled employees utilize these tools to communicate their disenchantment about their jobs and bosses, locate like-minded individuals and, in certain cases, encourage coworkers to file employment class action lawsuits. In this sense, Web 2.0 has made it much easier for employees separated by vast distances to organize, locate counsel and file class action employment lawsuits, all without their employers' knowledge. This article catalogues the various methods and sources used by employees to organize class action employment lawsuits, provides examples of such organizing attempts, and recommends best practices and practical advice for employers to recognize when they are faced with potential class litigation.

II. A Multiplicity of Online Avenues to Organize Class Actions

Online forums provide employees with easily-accessible avenues to initiate class actions or encourage others to join. For example, the website "EmploymentLawFirms.com" informs potential litigants that past wage and hour lawsuits yield enormous bounties to employees:

Other previous class action lawsuits covering wages and overtime payments include the following:

- *Citigroup Global Markets paid out $98 million;*
- *UBS Financial Services paid out $89 million;*
- *United Parcel Service paid out $87 million;*
- *IBM paid out $65 million;*

See http://www.employmentlawfirms.com/wages-overtime/wage-overtime-class-action.htm

With incentives like this being trumpeted in the e-world, it's no wonder employees take great pains to organize and join class actions. wikiHow – the "how to manual that you can edit" – has a page entitled "How to Organize a Class Action Lawsuit." *See* http://www.wikihow.com/Organize-a-Class-Action-Lawsuit. The article contains instructions for organizing a class action, suggesting that readers "contact others with similar or identical problems," "check out public records to find lawsuits with similar grievances," "consider publishing the details of your grievance in the local newspaper…to bring your case to the attention of others," and "collaborate with…individuals with similar grievances to choose an attorney."

A simple Google search for the words "class action" yields a multitude of websites dedicated to assisting individuals in locating class action lawsuits in which they might participate. For instance, the blogging site www.eHow.com contains an article entitled "How to Find a Class Action Suit that Benefits You." Among other things, the eHow article directs readers to check out the site www.topclassactions.com "every day or week" to find an applicable class action. The website bills itself as "connecting consumers to settlements, lawsuits and attorneys." It contains numerous listings of class action awards, investigations for potential future class actions and allows

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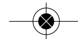


HOW WORKERS AND LAWYERS ORGANIZE CLASS ACTIONS IN THE ELECTRONIC AGE

(Continued from page 19)

site visitors to sign up for an electronic newsletter keeping them informed of potential opportunities to join class actions.

Yet another online class action information site, http://classactionworld.com, contains a forum where readers can post questions regarding their employment situations and ask other readers whether they might be interested in filing a class action lawsuit against specific employers. Some posts on the website's message board, like the following, attempt to whip up support for class action suits:

> *Have you been employed by Scully Transportation and had issues with them as an employer. Such as: discrimination, wrongful switching of accounts, intimidation, unsafe working conditions, and reprisal. If so reply and share your story.*

It's also clear that plaintiff's attorneys regularly surf this website to identify potential clients. In response to one post attempting to gauge interest in a class action lawsuit, an attorney posted the following, providing his name, firm name, address, phone number and email address:

> *Please contact me—I believe we can help you.*

The site http://www.classaction.com/ appears to be the most organized of such websites. It utilizes the "David v. Goliath" theme of individuals banding together to take on a large corporation. The main page states:

> Filing and fighting a lawsuit can cost a great deal of money… But if that person becomes a part of a class (a group of similarly situated people)…then all members of the class have a chance to right a wrong.

This particular site contains information tabs on the front page listing various types of class action lawsuits, including "Labor and Employment, Consumer Fraud, Product Liability and Real Property Damage." Clicking on the Labor and Employment tab yields the following options: "Misclassified Employees/Exempt," "Unpaid Overtime/Break Time," "Discrimination," and "Whistleblower/Qui Tam." The website www.undercoverlawyer.com is also particularly active, with a message board featuring 90 pages of user-posted topics regarding employment lawsuits, filing EEOC charges and locating attorneys. The website's slogan is "what your boss doesn't want you to know." Some users on the website attempt to remain anonymous, while others openly state the name of their employer.

Employees even use job search websites to organize class actions. For example, a post on the website www.indeed.com states:

> Hey all you former or soon to be Home Depot employees. I would [*sic*] like to know how many of you are long term workers or above the age of 60? It seems to me they are getting rid of all long term employees, like me 20 years, and just want to lower the payroll. I had heard at my former store (0268) that we were over staffed with too many full time employees. The ratio is to be 60/40 full time to part time.

A response to this post states: "Help is available, email: rainbowsnbeaches76@gmail.com Age Discrimination is illegal, and any type of discrimination. Class action."

Employees considering filing employment lawsuits sometimes post questions on websites like Ask.Metafilter.com, which describes itself as "querying the hive mind." For example, one user – named "UMDirector" – questioned whether he should file a class action lawsuit against his employer for disclosing his, and other employees', social security numbers. Another user named "MattD" answered:

> You would want to do it as a class action…to be sure. An inventive plaintiff lawyer should love this…: an easy to assemble and prove group, a sexy issue, and employer with (presumably) deep pockets.

See http://ask.metafilter.com/178861/My-former-employer-leaked-my-ss-number

Some employees don't need encouragement to start or join a class action lawsuit. One individual – with the username "Fungi" – who claimed to be employed by Retail Grocery Inventory Specialists, wrote that he was receiving money from an existing wage and hour class action against the Company, but nonetheless "would like to file my own lawsuit; *since work is so slow right now, I think I might have time to do so*." *See* http://answers.yahoo.com/question/index?qid=20101120122611AAvTOMC (emphasis added).

As demonstrated above, current and former employers are aware of the many opportunities for organizing class actions online. Given this, it's important for employers to be just as well-organized when it comes to monitoring electronic signs of a potential class or collective action in the making.

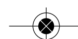
III. Recognizing Signs of Trouble

There are usually telltale signs of class action lawsuits long before they are filed. The trick is in locating these signs. Companies with the financial ability to do so could purchase software that automatically pinpoints company-related discussions on the web, Facebook or other social medial outlets. These products generally work by locating websites and discussions containing the company's name. Using filters can allow the company to locate communications between current and former employees who openly discuss suing the company. In the absence of such software, HR employees could be trained to periodically search the web to locate discussions involving the company.

One of the most distinctive signs of potential class litigation is an increase in the amount of discrimination charges filed against the company. If the company implements a layoff or reorganization, then notices a sharp upswing in the amount of discrimination charges filed against it, chances are that a class action may not be far behind. Similarly, a large number of voluntary resignations following a change in corporate structure could also be a sign of potential class litigation. To ensure these warning signs are recognized, company procedures should funnel all discrimination charges to a single individual or department – perhaps the HR Director or associate general counsel. That individual need not be charged with handling the nuts and bolts of each response, but at a minimum should be trained on recognizing patterns in discrimination charges. For multi-facility employers, pattern recognition becomes difficult if discrimination charges are handled solely by managers in the facility in which the charge arises.

Corporations should also train individual supervisors to provide copies of all attorney solicitations they find to the chief legal officer. Occasionally, employees accidentally leave copies of these solicitations in the copy machine or other conspicuous locations. If frontline supervisors fail to forward them to HR or general counsel's office, the company may lose advance warning of a class action. Managers should also be cautioned not to retaliate against employees involved in these activities. In some cases, employee action may constitute protected activity under the NLRA.

All of the methods above will permit the company to recognize and address whispers of discontent before they mushroom into very large and expensive class actions. ■



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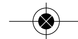


UNITED STATES SUPREME COURT UPDATE

Regan K. Dahle
Butzel Long

Court Opens Term with Oral Argument in Ministerial Exception Case

The U.S. Supreme Court opened its October 2011 term with several labor and employment law cases on its docket. It has heard oral argument in only one.

On October 5, 2011, the Court heard oral argument in *EEOC v. Hosanna-Tabor Evangelical Lutheran Church,* Dkt. No. 10-553. The issue in *Hosanna-Tabor* is whether the ministerial exception bars an Americans with Disabilities Act employment retaliation claim by a religious school teacher.

Cheryl Perich worked at Defendant Hosanna-Tabor Evangelical Lutheran Church and School in Redford, Michigan. The School is affiliated with the Lutheran Church. The School employed two types of teachers: "lay/contract" and "called." To be a "called" teacher, the individual must take a series of religion classes required by the Church and earn a certificate of admission into the teaching ministry. Once on the roster of certified teachers, an individual can be selected by a congregation, at which point the teacher becomes a "commissioned minister." The School does not require teachers to be called or Lutheran.

Perich started her employment at the School as a contract teacher, but became a called teacher after one year of employment. After Perich became a called teacher, her duties did not change. She taught a variety of secular classes, but also taught a religion class, attended chapel services with her class, led chapel services twice each year, and led her students in prayer.

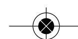
After four years of employment, Perich took a disability leave. After six months of leave, she advised the School that her doctor would return her to work in two months. The School was concerned that, despite the doctor's release, Perich would be unable to safely perform her duties. At a congregational shareholder meeting, the congregation accepted a Board proposal that Perich be offered a "peaceful release agreement" in exchange for her resignation. Perich refused this offer and appeared for work immediately upon being cleared by her doctor. The School asked Perich to leave, but she refused until she received a letter acknowledging that she had reported to work. Having received the letter, Perich left, but she received a phone call from the School later in the day telling her she would likely be fired. Perich advised the School that she intended to assert her rights against discrimination if she were not allowed to return to work. Several days later, the School sent Perich a letter stating, among other things, that Perich had damaged her relationship with the School by threatening to take legal action. The School ultimately terminated Perich's employment.

Perich filed a charge of discrimination and retaliation with the EEOC, and the EEOC filed a retaliation complaint on her behalf. The School moved for summary judgment on the grounds that the ministerial exception barred the District Court from considering an ADA employment retaliation claim against a parochial school. The District Court granted the motion and the Commission appealed.

The Sixth Circuit first held that the motion should have been decided under Fed.R.Civ.P. 12(b)(1), not Fed.R.Civ.P. 12(b)(6) because the ministerial exception is jurisdictional in nature. Nonetheless, the Court recognized that the ADA does have application to religious organizations, provided that it does not infringe on that organization's right to prefer employees of a particular religious background. The "ministerial exception" doctrine, however, rooted in the First Amendment's guarantee of religious freedom, prevents judicial interference in the selection of an organization's "ministerial employees." The question before the court, then, was whether Perich was a ministerial employee.

To be deemed a ministerial employee, that employee's primary duties must consist of "teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship." *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769, 778 (6th Cir. 2010) (citations omitted). Typically, teachers in parochial schools who teach primarily secular subjects are *not* deemed ministerial employees; teachers whose duties are ministerial typically teach only religious subjects or have a central role in the "spiritual or pastoral mission of the church." *Id.*

Regarding the case at hand, the Sixth Circuit held that the District Court's factual record was sound, but its legal conclusion that Perich was a ministerial employee was not supported by the record. The Court focused on the facts that Perich's duties did not change when she transitioned from a contract to a called teacher, and also that Perich did not need to be a called teacher, or even Lutheran, to lead those activities that were religious in nature. The Court noted that simply because the School gave Perich the title of commissioned minister did not make her duties primarily ministerial in nature. The Sixth Circuit vacated the District Court opinion and the School sought cert. ■



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MERC CORNER

Ruthanne Okun
Director, Bureau of Employment Relations/MERC

MERC Conducts Act 312 Arbitrator/Fact Finder and Constituent Training. On October 13, 2011, MERC conducted a full-day of workshops for its Act 312 Arbitrators and Fact Finders. During recent sessions at the Capitol, the state legislature amended two of the public sector labor relations laws that our agency administers - the Public Employment Relations Act (PERA) and Act 312/Compulsory Arbitration of Labor Disputes in Police and Fire Departments. The laws were amended numerous times and in a multitude of ways. Also, PERA continues to be amended time and again.

The primary focus of MERC's training was to familiarize panel members with the various pieces of new legislation. A good number of labor relations advocates and other labor representatives were also in attendance. All of this took place with the generosity and courtesies of the Michigan Department of Licensing & Regulatory Affairs (the State department that houses our agency), along with our long-time supporter - MSU College of Law with Professor Mary Bedikian taking the lead. Also, we again received significant assistance from the Municipal Employees' Retirement System of Michigan with Lynda Pittman, Retirement Services Director. The day-long program, held in the beautiful environs of the Inn at St. John's in Plymouth, Michigan, included more than 100 attendees who, in their evaluations, gave the program excellent ratings.

On the following day, October 14, the Bureau presented a half-day program devoted to MERC constituents. Besides a "Back to Basics" session conducted by MERC personnel, a lively panel discussion took place as our clientele continues to ponder unanswered questions left by the new legislation. Hopefully, after this training, labor relations representatives are more aware of the nuances of the new laws and better able to apply them in their work environments – fulfilling the purpose of the training.

The workshops and panel discussions on both days featured presenters who are renowned in their fields. Timely presentations along with panel discussions took place on such subjects as: Trends in 312 Awards and Fact Finding Reports; Legislative Update and the Impact of Recent Legislation on Act 312 and Fact Finding; Conducting an Act 312 Hearing under the New Law; and Insurance, Pension, and Municipal Updates. Also included were panel discussions relative to Consolidations & Mergers, Prohibited Subjects of Bargaining, Teacher Tenure; and Retroactivity. Please check out the "What's New? page on our web-site, at www.michigan.gov/merc, where some of the written materials from the Conference will be posted.

MERC Committees engage in rulemaking and in establishing qualifications for panel applicants. MERC's Administrative Rules Committee comprised of labor and management constituents along with ALJs, Mediators, and other MERC staff have been hard at work completing proposed amendments to the agency's administrative rules that were last amended in 2002. Soon these rules will enter the public comment phase of the official rulemaking process, and you will have the opportunity to let us know how they might affect you (both positively and negatively) in your work. We are also conferring with representatives and advocates who handle Act 312 matters to propose amendments to the rules governing compulsory arbitration cases to conform with Act 116 (the recent amendments to Act 312) and what appears to be the legislative intent. We anticipate that both of these rule sets will be ready for your consideration soon after this *Lawnotes* edition hits your desk.

Finally, Section 5(3) of the recent amendments to Act 312, MCL 423.235(3), requires that MERC establish the qualifications and training necessary for an individual to serve as the chair of an Act 312 panel. Recent action in Lansing made it apparent that the legislature wanted to ensure that only the highest caliber of decision makers serve as Act 312 chairpersons. It was noted that their decisions often vitally affect the financial future and viability of a municipality. Before adopting any of the requirements suggested by committee members, the Commission seeks comment regarding those suggestions from our constituents (namely you). So, please e-mail your comments to us at: berinfo@michigan.gov. Note the items set forth below require your comment.

Proposed Qualifications Criteria for becoming an Act 312 Arbitrator and Fact Finder:

- Minimum of 10 *(or should it be 15?)* years of senior-level business or professional experience or legal practice.

- Educational degree(s) and/or professional license(s) in Labor Relations or in a closely-related and relevant field. (NOTE that significant relevant experience — beyond the minimum of 10 *(or 15?)* years' experience requirement set forth above — may be a substitute for education.)

- Significant knowledge and hands-on training or experience in labor relations, including in Act 312 and/or grievance arbitration. (NOTE that the latter experience may be supplemented by participation in MERC's shadowing program.)

- Ability to write clearly and concisely - as evidenced by 2 or more writing samples.

- Legal residency in Michigan.

- Willingness to support the efforts and processes at MERC, including adhering to and submitting awards/reports within statutory or other established time frames.

- Held in the highest regard by peers and colleagues in the labor relations field as reflected by recommendations from 3 persons prominent in the labor relations arena, including one person from management, one from labor, and a neutral. *(Should we require that an applicant be nominated by a current panel member?)*

- Participation in MERC-related training programs for 312 Arbitrators and Fact Finders. *(Before serving as Chair of an Act 312 Panel, an applicant must attend a comprehensive MERC training and participate in a MERC "shadowing" program. Should we require a "shadowing" program for all panel applicants or, at least, for those who have not previously participated in an Act 312 proceeding?)* ■

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SIXTH CIRCUIT UPDATE

Scott R. Eldridge and Leigh M. Schultz
Miller, Canfield, Paddock and Stone, P.L.C.

Caterpillar Okay to Fire Employee for Failure to Report Injury Within 48 Hours

The plaintiff in *Geronimo v Caterpillar, Inc*, Docket No. 09-6401 (Sept. 7, 2011) sued Caterpillar, Inc for retaliatory discharge in Tennessee, after it terminated her for failure to promptly report a work injury. Caterpillar maintained a policy requiring employees to report workplace injuries, including "gradually-occurring" injuries, immediately or within forty-eight hours after an employee realizes she is injured and suspects that it is work-related.

Geronimo transferred to an "assembler position" in 2007. Upon starting the job, she experienced pain in her hands while performing the necessary manual tasks. After a month of working on the new job, Geronimo suspected that she had carpel tunnel syndrome. Two weeks later, Geronimo spoke with a nurse at Caterpillar about her pain. This was the first time she talked to anyone from Caterpillar's management about the pain in her hands. Geronimo told the nurse that she had experienced unbearable pain in her hands that kept her awake at night the week before. She explained to the nurse that she did not report her pain sooner because she thought the pain was just "muscle soreness" that would go away and she did not want Caterpillar to think that she could not do her job. The next day, Caterpillar terminated Geronimo's employment for failure to communicate her injury in a timely manner. Geronimo sued, alleging that the Tennessee Workers' Compensation Law ("TWCL") provided her thirty days to report her gradual-onset carpal tunnel. The district court granted summary judgment to Caterpillar.

On appeal, the Sixth Circuit, noting that Caterpillar never disputed and actually settled Geronimo's workers' compensation claim, affirmed. The Court explained that the TWCL makes clear that "every injured employee shall immediately" report an injury to her employer, regardless of the nature of the injury. The thirty-day rule in the statute, meanwhile, dictates that no compensation shall be payable for sustained injuries if written notice is not given within thirty days after the occurrence of the accident. For "gradually-occurring" injuries, the Court explained, the TWCL provides that the thirty-day period starts to run when the employee knew or reasonably should have known that she suffered a work-related injury or when the employee cannot perform her normal work activities as a result of the injury. Nothing in the TWCL, according to the Sixth Circuit, exempts an employee from having to provide immediate notice of the injury or prohibits an employer from imposing separate notice requirements for the purpose of safety. Finally, the Court rejected Geronimo's argument that simply notifying her employer of her injury was a "protected act" under the TWCL. It explained, "[t]he statute merely grants employees the right to wait thirty days to file their notice of injury and still receive workers' compensation, and that is exactly what Geronimo was able to do."

Arbitrator's Opinion Considering Parties' Bargaining History Affirmed

The plaintiff in *Titan Tire Corp of Bryan v United Steelworkers of America*, Docket No. 09-4460 (Sept. 9, 2011), Titan Tire Corp, sued the Union in federal district court, asking the court to vacate an arbitrator's award in favor of the Union. The underlying arbitration occurred as a result of a grievance filed by the Union after an employee was terminated for testing positive for marijuana. The Union argued that the termination was excessive and did not constitute just cause for termination because Titan did not provide advance notice of the drug testing policy and the consequences for testing positive. The policy was negotiated between the Union and Titan's predecessor and then adopted by Titan in a letter of understanding attached to the collective bargaining agreement ("CBA"). Titan argued that the language in the policy, which states that an employee who tests positive is "subject to termination," provided sufficient grounds for discharge.

The arbitrator agreed with the Union that the employee was not given enough notice of the drug testing policy. He also ruled that the Union and Titan's predecessor did not intend the policy to result in automatic termination, reinstating the employee with back-pay and converted her discharge to a 90 day suspension. In upholding the arbitrator's decision, the district court rejected Titan's argument that the arbitrator overstepped his authority by considering statements made during negotiations between the Union and Titan's predecessor where the CBA provided that Titan was not bound by statements made by its predecessor unless specifically adopted in writing.

On appeal, the Sixth Circuit explained that a court's review of a labor arbitration award is "confined to ascertaining whether there was a 'procedural aberration' in the arbitration process," including whether the arbitrator was "arguably construing or applying the contract." In concluding that the arbitrator construed and applied the contract, the Sixth Circuit rejected Titan's argument that the arbitrator improperly considered the bargaining history between the Union and Titan's predecessor. The Court determined that there was no evidence that the arbitrator in this case was doing anything other than trying to reach a good-faith interpretation of the contract. It could not be "said that the arbitrator's decision on the merits was so untethered from the agreement that it casts doubt on whether he was engaged in interpretation, as opposed to the implementation of his own brand of industrial justice." Finally, the Court ruled that the "subject to termination" language of the CBA was at best ambiguous and its plain meaning actually cut against Titan's argument because it indicates that an employee *might* be discharged for testing positive, but not automatically so. Consequently, the Court upheld the arbitrator's award and affirmed the district court's decision.

Court Clarifies Method for Determining When Volunteers Count as Employees

In *Bryson v Middlefield Volunteer Fire Dept, Inc*, Docket No. 10-3055 (Sept. 2, 2011), the plaintiff filed, among other things, a sexual harassment suit under Title VII of the Civil Rights Act of 1964 against her former employer, a volunteer fire department, and the former fire chief. Specifically, she alleged that the fire chief made unwanted sexual advances, requests for sexual favors and other physical and verbal contact of a sexual nature. The district court granted the fire department summary judgment on the basis that it was not covered by Title VII because, with mostly volunteer fire firefighters, it did not have the necessary fifteen employees.

On appeal, the Sixth Circuit was charged with determining whether the volunteer firefighters were employees. The Court explained that, for purposes of determining whether an employer has fifteen employees, the courts must consider the common law of agency. That test, according to the Court, requires an examination of the following factors: (1) the hiring party's right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party.

The Sixth Circuit rejected the district court's addition of a significant-remuneration requirement as an independent antecedent to the common-law agency test. Such a requirement, the Court noted, has been rejected by other courts and the EEOC. The Court held that each individual firefighter should be counted as an "employee" or "hired party" under Title VII because each provides firefighting services to the department in exchange for benefits, including workers' compensation coverage, insurance coverage, gift cards, personal use of the department's facilities and assets, training, and access to an emergency fund. The Court thus reversed the lower court decision and remanded the case for further proceedings. ■

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