LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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# EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION

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Laws prohibiting employment discrimination generally have been spurred through a combination of evolving social values, judicial decisions, and legislation. It took nearly 100 years to transform the laws of the United States from permitting slavery to prohibiting employment discrimination based upon race. The first modern federal equal employment opportunity bill was introduced in Congress in 1943. Various bills were introduced and defeated for twenty years before the landmark passage of Title VII of the Civil Rights Act of 1964, which barred employment discrimination based upon race, color, religion, sex and national origin. 42 USC 2000e *et seq*. In 1967, the Age Discrimination in Employment Act provided protection to employees based upon age. 29 USC 621 *et seq*. Discrimination against disabled persons was prohibited as to some employers by the Rehabilitation Act of 1973, 29 USC 791 *et seq.*, and more generally in 1990 by the Americans with Disabilities Act, 42 USC 12101, *et seq*. In 1978, Title VII was amended by the Pregnancy Discrimination Act to extend the prohibition on sex discrimination to include pregnancy discrimination. 42 USC 2000e(k).

In Michigan, the Fair Employment Practices Act was passed in 1955 prohibiting employment discrimination based upon race, color, religion, national origin, or ancestry. *formerly* MCL 423.301 *et seq*. Twenty-one years later, Michigan adopted the Elliott-Larsen Civil Rights Act and the original version of the Persons with Disabilities Act, which added age, sex, height, weight, marital status and disabilities as protected classifications. MCL 37.2101 *et seq.*; MCL 37.2101 *et seq.*

We are now in the midst of the potential development of another protected classification in employment law – sexual orientation. This article analyzes the judicial and legislative developments in this area.

## JUDICIAL DEVELOPMENT

Judicial development of sexual orientation discrimination law has followed a slow and meandering path. The federal courts have steadfastly refused to interpret Title VII's prohibition on "sex discrimination" to include "sexual orientation." *See, e.g., Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); *DeCintio v. Westchester County Medical Ctr.*, 807 F.2d 304 (2d Cir. 1986), *cert. denied*, 484 U.S. 825 (1987); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir.1978). As the Ninth Circuit held in *DeSantis*, 608 F.2d at 329-330:

> "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."

The courts have deferred to Congress the decision on whether to include sexual orientation in Title VII. *See, e.g., Smith*, 569 F.2d at 326-327. Michigan courts have likewise held that "harassment or discrimination based upon a person's sexual orientation is not an activity proscribed by" the Elliott-Larsen Civil Rights Act. *Barbour v. Department of Social Services*, 198 Mich. App. 183, 185 (1993).

However, the courts have been willing to address some forms of harassment and discrimination related to sexual orientation by fitting the claims into recognized causes of action. For example, a gay employee who is harassed at work in a sexual manner may have a viable claim. In *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), the U.S. Supreme Court unanimously held that workplace sexual harassment is actionable as sex discrimination under Title VII, even where the harasser and the harassed employee are of the same sex and where the harassing conduct is not motivated by sexual desire. In *Oncale*, the male plaintiff alleged that some of his male co-workers had subjected him to sexually humiliating actions, sexual physical assault and a threat of rape. The Court concluded that:

> "[W]e hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on the behalf of the defendant) are of the same sex." 523 U.S. at 79-80.

Similarly in *Barbour v. Department of Social Services*, 198 Mich. App. 183, 186 (1993), the Michigan Court of Appeals held that allegations of specific homosexual advances directed at an employee by a supervisor state a claim under Elliott-Larsen. However, these cases only nip at the edges of the issue of sexual orientation discrimination. In the *Oncale* opinion, the Court spent nearly as much time stressing the limitations on its decision as it did justifying it.

Other civil rights laws also provide only limited protection related to sexual orientation. Discrimination because of a perception that a gay employee must be HIV positive is prohibited under the Americans' with Disabilities Act and Michigan's Persons with Disabilities Act. *See, Bragdon v. Abbott*, 524 U.S. 624 (1998) (HIV infection is a "disability" under the Americans with Disabilities Act); *Sanchez v. Lagoudakis*, 440 Mich. 496 (1992) (The Michigan Act prohibits discriminatory treatment based upon an erroneous perception that an employee has AIDS). However, after remand the Michigan Supreme Court in *Sanchez* held that it is permissible for an employer to refuse to assign a food-service employee duties based upon a rumor that she has AIDS until the employee is tested. *Sanchez* (*after remand*), 458 Mich. 704, 708-709 (1998).

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**STATEMENT OF EDITORIAL POLICY**

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**Stuart M. Israel,** ***Editor***
**John G. Adam,** ***Associate Editor***



## EMPLOYMENT DISCRIMINATION BASED UPON SEXUAL ORIENTATION

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Further, the ADA and the Rehabilitation Act both specifically exclude coverage of homosexuality and bisexuality as "disabilities." 42 USC 12211(a); 29 USC 706(8)(E).

The judicial decisions addressing the constitutional issue of sexual orientation discrimination have followed a similar path of limited protection. The U.S. Supreme Court held that discrimination based upon sexual orientation may violate equal protection. *Romer v. Evans*, 517 U.S. 620 (1996). In *Romer*, the Court struck down a state constitutional amendment which barred the passing of any state or local laws prohibiting discrimination based upon sexual orientation.

However, recently the U.S. Supreme Court held that the Boy Scouts had a First Amendment right of expressive association to prohibit gay and lesbian members. *Boy Scouts of America v. Dale*, 68 U.S.L.W. 4625 (June 28, 2000). In *Dale*, the Boy Scouts revoked the adult membership of the plaintiff expressly because he was gay. The New Jersey Supreme Court held that New Jersey's public accommodations law required the Boy Scouts to admit the plaintiff as a member. The U.S. Supreme Court reversed, and held that this application of the New Jersey public accommodations law violated the First Amendment. The Court distinguished cases in which it had rejected similar arguments involving women in public accommodations by stating that in those cases admitting women would not "materially interfere with the ideas that the organization sought to express."

Therefore, the federal and Michigan courts have declined to find any general constitutional or statutory prohibition against employment discrimination based upon sexual orientation. It appears unlikely that any such decision will be forthcoming in the near future. Rather, the courts in all likelihood will continue to address certain cases by applying existing laws, while leaving it to the legislative branches to determine whether or not to adopt more general protection.

### FEDERAL LEGISLATIVE DEVELOPMENTS

Numerous attempts have been made in Congress since the mid-1970's to include sexual preference or orientation in the categories protected by Title VII. However, none of these bills have been successful. Most recently, the Employment Non-Discrimination Act (ENDA) has been introduced before Congress on several occasions beginning in 1994, with slight modifications each time. Generally, ENDA proposes to amend Title VII to prohibit discrimination based on sexual orientation. In 1996 ENDA was reintroduced with the backing of the House and Senate minority leaders and made it to a Senate vote, where it was narrowly defeated by a margin of 49 to 50.

The most recent version of ENDA introduced in Congress in 1999 would protect heterosexuals, bisexuals and homosexuals from discrimination. It applies to employers with 15 or more employees, but exempts the military and religious organizations to the extent that they are engaged in religious activities. The bill proposes to ban affirmative action based upon sexual orientation, and does not require companies to give equal employee benefits. ENDA-1999 was introduced on June 24, 1999 and currently is pending in the Senate Committee for Health, Education, Labor and Pensions. S. 1276, 106th Cong. (1999).

President Clinton first supported ENDA in 1995. In 1998 he signed an amendment to Executive Order 11478 EEO banning discrimination against employees in the executive branch of the federal government on the basis of sexual orientation. In 1998, an effort to overturn this Executive Order was defeated in the House by a margin of 252-176, with 63 Republicans joining 188 Democrats and one Independent. This House vote may eventually bode well for the future passage of ENDA, but ENDA still faces an uphill struggle.

**STATE AND LOCAL DEVELOPMENTS**

There has been significantly more development in state and local laws prohibiting discrimination based upon sexual orientation. *See, Lambda Legal Defense & Education Fund, Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation as of October 25, 1999.* Eleven states and the District of Colombia have laws that prohibit employment discrimination on the basis of sexual orientation: California, Connecticut, Hawaii, Massachusetts, Minnesota, New Hampshire, New Jersey, Nevada, Rhode Island, Vermont, and Wisconsin. The oldest such law is in the District of Colombia, where it has been in effect for over twenty years. Most of the other state laws have been passed within the last ten years. The most recent State to adopt such a law was Nevada, whose statute took effect on October 1, 1999. In addition, at least eight states have executive orders which ban discrimination based upon sexual orientation, including New York, Colorado, Louisiana, Maryland, New Mexico, Ohio, Pennsylvania, and Washington. *Id.*

Michigan law does not bar discrimination based upon sexual orientation. However, House Bill 5107 introduced November 9, 1999 proposes to amend the Elliott-Larsen Civil Rights Act to include sexual orientation as a protected classification under the Act. The bill was referred to the Committee on Constitutional Law and Ethics where it is currently pending.

Since the late 1970s there also has been a steady increase in local laws aimed at prohibiting sexual orientation discrimination. Approximately 165 cities and counties have adopted some form of local law prohibiting sexual orientation discrimination. *Id.* In Michigan, approximately ten cities or counties have ordinances, policies or proclamations which prohibit sexual orientation discrimination to some extent. Ann Arbor, Birmingham, Detroit, East Lansing, Flint, Grand Rapids, Ingham County and Ypsilanti. *Id.*

These local bans on discrimination have in some instances been met with various political and legal challenges. In Michigan, an ordinance adopted in Lansing in 1996 was repealed by a voter referendum, as was a Ferndale city ordinance adopted in 1999. The *Romer* case, discussed above, arose out of a state constitutional amendment in Colorado, enacted by a statewide ballot proposal, which was intended to prevent any state or local anti-discrimination laws based on sexual orientation. In addition, Maine adopted a law prohibiting discrimination based on sexual orientation, but it was repealed following a 1998 referendum. The Governor of Maine has now signed a new statute into law, but it will not take effect unless a majority of those voting in the State's general election in November endorse it. However, these challenges do not appear to have substantially blocked the proliferation of local laws prohibiting discrimination based upon sexual orientation.

**SUMMARY AND COMMENTARY**

In summary, there currently is no comprehensive protection against employment discrimination based upon sexual orientation. Consequently, it is legal in most states for an employer to openly fire gay and lesbian employees because of their sexual orientation. Further, an employer has no legal obligation to protect its employees from harassment because of their sexual orientation, as long as the harassment is not sexual in nature.

However, the trend does appear to be heading towards such comprehensive protection, either through federal legislation or the adoption of additional state laws. Although this "trend" has had its shares of ups and downs, that is not unusual in the development of a protected classification. It is unfortunate, but the legal issue over sexual orientation discrimination is likely to be determined in large part based upon issues of popularity and acceptance. In order to stir enough support to add a protected classification, there must be enough hostility or bias towards people in that classification to demonstrate a need for protection. On the other hand, if that hostility or bias is too widespread, proponents will never muster enough political or popular support to pass laws against discrimination.

The debate over sexual orientation appears to be somewhere in the middle of this process. Some religious leaders and other popular spokespersons continue to express the opinion that gay and lesbian lifestyles are immoral, and therefore oppose laws which would prohibit discrimination based on sexual orientation. Yet, network television apparently believed that gay and lesbian lifestyles were mainstream enough to allow a prime time sitcom starring a lesbian. The tension in the current debate was recently evidenced by the comments of the Pope, who responded to a gay rights march in Rome by stating that homosexuality was "objectively disordered," but at the same time expressing the opinion that homosexuals should not be subjected to "unjust discrimination." ABCNews.com, Daily News (July 9, 2000).

From a legal standpoint, sexual orientation is strikingly similar to other protected classifications. First, there is little doubt that a person's sexual orientation might engender hostility or bias by some employers. This is evidenced by the 1991 announcement by the Cracker Barrel restaurant chain that it would refuse to employ anyone whose sexual preferences failed to demonstrate heterosexual values.

Second, a person's sexual orientation generally is irrelevant to their qualifications as an employee. The workforce is undoubtedly filled with gay and lesbian employees who have achieved great success in all facets of the economy.

Finally, immutability has always been a cornerstone in the justification for determining protected classifications. Age, race, sex, color, national origin, and disabilities are things that an employee has no choice or control over. There is a dispute over the extent to which sexual orientation is an immutable characteristic, which involves scientific issues beyond the scope of this article. However, sexual orientation seems to be certainly no less of a "choice" than pregnancy or religion, which are protected classifications. Further, it is doubtful that a resolution of this scientific debate will ultimately carry much weight in determining whether or not sexual orientation employment discrimination laws are passed. The opposition to such laws appears to be rooted mostly in religious and moral objections to homosexuality, and such opposition is not likely to be swayed by new scientific findings. The fact that one person's sexual orientation offends another person's religious or moral convictions, though, should not be a basis to reject anti-discrimination legislation, as recognized by the fact that religious discrimination is unlawful.

Overall, I predict that the developments discussed above will ultimately culminate in comprehensive protection against discrimination based upon sexual orientation. ■

# THE EEOC MEDIATION PROGRAM

**Rosalie Tucker Rishavy**
***ADR Coordinator***
***EEOC Detroit District Office***

The U.S. Equal Employment Opportunity Commission's Detroit office began its mediation program on October 1, 1996 and is now beginning its fifth year. In that time we have mediated over six hundred cases, resolving two out of three of them. As with the EEOC's national program, there is no fee. The Program is entirely voluntary and absolutely confidential: a firewall is strictly maintained between the mediation unit and the rest of the office. The confidentiality of mediations is protected by both state and federal court rules, just as are any other settlement negotiations. The mediator is absolutely neutral and acts as a facilitator, which is unlike so-called mediation, now called case evaluation, in Michigan courts, where the case is presented to a panel of attorneys and then evaluated by them as to its worth.

The satisfaction ratings given to our local program have matched those given to the national program and, as a result, we have a number of attorneys on both sides of the bar who use EEOC mediation on a repeated basis. We find that not only are the parties very satisfied with the process, but the mediators and attorneys are happy, as well. Following are statements from Michigan mediators, defense counsel and plaintiff's counsel who have had extensive involvement with this program.

Jim Statham of the Federal Mediation and Conciliation Service has mediated dozens of our cases. He states: "Successfully mediating an EEOC case gives the mediator a tremendous feeling of satisfaction. This feeling comes from being able to use the mediation process to help the parties solve their dispute. We help them to define their problem and, once they have done that, to generate options. I find that parties are much more straightforward during mediation than during other forms of negotiations.The mediator helps them to pick the best of the options and the matter is generally resolved in just a few hours. The satisfaction of both parties is evident in their thanks to the mediator. The mediator gets his or her satisfaction from knowing that the parties are feeling a lot better when they leave than when they first walked in the door. These are people you have never seen before but, when they leave, they have a deal and they are happy. I don't think you can ask for anything more from your job than that!"

Nanci Klein, Executive Director of the Oakland Mediation Center, another of our mediation providers, states that EEOC mediation is one of the most satisfying programs she has been involved with and that it provides a wonderful service to the public,

> . . . advising charging parties of the opportunity to resolve their complaints without the costs and stress endemic to the legal system. Parties are given a full explanation of how facilitative mediation works and what benefits they can expect (savings in time, costs, disruption of business reputation, etc.). When disputants voluntarily agree to sit down together with a neutral and attempt to reach a mutual agreement, the magic begins. Parties to a dispute are frequently transformed into parties *not* working against each other, but parties seeking a mutually acceptable solution . . . The parties have full control whether or not to reach an agreement, but when they do agree, everyone wins something. The creativity, ingenuity and sincerity that the disputants bring to the process continuously impresses our mediators.

Defense attorney Terry Miglio of Keller, Thoma, Schwarze, Schwarze, Dubay & Katz, has put a number of EEOC cases into mediation. He comments:

> From a defense attorney's perspective, recommending that the employer participate in the EEOC's mediation process makes sense for several reasons: *First*, it provides a forum to resolve a potential claim without the employer having to spend a considerable amount of time and resources responding to EEOC requests for information and incurring attorney fees and costs in litigating the case. Often, the settlement reached at facilitation includes non-monetary adjustments. It may also include reciprocal promises by the charging party (i.e. to perform certain duties or to refrain from certain behavior). The facilitation agreement may also take the form of a last chance agreement for a problem employee who has been terminated. *Second*, facilitation often provides an employer with "tim of the iceberg" notice that other personnel problems and issues may be simmering in the Charging Party's department or workplace. Prior to facilitation, the employer's human resources department may not have been aware of these issues or may have received information that was one-sided or inaccurate. *Third*, the facilitation allows defense counsel the opportunity to hear first hand the charging party's version of events and assess his/her credibility and potential presence before a jury or other tribunal. Similarly, the process affords defense counsel and the employer the opportunity to discover, to prepare and to refute evidence suggesting discrimination or retaliation.

EEOC mediation has advantages for the plaintiff's side of the bar, as well. Isaiah Lipsey wears two hats. He mediates many EEOC cases and also represents charging parties at EEOC mediations, as well (not the same cases!). He says:

> The EEOC's Mediation Service is a truly unique and innovative way to quickly and inexpensively resolve a potential lawsuit. As a plaintiff's attorney I have resolved numerous cases without litigation by utilizing the EEOC's Mediation Service. By resolving cases quickly, fairly and effectively, I have been able to increase my caseload without experiencing a corresponding rise in my legal expenses. When I participate in mediation I do not have to invest extensive labor into depositions, motions, legal research and other related overhead. My clients who have participated in mediation have been extremely satisfied with the process and the end result. Many claimants who file a complaint with the EEOC do not wish to have to wait two or three years to learn the outcome of the case. In fact, a large number of my clients were actually relieved that EEOC mediation was able to resolve their claim without forcing them to endure the stress and aggravation of litigation. Since mediation is voluntary it encourages both the claimant and respondent to work towards a meaningful resolution of their disagreement. The

discussions by both the claimant and the respondent are vary candid, yet, respectful. I have noticed that when the adversarial nature of litigation is removed, EEOC mediators can effectively help both sides reach mutual agreement. This alleviates the negative sentiment that usually follows a lawsuit.

Plaintiff's attorney Cary S. McGehee agrees, stating:

"The EEOC's Mediation Program provides an excellent opportunity for the claimant and respondent to air their disputes, prior to litigation, in a professional forum with an objective third party listening to both sides. The claimant's ability to openly tell his or her side of the story with the full attention of the employer is an integral part of the resolution process. . . . In many instances mediation is the first time that the employer has really taken the time to listen to the claimant's complaints. In any event, whether or not the mediation process is ultimately successful in resolving ;the matter, both parties gain from the mediation process and, at a minimum, walk away from the process having gained a better understanding of the issues that are truly in dispute."

EEOC mediation is really the best bargain in town! It can save you and your client time and money, no matter which side of the bar you are on. It's free and everybody wins! Even if you do not come out with a resolution (even though you probably will), you and your client will walk away knowing more about the dispute than you did before. Try it. ■

# EEOC NATIONAL MEDIATION PROGRAM SCORES HIGH MARKS IN SURVEY OF PARTICIPANTS

The overwhelming majority of employers and charging parties participating in the U.S. Equal Employment Opportunity Commission's national mediation program find it to be highly effective, express strong satisfaction with the process, and are willing to participate again if party to a discrimination charge, according to a report prepared by a consortium of professors from Maryland colleges and universities who are experts in alternative dispute resolution, survey research, business, and employment law.

According to the report, entitled *An Evaluation of the EEOC Mediation Program*, nine out of 10 participants (96% of employers and 91% of charging parties) indicated that they would be willing to participate in EEOC's mediation program again if they were a party to an EEOC charge, regardless of the outcome of their mediation session. However, only 31% of employers initially accept mediation when faced with an EEOC charge. The full text of the report is posted on the EEOC Web site at www.eeoc.gov.

The report includes a history of the EEOC mediation program and a review of the theoretical and empirical studies previously conducted which involve mediation. The survey and sampling size reported represents one of the largest and most in-depth studies of mediation programs ever conducted.

Among the report's main findings, based on analysis of EEOC mediation sessions conducted from March through July 2000, are:

- The participants expressed strong satisfaction with EEOC's ability to communicate information regarding its mediation program prior to the actual mediation and also after the mediator's introduction at the session.
- The vast majority of participants agreed that their mediation was scheduled promptly, indicative of the effective management of the program.
- An overwhelming majority of the participants felt they had a full opportunity to present their views during the mediation session.
- The participants expressed high satisfaction with the role and conduct of the mediators indicating that the mediators understood and helped to clarify their needs, and also assisted them in developing options for resolving the dispute.
- The high level of satisfaction for the mediators performance was true for both EEOC staff mediators and for contract mediators.
- The overall level of satisfaction with the program remained high regardless of such factors as the size of the employer, basis or issue alleged in the underlying charge, or whether the parties were represented during the session.

EEOC launched its voluntary mediation program in February 1999 and it became fully operational at every district office nationwide in April 1999. Since implementation, the agency has resolved a cumulative total of over 11,600 private sector charges and obtained monetary benefits of over $150 million for charging parties through mediation. Thus far in Fiscal Year 2000, as of late September, 65% of cases that entered the mediation program were resolved in an average of 97 days — less than half the time it takes to resolve a charge through EEOC's traditional administrative/investigative process.

Mediation is a form of alternative dispute resolution offered by EEOC to facilitate resolution without lengthy investigations or litigation. The decision to mediate is completely voluntary for the charging party and the employer, and mediation is confidential at every stage. Unlike an arbitrator or judge, the mediator does not resolve the charge or impose a decision on the parties. Instead, the mediator serves as a neutral third party facilitator, helping the parties to arrive at a mutually acceptable resolution.

Rosalie Tucker Rishavy

# THE EEOC MEDIATION PROGRAM: A POSITIVE RECOMMENDATION

**James B. Perry**
***Abbott, Nicholson, Quilter, Esswaxis & Youngblood, P.C.***

It is indeed rare for any attorney representing exclusively employers to be able to positively recommend any program by one of our government's employment agencies. But that is exactly my position concerning the Equal Employment Opportunity Commission mediation program. I always recommend submitting civil rights charges to the EEOC mediation program instead of going through the administrative investigation procedures. I see the following four basic advantages for employers in utilizing the mediation program instead of responding to the charge in the more traditional manner: (1) lower costs; (2) speedier resolution; (3) involvement of mediators; and (4) finality.

**Lower Costs.** The cost of investigating and responding to a discrimination charge through traditional EEOC investigative procedures can be quite expensive, particularly for employers without human resource departments or in-house labor counsel. If an employer engages outside counsel (which I would obviously recommend in dealing with any governmental agency investigation), outside counsel will probably spend at least 10 to 20 hours of legal time to investigate the allegations of the charge by interviewing witnesses, reviewing comparable data, and then drafting a detailed position statement for consideration by the EEOC investigator. Frequently, investigators request follow-up information or personal interviews, which result in more legal time. Although this may be a lucrative case for the outside counsel, it is extremely costly at $150 to $250 per hour for an employer.

When you compare the cost of going through the investigative procedures to mediation, the value to employers is clear. Submitting the charge to the mediation procedure certainly requires investigation by the employer and/or its counsel, but does not require submission of a response. The mediation itself rarely takes more than half a day, since within a relatively short time, it becomes apparent whether the parties legitimately can achieve a resolution or are so far apart that mediation efforts are senseless. The mediation procedure itself encourages the parties to consider creative solutions to the charge. When dealing with discharge cases, these creative solutions include record rehabilitation, positive or neutral references, continuation of insurance benefits, and cash buy-outs. In non-discharge cases, creative solutions include agreement to provide more training, revising work schedules, transferring employees to other departments, or preparing performance improvement plans. Such creative solutions can be more easily explored in the mediation process, since the goal of mediation is a mutually acceptable resolution, compared to the goal of the traditional administrative investigation, which is to determine whether discrimination occurred.

**Speedier Resolution.** The accumulation of potential back pay and benefit liability for an employer during pendency of a charge over a termination can present significant risk to that employer. Mediations are generally scheduled within 45 days of the filing of a charge, before the amount of potential back pay and benefits have built up. This means that successful mediation can often resolve the case within less than 60 days, much more quickly than an investigation can be concluded.

**Involvement of Mediators.** Both the internal and external mediators assigned by the EEOC to the cases I have defended have been excellent. They have been diligent not only in scheduling the mediation to take place, but also in making great efforts to see that the case is resolved at the mediation. The involvement of a neutral, third-party to bring come rationality in what often can be an emotional situation, has been extremely helpful in resolving these cases. The latest report that I saw in the *BNA Reporter* showed that over 65% of cases that entered the EEOC mediation program were resolved in less than 100 days. I am not surprised by these favorable numbers as my own experience has been actually a little better than those national numbers. Most of my experience with the EEOC mediation program has been through the Detroit District Office, although I have also utilized the EEOC mediation program for cases in Indiana and Ohio, which were processed through the Indianapolis, Cleveland, and Cincinnati offices. In each case, I have been very pleased with the effort, neutrality, experience, and knowledge of the mediator involved.

**Finality.** The final and probably most significant advantage of the mediation program over the traditional administrative investigation process is that a mediated settlement is a final settlement. There is nothing more frustrating to an employer than receiving a federal or state court lawsuit over the allegations set forth in an EEOC Charge, after going through the time and expense of the EEOC investigative process, which resulted in the EEOC agreeing that the charge is groundless and dismissing the case from agency proceedings. In other words, the employer's "win" is meaningless, since a charging party, after even a formal EEOC dismissal, can simply proceed in federal or state court within the appropriate statute of limitations and litigate the exact same allegations that were found to be groundless by the EEOC, without any *res judicata* effect for the dismissal.

It is for these reasons, the lower cost, the speedier resolution, the involvement of the mediators, and the finality of a mediated settlement, that have led me to recommend proceeding through the EEOC mediation program for every EEOC charge that my clients have faced, for the past few years. This is one government program that works and really deserves sincere consideration by any employer faced with a discrimination charge. ■

## LOOKING FOR *Lawnotes* Contributors!

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

For information, contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., 1400 North Park Plaza, 17117 West Nine Mile Road, Southfield, Michigan 48075 or (248) 559-2110 or israel@martensice.com.

# ARE WE LOSING THE RIGHT TO DEFEND FEDERAL CLAIMS IN FEDERAL COURT?

**Louis B. Eble**
***Vercruysse Metz & Murray***

There has been some provision for the removal of federal questions cases, filed in state court, to a federal forum since the original Judiciary Act of 1789.[1] Furthermore, it has been long-settled by both the United States Supreme Court and the Sixth Circuit that once a defendant properly removes a federal question claim to a federal forum, a district court has no authority to remand a federal question claim back to state court.[2]

Nevertheless, some district courts, including at least two in the Sixth Circuit, have been remanding federal question claims back to state court for almost a decade.[3] The district courts are premising this alleged discretionary authority to remand federal questions claims, despite long-established precedent to the contrary, on an innocuous change in the wording in the 1990 amendment of 28 U.S.C. §1441(c). For example, in *Battle v. Park Geriatric Village Nursing Facility*,[4] the district court explained its "authority" to remand claims completely pre-empted by §301 of the Labor-Management Relations Act as follows:

> The 1990 amendments to section 1441 (c) evince a strong intent to restrict the removal jurisdiction of the federal courts . . . . Indeed the amended language has brought about two significant changes in removal jurisdiction. First, only separate and independent claims brought under 28 U.S.C. §1331 (federal question jurisdiction) will support removal of an entire case . . . . Second, section 1441 (c) gives this court discretion to remand the *entire case* to state court where state law predominates, even though federal question jurisdiction would have existed if the action were brought originally.[5]

Under this theory, plaintiffs can prevent defendants from defending federal claims in a federal forum by simply adding state claims to a federal question claim. The state claims will purportedly grant the district court the discretionary authority to remand the entire case, including any federal claims, back to state court. Some district courts have even dispensed with the requirement that the claims be "separate and independent" for §1441(c) to apply.[6] In fact, one court has used a type of incorporation theory to find that the purported authority in §1441(c) to remand federal question claims extends to the supplemental jurisdiction statute, 28 U.S.C. §1367.[7]

However, the district courts that rely on this reasoning are mistaken. While Congress removed diversity cases from the removal provision of §1441 (c), Congress did not drastically alter federal civil procedure by granting district courts the discretionary authority to remand properly removed federal question claims.[8] In fact, the amendment to §1441 (c), rather than its total repeal, as was recommended by the *Report of the Federal Courts Study Committee*, demonstrates that Congress intended to protect defendants' rights to have a federal forum for federal claims. For federal question claims, § 1441(c) provides a backup to the removal provisions of §1441 (a) and (b).

As a result of the 1990 amendment to §1441 (c), removal under its provisions is only permitted when a separate and independent federal question claim is joined with a non-removable claim.[9] The 1990 amendment also modified the scope of a district court's discretion to remand *state* claims pursuant to §1441 (c). The pre-1990 amendment language provided that "the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters not otherwise within its original jurisdiction." The post-1990 amendment language provides that "the entire case may be removed and the district court may determine all issues therein, or, in its discretion, *may remand all matters in which state law predominates*."[10] The new language parallels the language of the contemporaneously enacted §1367 (c), which restricted the discretionary remand of state claims subject to a district court's supplemental jurisdiction.[11] Put simply, the amended §1441 (c) provides no basis for the remand of *federal* question claims.

As one federal district court noted: "History, language, and logic compel the conclusion that under §1441 (c), the phrase 'matters in which state law predominates' does not encompass federal claims."[12] This is correct. This article will discuss the: (a) history, (b) language, and (c) logic of §1441 (c), all demonstrating that the words "matters in which state law predominates" excludes federal claims.

### *The History of §1441 (c)*

Pursuant to the Judicial Improvements and Access to Justice Act of 1988, Chief Justice Rehnquist appointed a 15 member Committee, including five distinguished federal judges, to study the Federal Courts and recommend reforms.[13] On April 2, 1990, the Committee issued its report. The Report made the following observations and reommendation:

> 3. Congress should repeal 28 U.S.C. § 1441 (c) (concerning removal of separate and independent claims).
>
> This provision permits the removal of a "separate and independent claim or cause of action" that would have been "removable if sued upon alone" when "joined with one or more otherwise non-removable claims or causes of actions." *A principal purpose [of 1441(c)] is to keep a defendant's right of removal to federal court alive when a state court plaintiff joins an unrelated, non-removable claim*. Most commonly, such situations arise in diversity cases when the separate claim is against another, non-diverse party. For complex reasons, however, the statute causes much litigation apart from the merits as defendants try and mostly fail to qualify for separate-claim removal. As one court has said of § 1441(c), this field "luxuriates in a riotous uncertainty."
>
> In the small number of *federal question cases* in which the statute might apply, however, *it can work fairly well as a backstop to the general removal provisions (§§1441*

*(Continued on page 8)*

# ARE WE LOSING THE RIGHT TO DEFEND FEDERAL CLAIMS IN FEDERAL COURT?

*(Continued from page 7)*

> *(a) & (b)*. Hence we recommend its repeal only if Congress retains the general diversity jurisdiction, in which most of the difficulties with §1441 (c) arise.[14]

Instead of repealing §1441 (c), Congress implemented a hybrid of the Report's recommendations: It eliminated diversity cases from the removal provision of §1441 (c) but retained §1441 (c) for the express purpose of protecting a defendant's ability to obtain a federal forum for federal claims:

> The amendment would, however, retain the opportunity for removal in the one situation in which it seems clearly desirable. The joinder rules of many states permit a plaintiff to join completely unrelated claims in a single action. The plaintiff could easily bring a single action on a federal claim and a completely unrelated state claim. *The reasons for permitting removal of federal question cases apply with full force*. In many cases the federal and state claims will be related in such a way as to establish pendant jurisdiction over the state claim. Removal of such cases is possible under Sec. 1441 (a). *The amended provision would establish a basis for removal that would avoid the need to decide whether there is pendant jurisdiction*.
>
> The further amendment to Sec. 1441 (c) that would permit the remand of all matters in which state law predominates also should simplify administration of the separate and independent claim ***removal***.[15]

Thus, Congress clearly intended to protect defendants' right to *remove* federal claims. District Courts that are remanding federal claims pursuant to §1441(c) are standing the amendment and congressional intent on its head. Certainly, Congress did not go out of its way to ensure defendants the ability to obtain a federal forum for federal claims only to have a district court turn around and remand the same federal claims back to state court. This seems especially obvious because such "discretionary authority" did not exist before the amendment and flies in the face of well-settled federal court precedent.

### *The Language of §1441(c)*

The district courts that are remanding entire cases because of a predominance of state law claims are misinterpreting the word "matters" in §1441 (c) to mean "the entire case." In other words, these courts fail to examine the individual claims in a case and make a determination that state law predominates in each claim remanded. However, as one district court noted, the word "matters" in §1441 (c) refers to "claims" and not the entire case:

> This Court concludes that the phrase "matters in which State law predominates" does not authorize the remand of claims arising under federal law which are properly removed and which fall within the district Court's subject matter jurisdiction. The word "matters" is reasonably construed as meaning "claims."[16]

This is an understatement, because "matters" can *only* be construed as meaning claims.

First, the term "matters" is plural. Therefore, it must refer to the claims within an entire case. Second, §1441 (c) states that "the entire case" may be removed but only "matters in which State law predominates" may be remanded. If Congress intended that the entire case, including the federal claims, could be remanded it would have said "the district court may determine all issues therein, or, in its discretion, *remand the entire case* if State law predominates." Instead, Congress used two different phrases meaning two different things: (1) "the entire case" and (2) "matters in which state law predominates."

Furthermore, before the 1990 amendment, the term "matters" in §1441 (c) clearly referred to particular claims. Prior to its amendment, §1441 (c) provided as follows: "the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters not otherwise in its original jurisdiction." In the 1990 amendment, Congress did not eliminate the term "matters" or otherwise disturb its clear and established meaning.

Obviously, state law issues cannot normally predominate in a federal question claim.[17] This is especially true for federal claims in which federal law completely preempts the field.[18] Nevertheless, district courts have not hesitated to remand preempted claims.[19] There will, however, be times when federal law predominates in a state claim for a variety of reasons including, but not limited to, federal preemption limiting the scope of a state claim, a federal defense, or because the merits of a state claim turn on an important federal issue.

Nothing in the language of §1441 (c), therefore, even remotely suggests the creation of a new "discretionary authority" for the district courts to remand entire causes of actions that still contain federal question claims.

### *The Logic of §1441(c)*

As noted, the main purpose of §1441 (c) is "to keep a defendant's right of removal alive when a state court plaintiff joins an unrelated non-removable claim."[20] Furthermore, §1441(c)'s legislative history expressly states that Congress's reason for keeping §1441(c) was due to the belief that the reasons for permitting the removal of federal question claims "apply with full force."[21] It is contradictory to assume Congress intended to give district courts the unprecedented right to remand the very claims Congress was ensuring would receive a federal forum.

It is also unreasonable to assume Congress intended to reverse years of Supreme Court precedent, surrender jurisdiction of federal claims to state courts, and deny defendants a right to a federal forum for federal question claims, all with such a minor wording change of §1441 (c). Neither in the Report of the Federal Courts Study Committee nor in the legislative history of § 1441 (c) is there even a suggestion that the amendment granted district courts "discretionary authority" to remand federal question claims.

Congress could not have intended such a radical change to federal civil procedure without even mentioning it *once* in the legislative history.[22] For example, as expected, the legislative history for §1441(c) explains the purpose behind eliminating diversity jurisdiction from its provision. Similarly, the legislative history for §1367

explains in detail the purpose for the codification of supplemental jurisdiction.[23] Given these examples, in which the purposes of other contemporaneously enacted provisions were explained, the absence of an analogous explanation for §1441(c) supports the view that no such change was made. As the Supreme Court noted more than two decades ago when rejecting a previous attempt by a district court to use an innocuous change in a remand statute to justify the remand of federal claims:

> That the word "improperly" in the old law was changed to "improvidently" in §1447 (c) . . . with reference to the criteria for remanding cases removed from state and federal court is of no moment. *"[N]o changes of law or policy are to be presumed from changes of language in the (1948) revision of the Judicial Code unless an intent to make such changes is clearly expressed*."[24]

Finally, to interpret §1441(c) as to allow the remand of federal question claims requires the illogical assumption that, where state claims in a lawsuit predominate, Congress *allowed* remand of "separate and independent" federal law claims, but Congress *forbade* remand of supplemental federal claims, which form part of the same case or controversy as the state claims. If Congress intended to allow remand of federal question claims due to the predominance of state law claims, Congress would have allowed remand of supplemental federal claims, which ordinarily should be adjudicated with the related state law claims. In enacting §1367, however, Congress did not permit remand of supplemental claims.[25] Congress enacted §1367 and amended §1441(c) contemporaneously. Since Congress, in enacting § 1367 (c), did not even permit remand of supplemental federal claims, which logically should be adjudicated with the companion state law claims, Congress certainly did not permit the remand of federal claims "separate and independent" from their companion state law claims.

The only logical interpretation of these two statutes requires the conclusion that neither authorizes the remand of federal question claims, but only the remand of state law claims. In changing the wording of §1441 (c), Congress merely paralleled the contemporaneously enacted §1367(c), providing guidance regarding the remand of state claims only.[26]

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The history, language and logic of §1441(c) all establish that its amendment did not grant district courts the authority to surrender jurisdiction of federal claims to state courts and concomitantly deny defendants a federal forum for federal claims. In fact, precisely such concerns prompted a unanimous Supreme Court to finally hold that discretionary remands are reviewable on appeal.[27] Unfortunately, the theory has taken on a life of its own. Two Circuits have indicated already that such discretionary authority may exist. A third, the Fifth Circuit has expressly endorsed the position although arguably in dicta.[28] On the other hand, two recent decisions rejecting the theory indicate that this trend may be reversing.[29] The Sixth Circuit recently granted a stay of a remand order for the express purpose of resolving this issue.[30] However, the case has since settled and, therefore, it will not be addressed. As it stands now, the district courts in this circuit are split on the issue.[31] It is this author's hope that when the Sixth Circuit has a chance to resolve this issue, it will find that the purported discretionary authority to remand federal question claims back to state court does not exist.

**— END NOTES —**

*Author's note:* a version of this article appeared in the Oakland County Bar Association publication *LACHES.*

[1]14B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721, 288 (citing 1 Stat. 73, c. 20 § 12).

[2]*E.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) ("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."); *Hughes v. Ohio Bell Tel.*, 916 F.2d 367, 372 (6th Cir. 1990) ("[T]he district court may not remand a case over which it properly has jurisdiction, even if that case had been removed from state court."); *see also England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964) ("When a federal court is properly appealed to in a case over which it has by law jurisdiction, it has a duty to take such jurisdiction.").

[3]*See, e.g., Moralez v. Meat Cutters Local 539*, 778 F. Supp. 368, 370-371 (E.D. Mich. 1991); *Moore v. DeBiase*, 766 F. Supp. 1311, 1321 (D.N.J. 1991).

[4]948 F. Supp. 33 (E.D. Mich. 1996) (emphasis added).

[5]*Id.* at 35.

[6]*See Administaff, Inc., v. Kaster*, 799 F. Supp. 685, 689, n. 9 (W.D. Tex. 1992).

[7]*See id.* at 689 (stating "[n]ow that 1441(c) authorizes remand of an entire case . . . it lends even stronger support to the authority of a court to remand an entire case . . . under . . . Section 1367(c) . . . .").

[8]*See* H.R. Rep. No. 101-734, 101st Cong., 2nd Sess., (1990), *reprinted in*, 1990 U.S.C.C.A.N. 6862 (stating "The core of H.R. 5381 is Title I, which implements a number of salutary, *but essentially noncontroversial recommendations* of the Federal Courts Study Committee.") (emphasis added).

[9]*See* 28 U.S.C. §1441 (c).

[10]*Id.* (emphasis added).

[11]*See* 28 U.S.C. §1367 (c).

[12]*Hickerson v. The City of New York*, 932 F. Supp. 550, 558 (S.D.N.Y. 1996).

[13]*See* H.R. Rep. No. 101-734, 101st Cong., 2nd Sess., (1990), *reprinted in* 1990 U.S.C.C.A.N. 6862.

[14]*Report of the Federal Courts Study Committee*, April 2, 1990, pp. 94-95 (emphasis added).

[15]H.R. Rep. No. 101-734, 101st Cong., 2nd Sess., (1990), *reprinted in*, 1990 U.S.C.C.A.N. 6869 (emphasis added).

[16]*Kabealo v. Davis*, 829 F. Supp. 923 (S.D. Ohio 1993), *aff'd on other grounds*,, 72 F.3d 129 (6th Cir. 1995).

[17]*See Hickerson, supra*, at 558 ("A 'matter' that includes a substantial federal constitutional claim cannot be a matter in which state law predominates.").

[18]*See Beard v. Carrollton R.R. and CSX Transp., Inc.*, 893 F.2d 117, 118 (6th Cir. 1989) (finding that completely preempted claims are not susceptible to adjudication in a state court); *Engelhardt v. Paul Revere Life Ins. Co.*, 139 F.3d 1214, 1217 (8th Cir. 1998) (finding district court erred in remanding preempted claim); *St. John v. International Ass'n of Machinist and Aerospace Workers, Local #1010*, 139 F.3d 1214, 1217 (8th Cir. 1998) (same).

[19]*See Moralez, supra*, at 370-371 (remanding claims preempted by §301 of the LMRA); *Battle, supra*, at 34-35 (*sua sponte* remand of claims preempted by §301 if the LMRA).

[20]*Report of the Federal Courts Study Committee*, April 2, 1990, p. 94.

[21]H.R. Rep. No. 101-734, 101st Cong., 2nd Sess., (1990), *reprinted in* 1990 U.S.C.C.A.N. 6869.

[22]*See Walton v. Hammons*, 192 F.3d 590, 594 (6th Cir. 1999) ("The meaning of a statute's words can also be 'enlightened by their context and the contemporaneous legislative history' as well as the 'historical context of the statute.'") (citations omitted).

[23]*See* H.R. Rep. No. 101-734, 101st Cong., 2nd Sess., (1990), *reprinted in* 1990 U.S.C.C.A.N. 6868-6869, 6873-6876.

[24]*Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, n. 15 (1976) (emphasis added).

[25]*See* 28 U.S.C. §1367(c) and *Hickerson, supra*, at 559 ("Nothing in §1367 authorizes a district court to dismiss or remand any claim over which the district court has original jurisdiction . . . .").

[26] *See Report of the Federal Courts Study Committee, supra*, at 48 (Congress should direct federal courts to dismiss *state claims* if these claims predominate . . . .") (emphasis added).

[27]*See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714 (1996) ("The [remand] puts the litigants in this case 'effectively out of court' [citations omitted] and its effect is precisely to surrender jurisdiction of a federal suit to a state court.'") (citations omitted).

[28] *See Fielder v. Credit Acceptance Corp.*, 188 F.3d 1031, 1037 (8th Cir. 1999); *In re City of Mobile*, 75 F.3d 605, 608 (11th Cir. 1996); *Eastus v. Blue Bell Creameries, L.P.*, 97 F.3d 100, 105 (5th Cir. 1996).

[29]*See Doll v. U.S. West Communications, Inc.*, 85 F. Supp.2d 1038, 1042, n. 2 (D. Colo. 2000) (stating "the most recent authority on this issue has rejected plaintiff's argument, holding that the court may remand only state law claims, not federal claims."); *Lujan v. Earthgrains Baking Co., Inc.*, 42 F. Supp.2d 1219, 1221-1222 (D.N.M. 1999) (opining that the Tenth Circuit would reject position that district courts may remand federal claims).

[30]*See Singh v. MascoTech, Inc.*, No. 99-2459 (6th Cir. March 9, 2000).

[31]*Compare Moralez, supra, and Battle, supra, with Kabealo, supra, and Salei v. Boardwalk Regency Corp.*, 913 F. Supp. 993 (E.D. Mich. 1996). ■

# CHECK THAT OIL?

**Sheldon J. Stark**
***Education Director, Institute of Continuing Legal Education***

Sometimes lawyers lose all perspective in the discovery process; and their sense of humor is the first thing to go. During a deposition in *Matras v. Amoco Oil Co.,* 424 Mich 675, (1986), an age discrimination case, I was questioning a high level company official about the decision to include my client in a large scale reduction in force. The defense believed my strategy was to emphasize a lack of "fairness" rather than age "discrimination" to prevail at trial.

As the deposition ground along, it occurred to me that the witness, a long term employee, offered a nice little opportunity for me to learn something about the economic history of our country. I had always wondered whether "Standard Oil," "Amoco," "Chevron," "Esso," etc. were related to one another. Were they connected? Did they have a common origin? If so, what was it?

So, I asked the witness: "How is Amoco Oil related to the original old Standard Oil of Ohio?" The question was innocent. Truly it was. Obviously, I was wasting a little time, but I wasn't going to dwell on it. I was genuinely curious. Wasn't defense counsel? No. He was steamed.

"Objection!" he roared. "I'm not going to let you get into all that robber baron stuff so you can argue fairness!"

"I was not planning to argue fairness," I replied. "That said, I might tell the jury that when you fire a well-qualified, able employee because he happens to be a certain age, it's enough to 'rock-a-fella!'"

Again, defense counsel vigorously objected. This time he moved to strike "all jokes" from the record.

The deposition eventually concluded and we each went on to other matters. Being proud of my little pun, I couldn't wait for the transcript to arrive so I could show my friends. Generally, of course, when a lawyer moves to strike, the offending material remains and the court reporter simply records that one of the lawyers moved to strike it. When the transcripts finally came, I ripped the envelope open and began pouring through the pages looking for my little joke. This was in the old days before key word indexes. My joke was not there. The court reporter literally did strike it out! "You mean you wanted that in the permanent record?" she asked incredulously when I called to complain.

# U.S. SUPREME COURT HEARS ARGUMENT IN FOUR EMPLOYMENT CASES

**Andrew M. Mudryk**
***The Law Offices of Andrew M. Mudryk***

The United States Supreme Court was busy early in its term listening to oral argument in four employment-related cases. The court will decide important issues in those cases dealing with disability discrimination suits against states as well as arbitration in a variety of contexts.

On October 11, 2000, the court heard oral argument in *University of Alabama Board of Trustees v Garrett,* No. 99-1240. At issue in *Garrett* is whether the Eleventh Amendment bars private citizens from filing suit in federal court under the Americans with Disabilities Act, 42 USC 12101 et seq and under Section 504 of the Rehabilitation Act of 1973, 29 USC 701 et seq. against non-consenting states.

The court also heard argument in three cases dealing with arbitration issues. On November 6, 2000, the parties argued *Circuit City Stores, Inc. v Adams,* No. 99-1379, in which the court will decide whether the ninth circuit was correct in its controversial holding that the Federal Arbitration Act (FAA), 9 USC 1 et seq, does not apply to employment contracts. On October 2, 2000, the court heard argument in *Eastern Associated Coal Corp v United Mine Workers,* No. 99-1038, which dealt with the enforcement of arbitration awards requiring reinstatement to safety sensitive positions of employees who test positive for illegal drugs. The following day, the court heard *Green Tree Financial Corp. v Larketta,* No. 99-1235, in which it will decide two issues: (1) whether an order compelling arbitration and dismissing a lawsuit's underlying claims is a "final decision with respect to an arbitration," appealable under 9 USC 16(a)(3) and (2) whether an arbitration provision that is silent on the issue of costs and fees is unenforceable under the FAA.

The Northwestern University Medill School of Journalism provides detailed information regarding all cases scheduled for oral argument before the Supreme Court, including oral argument transcripts and briefs. You can access those resources through the web site of the Cornell Law School's Legal Information Institute at www.law.cornell.edu. ■

# OYEZ OYEZ OYEZ

If you want to listen to the oral arguments in *Oncale v. Sundowner Offshore Services* (1998) and *Romer v. Evans* (1996), discussed in Dave Kotzian's article on page one, or learn more about the Supreme Court, check out *The OYEZ Project* of Northwestern University. OYEZ has over 600 Supreme Court oral arguments you can listen to using RealAudio. If you thought *Bush v. Gore* was interesting, OYEZ has a treasure trove of arguments dating back to 1955. Http://oyez.nwu.edu.

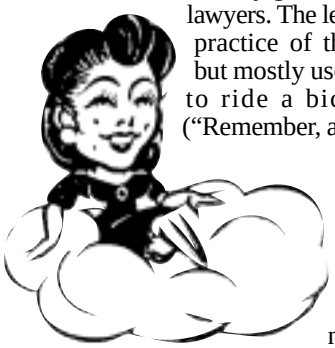
the editors

# PROFILING

**Stuart M. Israel**
***Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C.***

Cleaning the reaches of my basement recently, I came across *Trial Diplomacy* (2d ed) (Court Practice Institute, Inc. 1972), a trial advocacy text by Alan E. Morrill. I used *Trial Diplomacy* twice, once as a University of Michigan law student and a few years later in a CLE trial skills course put on by the Columbus (Ohio) Bar Association. The book brought back memories.

The law school course was a disappointment. Trial practice hadn't been offered for several years, although it was perpetually in the course catalogue. When it finally was offered, enrollment was so great it was given as lecture course to accommodate student demand. More than a hundred of us read *Trial Diplomacy* chapters with titles like "Direct Examination," "Cross Examination," "Impeachment" and others describing things lawyers do that made me want to go to law school in the first place. We didn't get to try our hands at these skills, however. Instead, we wrote papers and went to lectures delivered by guest speakers, mostly seasoned trial lawyers. The lectures addressed the theory and practice of the persuasive art. Interesting, but mostly useless; it was like trying to learn to ride a bicycle by reading about it. ("Remember, always maintain your balance.")



*"quick to smile"*

The Columbus CLE course was better. It combined *Trial Diplomacy* readings, lectures and simulations. Some lectures left something to be desired, however. One prominent lawyer admonished us, wholly without irony, "don't repeat and repeat and repeat and repeat." Still, we CLE students got to put our skills into practice with the benefit of peer review and instructor critique.

Times have changed. Lawyers are now well aware of the value of skills training. The Institute of Continuing Legal Education (ICLE) and the National Institute for Trial Advocacy (NITA) put on excellent skills courses and most law schools now offer meaningful practice courses and clinical programs.

Texts have improved, too. They do not offer "suggestions" like these from *Trial Diplomacy* (at pp. 15, 18-19), to be "considered when weighing the probabilities in selecting jurors."

> People whose name and appearance indicate an origin of a southern European country might be more likely to be plaintiff jurors.
>
> ---
>
> People of Oriental extraction or of other extremely small minorities exercise moderate influence on a jury. They are more apt to go along with the majority's expression in order to avoid dissension.
>
> ---
>
> Older jurors are generally favorable to the plaintiff. It should be kept in mind that some people become cantankerous in their old age and would, therefore, be an exception to the rule.
>
> ---
>
> Men and women who have never been married are more likely to be introverted, maladjusted, severe, or have an unhappy outlook on life and should be considered defendant jurors.
>
> ---
>
> Generally speaking, the plaintiff's lawyer should avoid civil service workers, insurance company employees, and those who have an occupation that would appeal to a "loner" or introvert.
>
> ---
>
> If a lawyer finds himself representing a person who is a member of a clearly identifiable small ethnic group and runs across a person in the jury who is also a member of this group, it is a mistake to accept that juror. . . . [H]e will want to demonstrate to his fellow jurors his fairness and impartiality. In his desire to convey this image he actually leans to the other side and becomes the opponent's juror.


*"grim, unsmiling" type*

> ---
>
> Plump people, or if you prefer "fat," who are quick to smile may lean toward the plaintiff. A thin person who has a grim, unsmiling demeanor and is not responsive can make a good defendant juror.

Why, that's profiling! Is this what high-priced jury consultants say behind closed doors? Actually, thinking back to law school, there were quite a few of those "grim, unsmiling" types in my graduating class, who only three years before were "quick to smile." It must have been the Ann Arbor water. ■

## *MEA CULPA*

*Lawnotes'* printer issued a public apology, taking full responsibility for the typographical error in Russell Linden's article in the Fall 2000 issue, titled "Non-union Employers Must Understand Impact of NLRA."

The article's last sentence reads: "These cases are a good reminder to non-union employers and attorneys that the NLRA and the NLRB are out there [not!]." The bracketed "not!" appears to be some snotty comment by Linden on the state of the law and the Board. Really, it was an erroneously published editorial direction, intended to communicate to the printer that the sentence should end with a period, and "not" with the exclamation point that appeared in the galleys. Linden was not being snotty, at least on this occasion.

The printer, to its credit, takes full responsibility for this bonehead error, fully exonerating the *Lawnotes* editors. Here is the text of the printer's heartfelt apology: "Okay, okay, we want to keep your business. Yes, you can print that we apologize for the typo, even though *you* signed off on the final galleys. Just don't use our name." Thus Linden and your editors are fully vindicated.

the editors

# A VIEW FROM THE CHAIR

**Arthur R. Przybylowicz, *Chair***
***Labor and Employment Law Section***

At the time this column is being written, we do not yet know who will be elected in the races for three Michigan Supreme Court seats. However, it is already very clear who is the biggest loser in this race: the judicial system.

The campaign for Supreme Court began with allegations of "race-baiting." From there, the campaign degenerated to the point where former Republican Governor William Milliken spoke out against his own party's campaign materials because they were so misleading. The advertisement in question accused Judge Fitzgerald of being "soft on crime," because he had the audacity, along with other members of a court of appeals panel, to affirm a lower court judge's sentence in a particular case. The campaign included the three incumbent justices running as a "slate," as if they were ordinary politicians running for seats in the legislature who could be expected to vote as a bloc.

No doubt after the election — regardless of the result — there will be calls for radical changes in the way Supreme Court justices are selected. There will be the familiar calls to scrap the elective system and adopt an appointive system, as if that will cure the problem. Of course, this election involved three justices who were appointed by the Governor. These three justices were viewed by many as having an uncanny knack for overturning precedent — both recent and long-term — and ruling on behalf of particular interest groups. The judicial process will not be respected by those subject to it when the result of a case can often be determined not by reviewing the facts and issues involved, but by examining who are the parties to the case. In my view, an appointive process for judges is no panacea for the problems we currently endure.

For the judicial system to command the respect of the public, it must act in a way that assures the public that decisions are based upon legal principles fairly applied to all. Regardless who wins this election, the public has been left with the notion that justice will not be fairly and evenly applied by the Supreme Court to all who come before it. Tinkering with the selection system will not eliminate the problem.

The judicial system, in my view, will not regain the respect that it has lost in the eyes of the public until judicial candidates and their supporters consider the cost to the institution of their political agendas and respect the history and future of the institution over their own political fortunes. This applies not only to candidates during a campaign, but also once those candidates become justices of the court. The judicial system has always worked best when it has gained the trust and confidence of the public. The system demands individuals who desire to serve from a sense of public service rather than a desire to implement a political agenda. That does not mean that candidates from political parties cannot become excellent Supreme Court justices. Most recently, Justice James Brickley, after serving as a Republican lieutenant governor, managed to gain respect as a fair and unbiased jurist on the Michigan Supreme Court. Thus, it does not take the elimination of the political parties in the selection process to improve the Court, but rather, it takes a commitment by all those who desire to serve on the Court to insure that their legacy will be one in which the administration of justice was fair and even.

We have a long way to go.

# NLRB PRACTICE AND PROCEDURE

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

On Thursday, October 19, 2000, the 8th annual Bernard Gottfried Memorial Labor Law Symposium was held at Wayne State University. This year, and hopefully for all future Symposiums, the sessions were held in the Spencer M. Partrich Auditorium. This facility provided a wonderful venue for speakers and listeners and it truly was a pleasure to be one of the first groups to use this facility.

This year the Gottfried Symposium featured two major panel presentations. The first panel discussed the subject of E-mail, the internet and employee protected concerted activities. Presenting the Board law on this subject was NLRB senior trial attorney Mary Beth Foy. After Mary Beth's presentation, management's perspective was presented by attorney Michael Blum and labor by attorney Bradley Raymond. Needless to say this very controversial subject generated some interesting discussion concerning the rights and obligations of employers vis-à-vis their employees and their policing of E-mail. Of course the rights and obligations of employees, whether union or non-union, were also discussed. Although very few hard conclusions were reached, there was I believe general consensus that this subject will be on the cutting edge for some time to come as our experience with E-mail and the internet develops.

Our second panel presentation was on the subject of section 10(j) injunctive relief with NLRB Deputy Regional Attorney Joseph Barker presenting the Board law and practice in this area. DRA Barker was followed by Attorney Scott Brooks presenting labor's perspective and Attorney Kent Vana presenting management's view. I think it would be a fair characterization of the labor perspective to say that there is much frustration regarding the Board's reluctance to seek 10(j) relief and even when sought the time delays involved. Again while I doubt that any hard conclusions were reached in this area, I did point out for the participants that in Region 7 during fiscal year 2000, I recommended 10(j) relief be sought only 12 times with a case intake in excess of 1500 cases. On the national level General Counsel Page later commented that the Board had authorized only 68 10(j) injunctions during all of fiscal year 2000.

This year's Symposium was, from my perspective, a very worthwhile and successful endeavor. I would like, however, to increase attendance at this event over and above the 100 to 150 attendees we usually have. I am interested in any suggestions you may have to increase our attendance.

Our luncheon speaker at the Gottfried Symposium this year was NLRB General Counsel Leonard Page. Leonard, as I am sure most of you know, was formerly an associate general counsel with the UAW and a long time labor practitioner in the state of Michigan. Leonard spoke on a variety of matters including section 10(j) injunctions and also about the need for additional remedial relief and some specific remedies that he had recently proposed, including front pay, compounding of interest, consequential damages and the expanded use of the remedies ordered by the Board in *Field Crest Cannon*, 318 NLRB 417(l995). Leonard indicated that the issue of consequential damages, e.g., such as seeking damages for someone who has lost their home because of a loss of income, may be the most controversial remedy and likely to wind up in front of the Supreme Court.

At this year's Symposium I spoke about the decision making process in the regional office and at least one significant change that has occurred in this process. Thus, in recent years regional directors have been delegated by the General Counsel greater authority to issue investigative subpoenas to compel the production of evidence from charged parties or third party witnesses. Recently General Counsel Page further expanded the authority of regional directors in this area by allowing directors to issue investigative subpoenas *ad testificandum* and *duces tecum* to charged parties and third party witnesses when the evidence sought would materially aid in the determination of whether a charge allegation has merit and whenever such evidence could not be obtained by reasonable voluntary means. While I still respect the right of a charged party to decline to present evidence, obviously there will be situations where your failure to do so may result in my issuance of an investigative subpoena to compel witness testimony or document production.

For the past several years the Gottfried Symposium has awarded a scholarship to a Wayne Law student. This year we presented our fourth Bernard Gottfried scholarship to Sarah Pring, who is a third year law student at Wayne State Law School. Congratulations to Sarah.

A number of you have raised questions about the procedure to be followed when you seek evidence from Board files or the testimony of a Board agent. Generally speaking when you desire a member of the regional office staff to testify at a representation or unfair labor practice hearing or seek to obtain evidence from an NLRB file, Section 102.118 of the Board's Rules and Regulations requires written authorization from the General Counsel (or the Chairman of the Board if in the control of the Board) for such testimony or documents. The General Counsel has over the years broadened the delegation of authority to regional directors in Section 102.118 situations. Thus, in most instances where you seek board agent testimony or the production of documents from an NLRB file, the request for same should be made to the regional director of the region involved rather than to the General Counsel. In those rare instances where the General Counsel's permission is necessary, the regional director will forward the request to the General Counsel.

The next meeting of Region Seven's Local Practice and Procedure Committee will be held at the time of the mid-winter meeting of the Labor and Employment Law Section. If you have any questions or issues that you want the Committee to address, please submit them to me or any Committee member. ■

# BILL SCHAUB WINS PRESIDENTIAL AWARD

William C. Schaub, Jr., Regional Director of the National Labor Relations Board's Detroit office, has been honored by President Clinton as a recipient of the Presidential Rank Award of Meritorious Executive.

Each year, the President bestows this prestigious award on a select group of the career members of the Senior Executive Service who are recognized for sustained exceptional performance and valuable contributions in leading federal programs. In announcing the award, NLRB General counsel Leonard R. Page stated:

> Simply put, Bill Schaub is one of our best and brightest people. Throughout his 30-year career with the Board, he has exemplified excellence in public service. To the Detroit community he has served so admirably, Bill's selection for the award will come as no surprise. They already know how skillfully he directs the handling of cases in his region. Parties to cases in Region 7 know they got a fair deal whether they win or lose. I know this to be true first hand from my litigation work as an attorney advocate before I became General Counsel. I couldn't be more pleased that Bill has been recognized with this award for which he is so deserving.

Schaub has served in the Detroit office since 1968, first as a trial attorney and, beginning in 1973, as a supervisory attorney. He was appointed regional attorney in 1986 and regional director in 1992. Born in Toledo, Ohio, he graduated from the University of Toledo with a B.A. degree in 1965, and received his J.D. degree in 1968.

# CUTTING EDGE CLE!

Attend ICLE's 26th Annual Labor and Employment Law Seminar, Thursday and Friday, April 26-27, 2001 at the MSU Management Education Center in Troy, cosponsored by the Labor and Employment Law Section.

Topics include: EEO, ADA and FMLA updates; immigration law for the labor and employment lawyer; non-compete and confidentiality agreements; ethical conduct and effective lawyering; MCR 2.411: new ADR rules for a new millennium; employment practices liability insurance; case evaluation; NLRB and MERC updates; opening statements and closing arguments in employment litigation and more.

The Employment Law Track will include presentations on: the new expert witness rules; using expert witnesses; forum selection; the 10 biggest mistakes my opponent makes; what you should know about workers' comp; great quotes for motion and appeal practice; and what employment lawyers should know about the NLRA and LMRA.

The Labor Law Track will include presentations on: new technology in organizing drives; anatomy of a just cause arbitration; NLRB investigations; the 10 biggest mistakes my opponent makes in labor negotiations; discrimination claims in the collective bargaining system; remedies before the Board; and critical issues in wage and hour law.

Labor and Employment Law Section members save $30 on the registration fee. That $30 savings is the same as the cost of your annual dues — so your Section membership pays for itself.

For information, watch your mail or contact Kelly J. Fitzsimmons, Marketing Manager, Institute of Continuing Legal Education: kellyf@icle.law.umich.edu, toll free phone: 877-229-4350, toll free fax: 877-229-4351. ■

# SIXTH CIRCUIT REVERSES COURSE ON ADA/CARPAL TUNNEL CLAIMS AND ADDRESSES MARITIME LAW, TITLE VII, AND NLRA ISSUES

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

From August of 2000 through October of 2000, the Sixth Circuit published over 20 cases dealing with a wide variety of labor and employment issues. The full text of Sixth Circuit decisions are available on the Internet at: "http://pacer.ca6.uscourts.gov/opinions/main.php".

**ADA - Sixth Circuit Again Addresses Carpal Tunnel**

In 1997 the court held that carpal tunnel syndrome that does not significantly restrict a plaintiff's ability to perform a broad range of jobs, but restricts her ability to perform a single job, does not constitute a disability under the ADA. As such, the court dismissed the plaintiff's claims in *McKay v. Toyota Motor Mfg,* 110 F.3d 369 (6th Cir. 1997). However, in the recent case of *Williams v. Toyota Motor Mfg*, 224 F.3d 840, the court stated that in determining whether a plaintiff is disabled within the meeting of the ADA, courts should not look at whether an employee is substantially limited in the major life activity of working, rather, the courts should examine whether an employee is substantially limited in her ability to perform manual tasks. Therefore, the Sixth Circuit determined that the plaintiff, who suffered from carpal tunnel syndrome, was disabled within the meaning of the ADA.

**Title VII - Retaliation**

Temporal proximity of alleged failure to promote to the filing of an EEOC charge is generally not sufficient to establish a causal link between the alleged failure to promote and the filing of the charge. *Nguyen v. City of Cleveland*, docket no. 99-3200 (October 11, 2000).

**NLRA - Clarifies The Standard For Setting Aside An Election**

In *Harborside Healthcare, Inc. v. NLRB,* docket nos. 99-6050, 99-6250 (October 18, 2000), the Sixth Circuit held that the NLRB erred by applying the wrong legal standard with regard to the issue of whether to set aside an election. The court stated that the issue that must be addressed in determining whether to set aside an election is whether a supervisor's conduct reasonably tended to have a coercive effect and was likely to impair the employee's freedom of choice. The NLRB erred by simply examining whether the employer promised benefits or made threats.

**ERISA - Plan Administrator Acted Arbitrarily And Capriciously**

The Sixth Circuit held that a plan administrator acts arbitrarily and capriciously as a matter of law when he determines that medical evidence submitted by a claimant may not be considered. *Williams v. International Paper Co.*, docket no. 98-6514 (September 27, 2000).

**ADA Does Not Apply To States**

In a case of first impression, the Sixth Circuit reversed a district court judgment for the plaintiff on his ADA claims against the Cuyahoga County Court of Common Pleas and Cuyahoga County holding that Title II of the ADA does not apply to states. Congress did not validly abrogate the states' eleventh amendment immunity by attempting to apply the ADA to the states. *Popovich v. Cuyahoga County Court of Common Pleas,* docket Nos. 98-4100, 98-4540 (September 18, 2000)

**LMRDA - Union Cannot Expel Member For Suing The Union**

In *Hrometz v. Local 550, International Association of Bridge, Construction and Ornamental Ironworkers*, docket nos. 98-3355, 98-3497, 98-3408 (September 14, 2000), a union member filed a lawsuit against his local union in a dispute over his bid to purchase one of the union's automobiles. The union expelled the plaintiff from the union because he proceeded to litigation without first exhausting internal union remedies in violation of the union's constitution. The plaintiff then filed another lawsuit claiming that the union violated his right to sue under Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act (LMRDA) by expelling him. The district court granted summary judgment to the union. The Sixth Circuit reversed and remanded the case with instructions for the district court to (1) enter an order reinstating the plaintiff, (2) enjoin the union from further disciplining the plaintiff, and (3) to determine the extent to which the plaintiff may be entitled to money damages.

**Maritime - Deckhand Offended by Captain's Video May Proceed With Emotional Injury Claim**

A deckhand who says he was emotionally injured after his captain ordered him to watch a pornographic video depicting acts of bestiality may sue the ship's operator and owner for damages under a federal common law claim for benefits available only in cases of injury or illness. *West v. Midland Enterprises Inc.*, 6th Cir., No. 99-5982 (September 14, 2000). The Sixth Circuit reversed a trial court's entry of summary judgment for the plaintiff, remanding the case for an evidentiary hearing to determine whether West's emotional injury was caused by watching the video or by pre-existing medical conditions that he failed to disclose in a pre-hire questionnaire.

In addition, the court rejected the defendant's argument that West's conduct in bringing his own pornographic videotapes on board in violation of the vessel's rules barred him from receiving maintenance-and-cure benefits available to seamen under common law. "The fact that West may have violated the vessel's rules by bringing his own pornographic videotapes on board is irrelevant, however, because the pornographic videotape that allegedly caused him to have mental problems was brought onto the vessel by the captain. Moreover, West's pornographic videotapes only featured human performances, whereas Captain Boggs's videotape had barnyard animals as co-stars."

The court explained that federal common law provides seamen who experience illness or injury relief not offered to other workers, including maintenance and cure. "Maintenance" refers to a ship owner's obligation to provide a mariner with food and lodging if he or she becomes injured or ill while in service of the ship, and "cure" is the duty to provide necessary medical care. To recover for maintenance and cure, a plaintiff must show that (1) he was working as a seaman, (2) he became ill or injured while in the vessel's service, and (3) he lost wages or incurred expenditures relating to the treatment of the illness or injury. The right to recover, the court explained, does not depend on the negligence or fault of the vessel or its owner.

**TITLE VII - Failure To Promote Does Not Constitute A Continuing Violation**

In *Cox v. City of Memphis*, docket no. 99-5789 (October 18, 2000), the plaintiffs appealed from the district court's dismissal of their Title VII failure to promote claims against the Memphis Police Department (MPD). The complaint alleged racial discrimination against white female Lieutenants with regard to promotions. On November 16, 1995, the MPD began an elective process for promotion to the rank of major that resulted in an eligibility list. Based on this list, the plaintiffs were not promoted. The district court, however, dismissed the plaintiffs' claims, finding that they had failed to timely file their EEOC charges.

The Sixth Circuit noted that in order to recover for a discriminatory act under Title VII, a plaintiff must timely file a charge with the EEOC. However, the doctrine of "continuing acts," creates a narrow exception to the usual rule. Under one leg of the continuing acts doctrine, a "series of acts may be challenged in their entirety as long as one of those discriminatory acts falls within the limitations period." The court, however, affirmed the dismissal of the plaintiffs' claims because "the better view is that promotion or hiring from an allegedly tainted promotions roster is not a 'continuing act' but is merely the effect of previous discrimination. It is at the point of promulgation of the roster that a potential plaintiff is aware that alleged discrimination is likely to play a pivotal role in her future advancement." ■

## WRITER'S BLOCK?

You know you've been feeling a need to write a feature article for *Lawnotes*. But the muse is elusive. And you just can't find the perfect topic. You make the excuse that it's the press of other business but in your heart you know it's just writer's block. We can help. On request, we will supply you with ideas for article topics, no strings attached, free consultation. Also, we will give you our expert assessment of your ideas, at no charge. No idea is too ridiculous to get assessed. This is how Larry Flynt got started. You have been unpublished too long. Contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., 1400 North Park Plaza, 17117 West Nine Mile Road, Southfield, Michigan 48075. (248) 559-2110.

# NLRB ADDRESSES A "GOOSE ESCAPADE" AND OTHER ISSUES

**George M. Mesrey and Jack VanHoorelbeke**
***Clark Hill PLC***

The NLRB has issued a number of significant decisions during the last six months. They include:

**EMPLOYER DISCRIMINATION**

***NACCO Materials Handling Group, Inc.*** 331 NLRB No. 164

In this case involving a "goose escapade," the Board held the employer had not violated the Act by suspending and terminating two employees who placed a 'Vote Yes' card around a wild goose and paraded the bird around the plant during the eighth union organizing campaign at the plant. This activity was considered unprotected horseplay.

***Tri-County Transportation;*** 331 NLRB No. 152

The Board held that the employer violated the Act by discharging employees because they engaged in protected concerted activity when filing unemployment compensation claims; and by promulgating, maintaining, and enforcing a rule precluding employees from acting concertedly in presenting work-related concerns to higher management officials.

**OBJECTIONABLE CONDUCT**

***Spring Industries, Inc.*** 332 NLRB No. 10

The Board ordered an election set aside based on a supervisor's threat of plant closure and adopted a rebuttable presumption that employer threats of plant closure are disseminated among employees.

***Baker Victory Services, Inc.*** 331 NLRB No. 146

The Board reaffirmed the standard set forth in *V.I.P. Limousine, Inc.*, 274 NLRB 641 (1985), that an election should be set aside where severe weather conditions on the day of the election reasonably denied eligible voters an adequate opportunity to vote and a determinative number did not vote.

***Family Service Agency*** 331 NLRB No. 103

The Board overruled *Plant City Welding & Tank Co.*, 119 NLRB 131 (1957), and adopted a new rule prohibiting the use of supervisors as election observers by either the employer or the union.

***Atlantic Limousine, Inc.*** 331 NLRB No. 134

The Board overruled the "multi-factor approach" followed on a case-by-case basis to determine whether an election raffle interferes with the holding of a fair and free election and adopted a new rule barring election raffles in their entirety.

***Raleigh County Commission on Aging, Inc.*** 331 NLRB No. 119

The majority opinion found that a catered victory dinner paid for by the employer 15 days after the union lost an election, even though announced by the employer 2 days before the election, did not constitute objectionable conduct in violation of the Act.

***Sea Breeze Health Care Center*** 331 NLRB No. 149

The Board majority ordered a second election upon concluding the employer had engaged in certain unfair labor practices that had interfered with the first selection, including a "group interrogation" and administering a "Union Truth Quiz."

*(Continued on page 22)*

# WESTERN DISTRICT: NO CLAIM FOR SEXUAL HARASSMENT AFTER CONSENSUAL AFFAIR WITH MANAGER GOES SOUR, AND MORE

**John T. Below and Matthew S. Slazinski**
***Kotz, Sangster, Wysocki and Berg, P.C.***

**Claim Preclusion Established Where Plaintiff's Title VII Claims Were Or Should Have Been Presented In Prior State Court Case.**

*Wilson v Spartan Stores, Inc.*, Case No. 1:99-CV-452 (October 11, 2000). Plaintiff filed a *pro se* complaint including claims of discrimination under Title VII of the Civil Rights Act and the Americans with Disabilities Act. Plaintiff also alleged state law claims of intentional infliction of emotion distress and constructive discharge. The defendant employer filed motions for summary judgment before U.S. Magistrate Judge Joseph G. Scoville, who granted summary judgment for defendant based on claim preclusion.

Plaintiff did not file a response to either of the defendant's motions for summary judgment, but did submit objections to the Magistrate's report and recommendation. The court found plaintiff's objections to be without merit noting that in a prior state case, plaintiff accepted a mediation award of $200,000 and that lawsuit was dismissed with prejudice. The court indicated that Magistrate Judge Scoville correctly applied the law to preclude plaintiff's claims, stating that "Michigan employs a broad application of claim preclusion, focusing on the factual allegations underlying the two cases rather than simply on the claims asserted." See *Jones v State Farm Mut. Auto. Inc. Co.*, 509 NW2d 829, 834 (Mich Ct. App 1993).

**Female Plaintiff Who Dated Assistant Store Manager Outside Her Division Cannot Recover On Quid Pro Quo Sexual Harassment, Hostile Work Environment, Or Retaliation.**

*Newman v Home Depot U.S.A., Inc.*, Case No. 5:99-CV-72. Judge David W. McKeague granted summary judgment in favor of defendant and dismissed plaintiff Newman's claims of "quid pro quo" sexual harassment, hostile work environment, retaliation and constructive discharge.

Newman began dating an assistant store manager outside her division and, a few months later, broke off the relationship Newman claims shortly thereafter she was harassed in the form of offensive language, failing to provide work support and unwelcomed touching.

Subsequent to these incidents, Newman contacted "Home Depot's Alert Line" and reported several of the incidents. Defendant's human resource manager investigated the complaints. Other employees within Newman's division learned she filed a complaint and acted cold toward her Newman eventually quit, stating she was depressed and had trouble sleeping. The defendant Home Depot filed a motion for summary judgment. The court granted defendants motion on all claims. *Quid Pro Quo Sexual Harassment:* "To establish a prima facie case of quid pro quo sexual harassment, plaintiff must show that her submission to the unwelcomed advances was an expressed or implied condition for receiving job benefits or that her refusal to submit to the supervisor's sexual demands resulted in a tangible job detriment. *Bowman v Shawnee State Univ.*, 220 F3d 456,461 (6th Cir. 2000)." The Supreme Court defined "tangible job detriment" as a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits: *Burlington Indus., Inc. v Ellerth*, 524 US at 761. Newman testified at her deposition that her relationship with Laczynski was consentual. She presented no evidence demonstrating job benefits were promised or received as a condition of dating, nor did she present evidence her refusal to continue the alleged relationship resulted in a tangible job detriment. The court also stated the "cold shoulder" plaintiff received from co-workers was not an actionable job detriment. *Hostile Work Environment:* Because plaintiff did not suffer a tangible job detriment, she must establish that any harassment was so severe or pervasive that she suffered "hostile work environment" sexual harassment. Newman testified that behavior at issue was the result of the soured intimate relationship and was not based on plaintiff's gender. The court noted that plaintiff could not reasonably expect that her employment relationship with Laczynski would not change once their consensual social relationship ended. Furthermore, the "cold shoulder" by plaintiff's co-workers were the result of her filing a complaint and not a result of her status as a woman. *Retaliation:* Plaintiff did not demonstrate she suffered an adverse employment action as a result of filing a harassment complaint. The only consequence appeared to be the "cold shoulder" which again was not actionable or severe or pervasive harassment. The court, thus, granted summary judgment for the defendant on the retaliation and constructive discharge claims.

**Court Denies Plaintiff's Claim For Supplemental Unemployment Benefits Under Union Agreement.**

*Fizzell v Robert Bosch Corp.*, Case No. 1:00-CV-176. Fizzell filed a complaint against defendant Robert Bosch Corp. for benefits pursuant to the supplemental unemployment benefit plan ("SUB Plan") contained in her union contract.

The plaintiff was discharged for misconduct, falling asleep on the job. Plaintiff filed a grievance challenging the discharge. The union and defendant entered into an agreement conditionally reinstating plaintiff to employment in place of discharge and withdraw its objections to plaintiff's claim for state unemployment benefits. Plaintiff received unemployment benefits from the state and filed a claim with defendant corporation for supplemental unemployment benefits available under the union contract. Defendant denied the claim because plaintiff was laid off for disciplinary reasons (i.e. falling asleep on the job) and was, thus, ineligible for such benefits.

The court found the plaintiff's arguments to obtain the additional SUB plan benefits to be completely without merit, noting defendant's agreement to "no longer contest" plaintiff's claim was limited state unemployment benefits, *not* the supplemental benefits. Plaintiff had not even filed an application for supplemental benefits at the time the parties entered into the agreement. Plaintiff's claims were dismissed and plaintiff's counsel was sanctioned because he filed a meritless claim and failed to appear for argument.

**The Court Lacks Subject Matter Jurisdiction Over Title VII Claim When Plaintiff Failed To Exhaust EEOC Remedies.**

*Hawkins/Mann v TRMI, Inc.*, Case No. 4:99-CV-152. Plaintiffs filed action alleging gender and age discrimination in violation of Title VII, the Equal Pay Act of 1963, the Age Discrimination and Employment Act of 1967, and Michigan's Elliott-Larsen Civil Rights Act. Defendant filed a motion for partial dismissal or, in the alternative, for summary judgment with respect to plaintiff Mann's gender discrimination and constructive discharge claims. Judge McKeigh dismissed each claim without prejudice.

Mann began working as a production engineer for defendant and was later promoted to training coordinator. Two years later, the company assigned a male employee to "a higher position" in plaintiff's department. There was no internal job posting for the position which required the same job duties for a higher wage. Mann was involuntarily transferred to another position in another department. Mann filed a charge with the EEOC alleging gender discrimination. Mann's previous position later was eliminated and she was turned down for a quality engineer position within the company. The latter employment decisions were *not* added to Mann's EEOC claim.

The court dismissed Mann's claims of alleged discriminatory denial of the quality engineer position and constructive discharge must be dismissed (without prejudice) because they exceed the scope of her EEOC charge. The allegations forming the basis for her discriminatory denial and constructive charge took place some three months after her EEOC charge. "In order for the court to have subject matter jurisdiction over a Title VII claim, the plaintiff must exhaust administrative remedies by raising the claim in a charge to the EEOC. Exhaustion occurs only when the plaintiff has either set forth a claim in the EEOC charge or the claim could be reasonably expected to grow out of the EEOC's investigation. Claims that are not within the scope of the EEOC investigation must be dismissed for lack of subject matter jurisdiction." (citations omitted). ■

# ERWIN ELLMANN RECEIVES LELS DISTINGUISHED SERVICE AWARD

Erwin Ellmann, of Doepken Keevican and Weiss, will receive the 2001 Distinguished Service Award from the Labor and Employment Law Section of the State Bar of Michigan. The award is given to Michigan attorneys who exemplify outstanding service and professionalism in the practice of labor and employment law. Previous recipients are Ted Sachs, Bill Saxton, George Roumell, and Ted St. Antoine.

A graduate of the University of Michigan Law School, Ellmann served early in his career at the United States Department of Labor, where he was involved in several Depression-era decisions that began to dramatically reshape American labor law. He returned to Michigan following World War II, where he established a labor practice. At the same time, he joined with a group of lawyers to revive the ACLU, first in Detroit and later throughout Michigan. Through that affiliation he was involved in cases that challenged Michigan's one-man grand jury system and real estate discrimination in Grosse Pointe. In addition to teaching, lecturing and legal writing over the past half century, Ellman has served as an arbitrator in hundreds of labor, employment, securities and commercial cases.

Ellmann will receive the Distinguished Service Award on January 26, 2001 at the mid-winter meeting of the Labor and Employment Law Section.

# EASTERN DISTRICT UPDATE

**Jeffrey A. Steele**
***Brady Hathaway Brady & Bretz, P.C.***

**Judge Cleland Enjoins NLRB From Prosecuting Untimely ULP Charges**

In *Detroit Newspaper Agency v Schaub*, 108 F Supp2d 729 (ED Mich, 2000), the NLRB Regional Director unsuccessfully attempted to add 77 unfair labor practice charges to a consolidated complaint on the last day of trial. The Regional Director then filed a new complaint alleging 59 unfair labor practice charges. According to the new complaint, these 59 charges were "closely related" to the timely filed charges in the initial complaint. The defendant responded by asking the federal district court to enjoin prosecution of the untimely charges. Resolving that it had jurisdiction under *Leedom v Kyne*, 358 US 184 (1958), to review NLRB actions which violate a "facially clear" statute giving a "mandatory directive," Judge Cleland ruled that "based on the unambiguous mandatory language of §10(b), it is clear that any complaint based upon any ULP occurring more than six months prior to the filing of a charge with the Board is time barred, even if the underlying charges are 'closely related' to charges that were timely filed with the Board. Under *Leedom*, the district court has the power to prevent the NLRB from engaging in activities that are expressly prohibited to it by statute, and the court will exercise that power here." Judge Cleland thus enjoined further prosecution of the unfair labor practice charges that were filed more than six months after the charging party knew or reasonably should have known of the unfair labor practice.

**No Wrongful Death Damages in ADEA Suit**

In *Kulling v Grinders for Industry, Inc*, 2000 WL 1520949 (ED Mich 2000), Judge Rosen found material factual disputes regarding the authenticity of the employer's RIF defense. According to Judge Rosen, there was (1) evidence that decisionmakers gave age-related explanations for the contested terminations; (2) statistical evidence that older workers were discharged at a higher rate than younger workers; and (3) evidence undermining the alleged economic basis for the RIF. Judge Rosen then dismissed a wrongful death claim brought by the spouse of an employee who committed suicide as an alleged result of his post-termination depression. Judge Rosen construed the ADEA and ruled, as a matter of law, that the statute specifically limits the available damages and does not permit recovery under state statutes or tort theories. Accordingly, wrongful death and other state tort remedies such as loss of consortium and intentional infliction of emotional distress are unavailable to ADEA plaintiffs. Judge Rosen also ruled that although the right to pursue an ADEA claim survives the former employee's death, the right to seek "liquidated damages" does not. Finally, although plaintiffs can generally seek wrongful death damages under the Michigan Civil Rights Act, that remedy was unavailable to plaintiff because her decedent had signed a release in exchange for severance pay. Although the release was invalid as to the ADEA action due to the employer's failure to comply with the OWBPA, the release was valid as to other rights and remedies.

*(Continued on page 18)*

# EASTERN DISTRICT UPDATE

*(Continued from page 17)*

**Judge Rosen Questions the Sixth Circuit's Holding in *Cline***

In *Nizami v Pfizer Inc*, 107 F Supp2d 791 (ED Mich, 2000), Judge Rosen articulated a lengthy critique of the Sixth Circuit's opinion in *Cline v Catholic Diocese of Toledo*, 206 F3d 651 (CA 6, 1000), which Judge Rosen characterized as holding that the '"qualified' prong of the *prima facie* case [must] be evaluated in light of the plaintiff's employment record 'prior to the onset of the events that the employer cites as its reason' for the decision." Judge Rosen argued that the issue should not focus on whether the employee was qualified in the past, but on whether the employee was qualified *at the time the adverse decision was made*. Recognizing his obligation to follow Sixth Circuit precedent, however, Judge Rosen ruled that despite recent problems in the plaintiff's performance, positive performance evaluations from the past satisfied the plaintiff's *prima facie* burden to show that he was qualified for the position. Judge Rosen then rejected the plaintiff's argument that he had established pretext by showing that the employer's basis for demoting him was untrue, subjective and insufficient. Judge Rosen reasoned that (1) the employer could rely on its "honest belief" as to the plaintiff's deficiencies "[g]iven ... consistent evaluations [by three supervisors] resting upon particularized facts;" (2) subjective evaluations are an acceptable basis for review and not automatically pretextual since "nothing in Michigan's Elliott-Larsen Act or its federal counterparts requires that an employer justify its decisions with mathematical precision or through quantifiable measures, or that these decisions be determined by a court to be objectively rational and reasonable;" (3) the plaintiff's failure to "identify any other employee who was not demoted despite repeated citations and warnings" was fatal to his claim; and (4) a court cannot second-guess the business wisdom of the employer's decision. Judge Rosen also dismissed the plaintiff's challenges to promotion decisions which fell outside the three year limitations period. Judge Rosen ruled that: "Each challenged promotion decision clearly stands on its own, and cannot be viewed as a 'recurring' event" and that "each denial was a 'permanent' decision, and was a sufficiently discrete event to trigger Plaintiff's awareness that he had suffered a distinct injury."

**Noncompete Agreement Survives Promotion**

In *Superior Consultant Co, Inc v Bailey*, 2000 WL 1279161 (ED Mich), the defendant argued that he was not bound by the noncompete agreement he signed near the beginning of his employment because he was not asked to sign another noncompete agreement when he was promoted. Judge Steeh rejected this argument, reasoning that a jury could believe that the parties intended the defendant to remain bound by the terms of the pre-promotion contract. Judge Steeh then held that the six month noncompete, nondisclosure and nonsolicitation restrictions were reasonable even though they lacked a geographic limitation. However, Judge Steeh ruled that the nonsolicitation provision lacking a temporal limitation and the prohibition against working in "management consulting" were unreasonably broad. Judge Steeh thus "blue penciled" the agreement, adding a six month temporal limit to the non-solicitation clause. Judge Steeh also limited the noncompete obligation to "health care information systems consulting," which, according to the plaintiff's promotional materials, was the exclusive focus of its business.

**Direct Evidence Can Be Established Through Circumstantial Evidence**

In *Hoffman v Sebro Plastics, Inc*, 108 F Supp2d 757 (ED Mich, 2000), the defendant in a sex discrimination case argued that the intentional discrimination theory could be shown only through "direct", *i.e.*, not circumstantial, evidence of discrimination. In rejecting this argument, Judge Rosen observed that there has been some confusion about the definition of "direct evidence" and whether "direct evidence" can be proved with circumstantial evidence. Pointing to several cases where circumstantial evidence was held to support the direct evidence theory, Judge Rosen rejected what he called the Sixth Circuit's "dictionary definition" of direct evidence, noting that even the Sixth Circuit has not applied the theory that strictly. Judge Rosen thus ruled that a combination of factors including a segregated workplace, references to female operators as "the ladies" and a supervisor's alleged statement that the foreman position the plaintiff wanted was "a man's job" could combine to circumstantially establish "direct evidence" of discrimination and, hence, eliminate the need to apply the traditional *McDonnell Douglas* framework. Judge Rosen then ruled alternatively that the plaintiff had established a triable case under the *McDonnell Douglas* framework by presenting evidence that her employer's legitimate nondiscriminatory explanation was false.

**Denial of Lateral Transfer Not Materially Adverse**

In *Samul v Daimler Chrysler Corp.*, 2000 WL 1480890 (ED Mich, 2000), the plaintiff had to take blood thinning medication to treat his heart condition. He premised his ADA claim on the theory that the medication made him excessively cautious due to fear of bleeding to death and that this cautiousness substantially limited his ability to perform major life functions. Judge Borman rejected this theory, reasoning that the plaintiff was claiming a potential, not an actual limitation on his ability to perform major life activities. Judge Borman ruled, however, that the plaintiff was still protected by the ADA because his employer "perceived" him as being disabled. Judge Borman then dismissed the perceived disability claim for failure to establish an adverse employment action. Citing to Sixth Circuit precedent holding that lateral transfers generally are not materially adverse employment actions, Judge Borman reasoned that "[t]here is no evidence in the record demonstrating any substantive advantages Plaintiff may have enjoyed or adverse consequences that he suffered relating to the temporary lateral commissioning position" the plaintiff had sought.

**Performing Similar Jobs Defeats ADA Claim**

In *Beaudion v Customized Transportation, Inc.*, 2000 WL 1022964 (ED Mich), Judge Cohn dismissed the plaintiff's ADA claim because (1) the plaintiff was not disqualified from performing a broad range of jobs where he was able to find and perform two positions that were similar to the job he had held with the defendant, and (2) the plaintiff could not establish that he was able to perform the essential functions of his job where his doctor would not let him return to work unless he was given a "less stressful position." According to Judge Cohn, this proposed accommodation of working a "less stressful" job was unreasonable because it provided the employer no guidance as to what, if any, position may satisfy this vague criteria. ■

# MICHIGAN COURT OF APPEALS UPDATE

**Rosemary G. Schikora**
***Dykema Gossett PLLC***

**Supervisor's Failure To Prevent Harassment By Co-Workers Constitutes Adverse Employment Action**

In a per curiam case of first impression, the Court of Appeals decided in *Meyer v City of Centerline,* 2000 Mich. App. LEXIS 208 (September 15, 2000), that a supervisor's failure to take action to stop harassment by co-workers in retaliation for an employee's filing an EEOC charge of sex discrimination can constitute an "adverse employment action" under the Elliott Larsen Civil Rights Act.

Plaintiff was employed by the 37th District Court. After being denied a position as a reserve police officer with the City of Centerline, plaintiff filed an EEOC charge claiming the failure to promote constituted gender discrimination. After the charge was dismissed, plaintiff filed a lawsuit and alleged that the administrator of the 37th District Court told her that he had heard that she had filed a lawsuit against the City and that this fact might affect her position with the court. She also alleged that she was then demoted and subjected to harassment by co-workers, which her supervisor failed to stop.

Plaintiff appealed from a judgment of no cause of action on her claims of sex discrimination and retaliation. After rejecting a number of alleged errors, the Court addressed plaintiff's contention that the trial court erred in excluding from evidence sixteen offensive notes and/or cartoons that were allegedly left on her desk or around her work station. Plaintiff claimed that these were probative of an adverse employment action and substantiated her claim of retaliation. The trial court had excluded them as irrelevant.

To establish a prima facie case of retaliation under the Civil Rights Act, a plaintiff must show that (1) she engaged in a protected activity (i.e., filing a change with the EEOC), (2) this was known by defendant, (3) defendant took an "adverse employment action," and (4) a causal connection between the protected activity and the adverse employment action. *DeFalviis v Lord & Taylor, Inc.,* 223 Mich. app. 432, 436; 566 N.W.2d 661 (1997). The focus of the Court's opinion was the third element, namely, whether harassment by co-workers and a supervisor's failure to prevent the harassment can constitute an *adverse employment action* for purposes of establishing a retaliation claim. Acknowledging that federal decisions construing Title VII are "highly persuasive," the Court noted that the various circuits have come out differently on whether co-worker harassment and a supervisor's failure to stop it can constitute an "adverse employment action." Aligning itself with the Sixth Circuit, the Court agreed that they can. *Morris v Oldham Co. Fiscal Court,* 201 F.3d 784, 791 (CA6, 1999).

This decision is important because it is no longer a defense to claim of retaliation that plaintiff was not demoted, fired, or subjected to a cut in salary. As the Court in *Meyer* held, "a supervisor's decision not to take action to stop harassment by coworkers in retaliation for an employee's opposition to a violation of the Civil Rights Act can constitute an adverse employment action."

**Finality of Administrative Proceedings**

In *Minicuci v Scientific Data Management,* 2000 Mich. App. LEXIS 230 (October 20, 2000), the Court held that collateral estoppel prevented plaintiff from relitigating his unsuccessful claim under the Wages and Fringe Benefits Act, MCL 408.471 *et seq.* ("Wage Act").

Plaintiff filed a claim for allegedly unpaid commissions with the Michigan Department of Labor (which later became the Department of Consumer and Industry Services). The Department issued a determination order essentially agreeing with defendant that plaintiff was not entitled to any additional wages. Plaintiff timely appealed but before the hearing, requested that his appeal be withdrawn without prejudice. The hearing referee granted plaintiff's motion to dismiss, but ordered dismissal with prejudice. Instead of appealing the administrative determination or the order of dismissal to the circuit court, plaintiff filed a circuit court action, alleging breach of contract, failure to pay commissions in violation of MCL 600.2961(4) and (5), and violation of the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq.* The trial court granted defendant's motion for summary disposition, citing dicta in *Murphy v Sears, Roebuck & Co.,* 190 Mich. App. 384, 388; 476 N.W.2d 639 (1991), and concluded that once plaintiff chose to seek the administrative remedy, he had to pursue that remedy exclusively.

Collateral estoppel requires that a question of fact essential to the judgment be actually litigated and determined by a valid and final judgment. The Court of Appeals (Gage, J.) found that collateral estoppel controlled the outcome and barred plaintiff from having two bites at the apple. His entitlement to commissions was raised and decided adversely to him in the administrative action and was thus binding on him. The Court found that the hearing referee's determination that plaintiff was not entitled to any further wages and the order dismissing his claim with prejudice represented an adjudication on the merits for claim preclusion purposes.

Collateral estoppel also requires that the same parties have a full opportunity to litigate the issue, and that there be mutuality of estoppel. Both were found to exist in this case.

In the case of an administrative decision, three additional requirements must be satisfied for collateral estoppel to apply. First, the administrative decision must have been adjudicatory in nature, i.e., evidence must have been presented to and decided by the agency. Second, there must be a right to appeal (expressly provided for by the Act). And third, "the Legislature must have intended to make the decision final absent an appeal." It is noteworthy that the Court found preclusion is *presumed,* absent a statutory provision evidencing a legislative intent to *limit* the preclusive effect.

The lesson for counsel is to carefully evaluate the forum. The statutory remedy of an administrative Wage Act claim is cumulative, not exclusive. But any essential factual determination made by the agency will be binding on the parties (absent appeal) and preclude either party from pursuing the same claim in court.

**Failure To Raise The Exclusive Remedy Provision Of The WDCA As An Affirmative Defense Does Not Waive The Defense —**

In *Harris v Vernier,* 243 Mich. App. 306 (2000), an interesting opinion with a thoughtful dissent, the Court of Appeals (Zahra, J.) construed MCR 2.111(F) and held that the exclusive remedy provision of the Workers' Disability Compensation Act ("WDCA") is an affirmative defense which challenges the court's subject-matter jurisdiction. As such, it may be raised at any time, and is therefore *not* waived if not asserted in a responsive pleading or by motion. The defense is jurisdictional and need not be asserted in a responsive pleading to avoid waiver. MCR 2.111(F)(2). In so finding, the court rejected plaintiff's argument that this affirmative defense is more properly characterized as a waivable affirmative defense based on "immunity granted by law." MCR 2.111(F)(3)(a). Even though the defense was not asserted until 1½ years after the complaint was filed, the Court found that the exclusive remedy barred plaintiff's suit and affirmed summary disposition. ■

# MERC UPDATE

**Alexandra S. Matish and Michael M. Shoudy**
***White, Przybylowicz, Schneider & Baird, P.C.***

Since the previous issue of *Lawnotes*, the Michigan Employment Relations Commission has issued 19 decisions and orders in a variety of cases. A brief summary of a few of those cases follows. Out of those 19 cases, two were representation hearings, four were unit clarification hearings, and the remaining were unfair labor practice proceedings. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations' website at www.cis.state.mi.us/ber.

***Mosaica Academy of Saginaw***
**Case No. R00 C-42 (September 27, 2000) (Appeal Pending)**

The Michigan Education Association filed a certification petition, seeking an election in a bargaining unit of all certified teachers employed by the Mosaica Academy of Saginaw. The employer maintained that the teachers employed by Mosaica Academy are not public school employees for purposes of PERA because they are employed by a private, for-profit corporation.

Under Section 501 of the Revised School Code, a public school academy is a "body corporate and is a governmental agency. The powers granted to a public school academy under this part constitute the performance of essential public purposes and governmental functions of this state." Section 503(6) of the Revised School Code provides that public school academies shall comply with all applicable law, including PERA.

The public school academy in question, Mosaica Academy of Saginaw, although chartered by Saginaw Valley State University, was operated by Mosaica Education, Inc. ("MEI"). The principal of the Academy was hired by MEI and was responsible for the day-to-day operations of the Academy, including all matters involving teachers' hiring, firing, and disciplining. Employees seeking a position at the Academy must fill out an application on an MEI form and are given an employee manual prepared by MEI which covers employment practices and guidelines. MEI is responsible to the school board for the administration, operation and performance of the Academy. The Academy reimburses MEI for all costs incurred and paid by MEI in providing its services.

The agreement between MEI and the Academy states that the Academy is a governmental entity authorized under the School Code and is not a division of MEI. Nevertheless, Article 5 of the agreement between the MEI and the Academy states that MEI shall have the sole responsibility and authority to determine staffing levels, and to elect, evaluate, assign, discipline, and transfer personnel.

The petitioner maintained that the Academy is, by statutory definition, a public employer subject to PERA. The employer, however, claimed that, because MEI performs all essential functions of an independent employer, exercising sole control over wages, benefits, and all essential terms and conditions of employment, it is a private entity and, subsequently, subject to the jurisdiction of the National Labor Relations Board. The Commission found otherwise. When reviewing Sections 501 and 503 of the School Code, the Commission held that a public school academy is a public school, subject to the supervision of the State Board of Education. Section 503(6) specifically refers to PERA and mandates that public school academies comply with its provisions. In light of these statutes, the Commission found that the Legislature intended public school academies to be part of the state public school system and to function as public employers.

Moreover, the Commission found that any question as to the status of academies as public schools was resolved in *Parochiaid, Inc v Governor,* 455 Mich 557 (1997). The court in *Parochiaid* found that public school academies are under the immediate control of the state and are therefore public schools. Sections 1(f) and (h) of PERA also include the board of a public school academy in the definition of public employer.

The employer argued that the employees of a public school academy fall within the exception created by Section 1(e)(I) of PERA, which allows individuals employed by a private employer providing services under a time-limited contract with the state to be considered private employees. The Commission, however, held that, because statutory exceptions operate to restrict the general applicability of the legislative language and aren't strictly construed *(Huggett v Dept. of Natural Resources,* 232 Mich. App. 188, 194 (1998), *IV pending)*, Section 1(e)(I) exempts only those individuals working for a private organization under contract with "the state or political division of the state." Following the doctrine of "expressio unius est exclusio alterius," the Commission determined that because the Legislature implicitly excluded language in Section 1(e)(I) to other entities within the state apart from "state or political subdivision of the state," the exemption provision is not applicable to teachers employed at public school academies.

Moreover, the Commission found that legislative analysis of Section 1(e)(I) further supports its interpretation of the section. Other amendments to PERA were being considered at the same time. No reference to public school district or employees was included in the legislative analysis of Section 1(e)(I). Consequently, the Legislature did not intend to include public school academies under that exception.

The Commission also found that even if the employer's interpretation of the exemption provision was correct, the public school academy, and not MEI, is the actual employer for purposes of PERA. Although MEI plays a managing role in the employment of teachers, the actual authority over educational standards and programs, school calendar, budget, and all terms and conditions of employment, rest solely with the academy board and is subject to board review and approval. MEI's role, according to the Commission, is to relay and enforce the decisions and educational policies of the academy board. MEI also argued that, pursuant to *AFSCME v Michigan Dept of Mental Health and Quality of Living Systems,* 215 Mich App 1 (1996), where federal jurisdiction is "arguable and an insufficient showing has been made that the NLRB would decline to assert its jurisdiction, the Commission must defer to the NLRB." The Commission found, however, that the NLRB's jurisdiction is not arguable. State requirements are not minimal, and academies are part of the state's public school system. The Academy is a public school and is an exempt institution under the NLRA.

***City of Detroit (Human Rights Dept)***
**Case No. C99 H-154, C99 H-158 (October 4, 2000)**
**(No Exceptions)**

The Senior Accountants, Analysts and Appraisers Association ("union") filed an unfair labor practice charge against the City of Detroit, alleging that Respondent violated Section 10(1)(a) of PERA by suspending an employee for refusing to meet with her supervisors without the presence of a union representative.

The employee in question, M. Diane Bukowski, was employed as a governmental analyst in the Contract Compliance Division of the Human Rights Department of the City of Detroit. Bukowski's immediate supervisor was Kim Harris, and her manager was Robert Ealy. Bukowski was an active member of a public interest coalition, and was aware that her manager Ealy was suspicious of her activities with that organization. Bukowski periodically received personal phone calls at work regarding her activities for the public interest group. These calls constituted the majority of her personal calls.

On February 12, 1999, Harris called Bukowski into his office to talk to her about employees' complaints regarding her coalition-related calls. At that point, Bukowski requested union representation, to which Harris agreed. Bukowski then contacted her union's acting secretary. A few moments later, Harris called Bukowski and told her that the manager, Ealy, said union representation was not necessary because the meeting would not be disciplinary in nature, or words to that effect. At this point, however, the parties had to attend a staff meeting. At the staff meeting, the union's secretary advised Bukowski to have her supervisor contact him after the staff meeting for purposes of attending her investigatory meeting.

Bukowski went to Ealy's office at 2:00 p.m., at which point she asked Ealy to have the union secretary represent her. Ealy refused to get the secretary for Bukowski, telling Bukowski that she did not need union representation. Bukowski then phoned the personnel office but could not find anyone available to talk to her. She subsequently spoke with the union's vice president, who was not able to make it. After speaking with the vice-president, Bukowski contacted the union president, who informed her that he would be there, but he would be late. The union president Ron Gracia then called Bukowski's manager, Ealy; however, Ealy did not return his phone call. The union president then told Bukowski that if he was not there at 2:00 p.m. she should wait for him before entering the meeting.

Bukowski did not arrive at Ealy's office at 2:00 p.m. When Harris called her, Bukowski told him she was waiting for Gracia, who was on his way. Moments later, Ealy came into Bukowski's work area and demanded that she go to the meeting immediately or be subject to disciplinary action. Bukowski responded that she was waiting for Gracia. Gracia then arrived at 2:15 p.m. Harris and Gracia met privately, where Harris told Gracia that no disciplinary action would result from his meeting with Bukowski. He further explained to Gracia that the meeting was not for that purpose. Harris explained that it was a routine meeting to clarify some things and they were not "building a case against Diane." After Gracia spoke with Harris, he then told Bukowski to go to the meeting. Bukowski went to Harris' office, where Harris told her she should keep her voice down while speaking on her phone in her cubicle. Harris also told her she would be disciplined for refusing to meet with Ealy. Shortly thereafter, Bukowski was issued a one-day notice of suspension for insubordination for refusing to attend the scheduled 2:00 p.m. meeting. The union then filed this unfair labor practice charge.

Although Judge Stern cites *University of Michigan*, 1977 MERC Lab Op 496, which held that an employer who disciplines an employee for refusing to attend a meeting without union representation violates Section 10(1)(a) of PERA when that employee has reasonable belief that the meeting could have led to discipline, Judge Stern found that there was no *Weingarten* right in this case. The right to representation under *Weingarten* is limited to situations where the employee reasonably believes that the investigation will result in disciplinary action. Consequently, Judge Stern found that the only issue was whether Bukowski reasonably believed that attending the meeting would result in disciplinary action.

Bukowski initially had a reasonable basis for believing that the meeting might be an investigatory interview, which would then lead to discipline. Nevertheless, because Bukowski's supervisor, Harris, eventually told her that the meeting was not going to be disciplinary in nature, Bukowski could not have reasonably believed that she would be subject to discipline at this meeting. Judge Stern cites *Wayne-Westland CS*, 1987 MERC Lab Op 624, *aff'd* 176 Mich App 361 (1989), for the proposition that an employee could have a reasonable belief that a meeting with his employer would lead to disciplinary action even though the employer assured him to the contrary. Nevertheless, Judge Stern found that whether an employer told the employee prior to the meeting that no disciplinary action would result was relevant to the issue of an employee's belief that she was to be disciplined.

Judge Stern found that because Harris told Bukowski the meeting did not have a disciplinary purpose, she no longer had any reasonable cause to believe that the 2:00 p.m. meeting was to be an investigatory interview which might lead to her being disciplined. Moreover, Harris' explanation of this to union president Gracia was indicative that Bukowski knew that no discipline would take place. Gracia, however, was not told that no discipline would result from this meeting until after he arrived at the meeting at 2:15 p.m. Moreover, Bukowski's manager, Ealy, never returned Gracia's call regarding this meeting. Nevertheless, Judge Stern held that, because Bukowski did not have a reasonable belief that she may be disciplined as a result of her investigatory interview, the employer did not commit an unfair labor practice when it disciplined Bukowski. ■

## *LAWNOTES* FOR CIVILIANS

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# NLRB ADDRESSES A "GOOSE ESCAPADE" AND OTHER ISSUES

*(Continued from page 15)*

**EMPLOYER INTERFERENCE**

***Adtranz, ABB Daimler-Benz Transportation*** 331 NLRB No. 40

The Board agreed with the administrative law judge that the employer, by maintaining overly broad rules restricting solicitation, distribution, and abusive language, violated the Act.

**PROTECTED CONCERTED ACTIVITIES**

***Electronic Date Systems Corp.*** 331 NLRB No. 52

The Board held that the discharge of an employee who solicits a partial work stoppage is not a violation in the Act because the employee activity is not protected.

**WITHDRAWAL OF RECOGNITION**

***Chelsea Industries, Inc.*** 331 NLRB No. 184

The Board found that the Respondent violated the Act by withdrawing recognition from the Union after the certification year expired, based on an antiunion petition obtained during the certification year. In making the decision the Board clarified and relied on *United Supermarkets*, 287 NLRB 119 (1987), enfd. 862 F.2d 549 (5th Cir. 1989).

***Scepter Ingot Casting*** 331 NLRB No. 153

The Board found the employer unlawfully withdrew recognition from the union because it did not have sufficient grounds to support a good-faith doubt that the union retained support by relying on statements by an employee to management that she "felt" the union had "no standing."

**REFUSAL TO HIRE**

***Northside Electrical Contractors, Inc.*** 331 NLRB No. 166

The Board held that the employer (1) discriminatorily laid off two employees in 1996, and (2) refused to hire three union applicants for legitimate reasons, consistent with *Thermo Power*, 331 NLRB No. 20 (2000) — which issued after the judge's decision.

***Hudson Valley Electrical Construction & Maintenance, Inc.*** 331 NLRB No. 115

The Board held that the employer did not violate the Act by refusing to consider hiring a union organizer as an electrician during an organizing campaign, where the said applicant had attempted to harass and embarrass the employer with a false report regarding alleged deficiencies in its work.

**BARGAINING UNIT DETERMINATIONS**

***The Aerospace Corporation*** 331 NLRB No. 74

The Board found appropriate the petitioned-for narrow maintenance employee unit against the employer's contention that Board precedent mandates facility-wide units.

***M.B. Sturgis, Inc. and Jeffboat Div., American Commercial Marine Service Co.*** 331 NLRB No. 173

The Board held that employees obtained from a labor supplier may be included in the same bargaining unit as the permanent employees of the employer to which they are assigned, when the supplied employees are jointly employed by both employers.

***Home Depot USA, Inc.*** 331 NLRB No. 168

The Board found that the employer's drivers (and dispatchers who drive) share a sufficiently distinct community of interest to constitute an appropriate bargaining unit.

***Young Broadcasting of Los Angeles, Inc. d/b/a/ KCAL-TV*** 331 NLRB No. 46

The Board found where time spent and work performed by a single dual function employee in one job classification is distinct and separate from time spent and work performed in another classification, that employee should be eligible to vote in both unit elections.

**DUES CHECKOFF**

***Hacienda Hotel Inc. Gaming Corp.*** 331 NLRB No. 89

The Board held that the employer did not violate the Act when it unilaterally ceased checking off union dues after the collective-bargaining agreement with the union had expired.

**DUTY OF FAIR REPRESENTATION**

***Office Employees Local 29 (Dameron Hospital Assn.)*** 331 NLRB No. 15

The Board found that the union breached its duty of fair representation by requiring that dues objectors specify each expense category that they contend has been improperly allocated between chargeable and nonchargeable activities.

***AVW Audio Visual*** 332 NLRB No. 3

The Board found the union had not breached its duty of fair representation when it permanently barred the charging party, who had already been expelled, from using its exclusive hiring hall system.

**SUPERVISORS**

***GRB Entertainment, Inc.*** 331 NLRB No 41

The Board concluded that an employee who tested applicant technical editing skills and reported the results to the Director of Post Production for hiring purposes was not a supervisor under the Act.

**FAILURE TO BARGAIN**

***Woodland Clinic*** 331 NLRB No. 91

The Board held that the employer violated the Act by failing to timely comply with the union's request for the home telephone numbers of unit employees.

***Oklahoma Fixture Co.*** 331 NLRB No. 146

The Board found that the employer did not bargain in bad faith when it utilized bargaining pressure in an effort to secure from the union an agreement to eliminate the contractual requirement to hire employees through the union's hiring hall.

**WEINGARTEN RIGHTS**

***Epilepsy Foundation of Northeast Ohio*** 331 NLRB No. 92

The Board held that the Supreme Court's *Weingarten* rule, which affords unionized employees the right to have a union representative present at an investigatory interview which the employee reasonably believes might result in disciplinary action, also applies to employees in nonunion workplaces.

**INTRAUNION DISCIPLINE**

***Office Employees Local 251 (Sandia National Laboratories)*** 331 NLRB No. 193

The Board held that it will no longer proscribe intraunion discipline against union members under the Act when the matter involves a purely intraunion dispute and discipline imposed does not interfere with the employee-employer relationship or contravene a policy of the statute. ■

# THE JOY OF LABOR LAW

**Supremes Injustice.** There is little "joy" this edition due to the supreme body blow inflicted by the U.S. Supreme Court. Five justices appointed the new president. Justice Clarence Thomas spoke to a select group of polite high school students the day after the Court declared Bush the president via the aptly titled, *Bush v. Gore*. Thomas instructed that judicial decisions are not at all about politics (subliminaly invoking the impeachment refrain "It was not about sex"). As the normally-silent Justice was speaking, his wife was recruiting employees for the Bush administration, while Justice Scalia's sons labored for partisan law firms. As for counting votes, Justice (when-I-say-so-order-is-more-important-than-law) Scalia even warned us that he had counted five votes when the Court issued an injunction staying the Florida recount to avoid undermining Bush's "victory." The next time I hear a management lawyer repeat the mantra that the NLRB is "political," I will tell him at least the NLRB never appointed the President and at least you can appeal.

I agree with *The New Republic*'s December 14 editorial, www.tnr.com, that we should not forget that "Constitutionally speaking this presidency is ill-gotten. It is the product of a judicial putsch." Don't take my biased viewpoint on faith; just read the "per curiam" opinion, concurring opinions and the four dissenting opinions and the briefs at the Court's web site. Www.supremecourtus.gov, soon to be renamed www.supremecourtappointsprez.now.

**It Didn't Start With *Bush v. Gore***. As labor attorneys well know, the courts are hardly infallible. For example, when we hear about "pregnant chads," we remember that the Pregnancy Discrimination Act of 1978 (PDA) was passed in reaction to the Court's flawed decision, authored by then-Justice Rehnquist, in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In a 6 to 3 decision, with Justice Stevens in dissent, the Court upheld a pregnancy exclusion in a private employer's disability insurance plan, challenged under Title VII (which I thought banned "sex" discrimination). In enacting the PDA, Congress directly repudiated the logic and the result of *Gilbert*. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) ("When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision"). Thus born out of *Gilbert*, Title VII was amended in 1978 by the PDA which added subsection (k) (in pertinent part): "The terms 'because of sex' or 'on the basis of sex' [in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work.[.]" The Court has shown again and again, to paraphrase Justice Robert Jackson's dictum, that it is not infallible.

**Did You Ask a Good Question Today?** Listening to the Supreme Court Justices grill the attorneys in *Bush v. Palm Beach County* and *Bush v. Gore* on December 1 and 11, I was disturbed by the stone cold silence from Florida state judge N. Sanders Sauls. On December 3, during the four hours of closing arguments in Gore's lawsuit requesting that manual recounts resume in Palm Beach and Miami-Dade counties, Sauls failed to ask any questions. I thought maybe he fell asleep or was writing his "opinion." It reminded me of what Dr. Steven Rosenberg of the NIH said at my wife's medical school commencement. He told us that "good doctors" ask good questions." A good question reflects a good mind.

That is why Judge Sauls' silence was mind-boggling given the issues involved and the limited time he had to make his decision. Why not use the lawyers to learn about the issues, test each side's case, and at least demonstrate you are paying attention. Judge Sauls sat for four hours in his big leather chair and listened in even-handed silence to compelling arguments from the principal parties, to nonsense from the intervener-idiots who either quoted the pigs from Orwell's "Animal Farm"or who did not vote because the infamous "media" called the election. Maybe Judge Sauls forgot this was a bench trial. Or maybe he was tired. But suck it up man, this is the biggest case you're ever gonna have! In his case, I think it may reflect going through the motions, shown by his bench opinion — all conclusion and no legal authority.

Judges and Justices like Clarence Thomas should not be "potted plants" during oral arguments. Judges should ask fair questions to expose the strengths and weakness of arguments, to test their own thinking, to challenge their own bias or preconceptions, to make sure they understand the case, and to let the lawyers know what is on their mind. Lawyers should welcome questions as a chance to explain, convince, and respond to the judge's points or to guide them back to the real issue as you see it. The public should welcome questions as a chance to see that the judge understands the issues and is knowledgeable.

**Why the Electoral College is Undemocratic**. Our constitution, not just the Supreme Court, failed us. And while I know the partisans and pundits, including the *New York Times* editorialist, will proclaim the unending genius of our Founding Fathers, the electoral college is flawed. Vice President Gore won the popular vote by over 500,000 but lost the electoral college vote 271 to 266 (out of 538 votes) with one faithless Gore elector. And while I know Bush won more counties, vacant lots and side streets starting with the letter Y, people vote, not trees, counties or real estate.

Most people do not know that the electoral college reflects the antidemocratic structure of the United States Senate, our own House of Lords. If it didn't, Gore would have won the electoral college majority even without Florida and New Mexico. There are 538 electoral college votes. The votes allocated to each State corresponds with the number of Representatives and Senators each State has in Congress, based on the outdated 1990 census. The 538 figure reflects the 435 votes for the House, 100 votes for the Senate and 3 for the District of Columbia. The House is based on "one person one vote" formula, unlike the Senate. Thus, a candidate needs 270 votes (one-half of 538 is 269, plus 1). Since Florida was awarded (5/4) to Bush, he gets 271 votes and Vice President Gore gets 267 votes except for the faithless elector in DC. Since Bush won 30 states to Gore's 21, he walked away with 18 extra "Senate" votes more than Gore, enough to win the college.

If the "Senate" votes were struck, however, the figure is 436, based solely on the democratic House formula. Based on this formula, Gore would win the electoral college by 225 to 211, even if Gore really lost Florida. But the democratic formula was abandoned to compromise in the 18th century and the "College" flunked in 2000. If you have doubts about the electoral college, or want more facts and explanations, read the excellent 1999 book *The Electoral College Primer 2000* by Lawrence Longley and Neal Peirce. They explain the why it was created, examine past crises and accurately predicted in 1999 the problems experienced in 2000. It is time for the college to go!

Or, maybe the NLRB should adopt the electoral college system, with punch ballots to be postmarked after the election date, with voters selecting union or management "electors" who can be bribed or faithless. The voting will be conducted using outdated votarooter machines from the Tammany Hall era, which will be operated by retired NLRB agents at least 85 years old. If, however, under a Bush-NLRB, the union loses, recounts cannot include pro-union ballots that had attached chads connected by three, two or one hinge. And of course, pregnant chads would be governed by *Gilbert* and excluded. Likewise, the fact that management attorneys filled out and supplied ballots for employees is just a "technicality." And we can't be "sore losers" because we would have won the election if all the votes were counted. Try again in a few years. As we now know, votes are not as important as the possibility of undermining an employer victory. Counting every vote violates Equal Protection and will soon violate the NLRA — if the union deigns to "win." So excuse me if I lack some joy and am filled with righteous indignation. But at least I can watch reruns of "West Wing."

John G. Adam

# INSIDE *LAWNOTES*

- Dave Kotzian surveys the law of employment discrimination based on sexual orientation.
- EEOC ADR Coordinator Rosalie Tucker Rishavy and Jim Perry describe the EEOC mediation program.
- Lou Eble looks at the law of removal and remand, and asks whether we're losing the right to defend federal claims in federal court.
- Shel Stark tells a "war story" about a deposition encounter.
- Art Przybylowicz comments on the recent Michigan Supreme Court campaign.
- Information on upcoming events and LELS business: the 26th LELS-ICLE-FMCS Labor and Employment Law Seminar on April 26-27 in Troy; Bill Schaub's Presidential Rank Award; Erwin Ellmann's LELS Distinguished Service Aware; and more.
- Labor and employment decisions from the U.S. Supreme Court, the Sixth Circuit, the Eastern and Western Districts, the Michigan Supreme Court and Court of Appeals, the NLRB and MERC, websites to visit, the Joy of Labor Law, and more.
- Authors John G. Adam, John T. Below, Louis B. Eble, Gary S. Fealk, Stuart M. Israel, David A. Kotzian, Alexandra S. Matish, George M. Mesrey, Andrew M. Mudryk, James B. Perry, Arthur R. Przbylowicz, Rosalie Tucker Rishavy, William C. Schaub, Jr., Rosemary G. Schikora, Michael M. Shoudy, Matthew S. Slazinski, Sheldon J. Stark, Jeffrey A. Steele, Jack VanHoorelbeke; and more.

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