LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

Volume 10, No. 3 Fall 2000

COMMON FMLA MISTAKES

David B. Calzone
Vercruysse Metz & Murray, P.C.

When the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2101 *et seq.*, was enacted seven years ago, the statute was advertised as an inexpensive and easily administered unpaid leave program for new parents, seriously ill employees and employees with seriously ill family members. For many employers, however, the statute has proven to be deceptively complex and difficult to administer. The purpose of this article is to discuss several of the common errors made by employers in administering FMLA leaves and the steps that can be taken to avoid potential liability for these errors.

1. Which Employees Are Eligible For FMLA Leaves?

One mistake often made by employers is the failure to promptly and properly assess an employee's eligibility for an FMLA leave as soon as the need for the leave arises. Employees are eligible for FMLA leaves if they have been employed by the employer for at least 12 months, have worked 1,250 hours during the 12-month period prior to the start of the leave, and currently work at a site where the employer employs 50 or more employees within a 75-mile radius. 29 U.S.C. § 2611(2)(B)(ii); 29 C.F.R. §§ 825.110(a)-(b), 825.111(b).

Eligibility determinations are made at the time leaves commence. *Jessie v. Carter Health Care Center, Inc.*, 926 F.Supp. 613, 617 (E.D. Ky. 1996). Accordingly, the determination of whether an employee has worked 1,250 hours in the previous 12 months is made based on the date the leave is scheduled to begin. 29 C.F.R. § 825.110(d). The calculation includes hours *actually worked* by the employee within the meaning of the Fair Labor Standards Act (FLSA). 29 C.F.R. § 825.110(c). Time spent on paid or unpaid leave is not counted toward the 1,250-hour threshold. FMLA Admin. Op. No. 18 (November 15, 1993); FMLA Admin. Op. No. 46 (October 14, 1994); *Sepe v. McDonnell Douglas Corp.*, 176 F.3d 1113 (8th Cir. 1999); *Robbins v. Bureau of National Affairs, Inc.*, 896 F. Supp. 18, 21 (D. D.C. 1995).

Late last year, the Sixth Circuit held in *Butler v. Owens-Brockway Plastics Products, Inc.*, 199 F.3d 314 (6th Cir. 1999), that the 1,250 hours that an employee is required to have worked in the previous 12 months must be computed from the date of the commencement of the leave rather than from the date of the adverse employment action. In the case of intermittent leaves, an eligibility determination can only be made once with respect to all related intermittent leaves. *Barron v. Runyon*, 11 F. Supp. 2d 676 (E.D. Va. 1998).

The determination of whether an employee is eligible for an FMLA leave ***must*** be made when the leave is requested and prior to the commencement of the leave. If the employee does not request the leave more than two business days prior to the commencement of the leave, the employer has ***two business days*** to notify the employee of whether he or she is eligible for an FMLA leave. If the employer fails to notify an employee that he or she is not eligible for an FMLA leave within the above time periods, the employee will be ***deemed eligible*** for an FMLA leave, and the employee's eligibility cannot later be challenged by the employer. 29 C.F.R. § 825.110(d). This problematic regulation effectively transforms an employee with no eligibility for an FMLA leave into an eligible employee based solely on an employer's failure to follow a procedure dictated by the DOL but appearing nowhere in the statute itself.

A number of courts have been reluctant to apply this rather draconian "deemed eligible" estoppel mechanism in 29 C.F.R. § 825.110(d). In *Wolke v. Dreadnought Marine, Inc.*, 954 F Supp 1133 (E.D. Va. 1997), the plaintiff went on a medical leave after seven months of employment, and his employer canceled his medical insurance two months later. Although there was no dispute that the plaintiff did not meet the eligibility requirements of the FMLA, he argued that he should be "deemed eligible" because he was not notified of his ineligibility at the time he commenced his leave. Although the language of 29 C.F.R. § 825.110(d) supported the plaintiff's position, the court held that the regulation "is invalid because it impermissibly contradicts the clear intent of Congress to restrict the class of employees eligible for the FMLA." *Wolke*, 954 F. Supp. at 1135. The court stated that the DOL had impermissibly assumed a quasi-legislative role by transforming employees who Congress deemed ineligible for FMLA leaves into eligible employees. *Id*. at 1137. Several courts have adopted the reasoning in *Wolke*. *Seaman v. Downtown Partnership of Baltimore, Inc.*, 991 F. Supp. 751, 754 (D. Md. 1998); *Dormeyer v. Comerica Bank-Illinois*, 2000 WL 1010865 (7th Cir. July 24, 2000); *McQuain v. Ebner Furnaces*, 55 F. Supp.2d 763 (N.D. Ohio 1999).

Although the weight of the authority is clearly against a strict application of the "deemed eligible" estoppel mechanism, employers should still be vigilant in promptly and correctly making eligibility determinations as soon as they are notified that an employee is absent for reasons that qualify for an FMLA leave. The DOL is still applying 29 C.F.R. § 825.110(d) in charges alleging FMLA violations filed with the DOL notwithstanding the holdings in the cases cited above. It obviously makes much more economic sense for employers to do their best to comply with this regulation than to ignore it and take their chances arguing *Wolke*, *Seaman*, *Dormeyer* and *McQuain* if and when litigation is filed.

2. When Do Common Ailments Become Serious Health Conditions?

The FMLA defines a "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves either **inpatient care** at a hospital or other medical facility or **continuing treatment by a health care provider**. 29 U.S.C. §

(Continued on page 2)

CONTENTS

STATEMENT OF EDITORIAL POLICY

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

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

COMMON FMLA MISTAKES

(Continued from page 1)

2611(12); 29 C.F.R. § 825.114. Inpatient care must involve an overnight stay at a hospital or other medical facility. *Oswalt v. Sara Lee Corp.*, 74 F.3d 91 (5th Cir. 1996). "Continuing treatment by a health care provider" has five different elements. 29 C.F.R. § 825.114(a)(2). Employers often have difficulty applying these five elements, particularly when faced with common ailments, such as asthma, migraine headaches, the flu, or prenatal morning sickness and care. The five elements are as follows:

a. A Period of Incapacity and Continuing Treatment: This element involves a period of incapacity requiring an absence from work for more than three consecutive calendar days if this absence also involves two or more treatments by a health care provider or one treatment by a health care provider that results in a regimen of continuing treatment supervised by the health care provider. FMLA Admin. Op. No. 43 (August 24, 1994); FMLA Admin. Op. No. 60 (May 2, 1995). Even common ailments, such as chicken pox, can qualify as serious health conditions requiring FMLA leave, if the employee is incapacitated for more than three work days and is under the care of a health care provider. *George v. Associated Stationers*, 932 F. Supp. 1012 (N.D. Ohio 1996), *Reich v. Midwest Plastic, Engineering, Inc.*, 66 EPD Cases ¶ 43,701 (W.D.Mich. 1995), *aff'd without op.*, 113 F.3d 1235 (6th Cir. 1997). Employees who suffer severe physical symptoms but have undiagnosed health conditions may also qualify for protection under the FMLA. *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998). Likewise, an employee who suffers from several minor ailments simultaneously may have a serious health condition depending on the severity of the symptoms when analyzed together. *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir. 1997).

The DOL and one circuit court created considerable confusion about the level of severity necessary for minor ailments to constitute a serious health condition. In FMLA Admin. Op. No. 57 (April 7, 1995), the DOL ruled that merely because an employee has been absent for more than three days and is under treatment for a minor ailment such as the cold, flu, earaches, upset stomach, minor ulcers, or headaches other than migraines does not bring the employee within the protections of the FMLA. Then, more than a year and one-half later, the DOL sent a follow-up opinion letter to the same employer rescinding its earlier opinion letter. FMLA Admin. Op. No. 86 (December 12, 1996). The DOL stated that if a minor ailment, such as the flu, required an employee to be absent for more than three days, and the employee visited a health care provider and began a continuing regimen of treatment, such as antibiotics, the employee would meet the requirements of a serious health condition under the FMLA. This reversal in positions by the DOL caused the Eighth Circuit in *Thorson v. Gemini, Inc.*, 123 F.3d 1140 (8th Cir. 1997), to remand a case for further consideration that had been dismissed because the plaintiff had only established that she had been absent due to an upset stomach. Tests completed at the time of the absence were normal, but tests conducted several weeks after the plaintiff was terminated for excessive absenteeism resulted in a diagnosis that the plaintiff was suffering from a hiatal hernia and mild antral gastritis and duodenitis. On remand, the trial court determined that the plaintiff's upset stomach and minor ulcer constituted a serious health condition. *Thorson v. Gemini, Inc.*, 998 F. Supp. 1034 (N.D. Iowa 1998), *aff'd*, 205 F.3d 370 (8th Cir. 2000).

Notwithstanding *Thorson* and the DOL's confusing pronouncements, the courts have generally not been sympathetic to plaintiffs who suffer from medical problems but are either not incapacitated or seek protection for absences without obtaining treatment from a health care provider. *See e.g., Bauer v. Varity Dayton-Walther Corporation*, 118 F.3d 1109 (6th Cir. 1997); *Reich v. Standard Register Co.*, 1997 WL 375744 (W.D.Va. 1997); *Haefling v. United Parcel Service*, 169 F.3d 494 (7th Cir.), *cert. denied*, 120 S. Ct. 64 (1999); *Bell v. Jewel Food Store*, 83 F. Supp.2d 951 (N.D. Ill. 2000); *Nanopoulos v. Lukens Steel Co.*, 1997 WL 438463 (E.D.Pa. 1997), *aff'd*, 156 F.3d 1225 (3rd Cir. 1998); *Olsen v. Ohio Edison Co.*, 979 F. Supp. 1159 (N.D. Ohio 1997); *Bond v. Abbott Laboratories*, 7 F. Supp. 2d. 967 (N.D. Ohio 1998), *aff'd without op.*, 188 F.3d 506 (6th Cir. 1999); *Godwin v. Rheem Mfg. Co.*, 15 F. Supp. 2d 1197 (M.D. Ala. 1998); *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995).

b. Prenatal Care and any Period of Incapacity due to Pregnancy: "Continuing treatment by a health care provider" also includes any period of incapacity due to pregnancy or for prenatal care. 29 C.F.R. § 825.114(a)(2)(ii). Pregnancy, standing alone, does not constitute a serious health condition under the FMLA unless "the pregnancy has caused [the employee] to be incapacitated." *Dormeyer v. Comerica Bank*, 4 WH Cases 2d 1775, 1997 WL 403697 (N.D.Ill. 1997), *aff'd*, 2000 WL 1010865 (7th Cir. July 24, 2000). Some courts have been quite expansive in finding the existence of a serious health condition when pregnancy or prenatal care is at issue. In *Pendarvis v. Xerox Corp.*, 3 F. Supp. 2d 53 (D.D.C. 1998), for example, the court held that to qualify for leave under the FMLA in cases of pregnancy-related morning sickness, an employee is *not* required to provide medical evidence to establish that she is unable to perform the functions of her job due to morning sickness. *See also*, 29 C.F.R. § 825.114(e).

c. Chronic, Episodic Conditions: The definition of "continuing treatment by a health care provider" also includes any period of incapacity or treatment for chronic, episodic conditions, such as diabetes or epilepsy, that require periodic treatments and continue over an extended period of time. 29 C.F.R. § 825.114(a)(2)(iii); FMLA Admin. Op. No. 60 (May 2, 1995); FMLA Admin. Op. No. 75 (November 14, 1995). Thus, even a single absence may qualify for an FMLA leave if the absence is caused by a chronic, episodic health condition. Like the pregnant employee, an employee with a chronic, episodic condition may not be required to actually receive treatment from a health care provider during the absence. 29 C.F.R. § 825.114(e). *See also*, *Rhoads v. F.D.I.C.*, 956 F. Supp. 1239 (D. Md. 1997); *Victorelli v. Shadyside Hosp.*, 128 F.3d 184 (3d Cir. 1997); *Barnett v. Revere Smelting & Refining Corp.*, 67 F. Supp.2d 378 (S.D. N.Y. 1999).

d. Long-Term or Incurable Conditions: "Continuing treatment by a health care provider" can also include any period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. The employee need not be receiving actual treatment so long as he or she is under the continuing supervision of a health care provider. The most obvious examples of such a condition are severe stroke or the terminal stages of a disease such as cancer. 29 C.F.R. § 825.114(a)(2)(iv).

e. Multiple Treatments: Finally, "continuing treatment by a health care provider" covers any absence to receive and recover from multiple treatments, such as physical therapy, dialysis or chemotherapy, if an absence of more than three calendar days is likely if the condition is not treated. 29 C.F.R. § 825.114(a)(2)(v). This portion of the "serious health condition" definition may also apply to restorative surgery or treatment that results in incapacity, even though prior to the surgery or treatment the employee is fully able to perform his or her job. *See* dicta in *Santos v. Shields Health Group*, 996 F. Supp. 87 (D. Mass. 1998).

The foregoing cases illustrate that employers are placed at considerable risk when they deal with employees who have excessive casual sick day absences. If any of the casual absences are for a seemingly minor ailment that qualifies as a serious health condition under the DOL's lax standards, those absences cannot be used in considering disciplinary action for attendance problems, nor can they be counted under a "no fault" attendance policy. 29 C.F.R. § 825.220(c). It is therefore critical that employers have effective attendance control procedures in place to identify and respond to casual absences that may qualify for protection under the FMLA. In addition, medical certification is critical for all absences of more than three days in duration involving the health of employees or their family members, even if the illness or injury appears to be minor.

3. Reasonable Accommodations, Light Duty And The FMLA

Employers frequently encounter coordination problems between the FMLA, the Americans with Disabilities Act (ADA) and state workers' compensation statutes because the statutes provide protections and impose obligations that often affect employee leaves in differing and sometimes contradictory ways. The FMLA, for example, is designed to provide employees with the opportunity to take time off under certain circumstances. By contrast, the ADA and state workers' compensation statutes are designed to encourage the continued employment of disabled or injured employees. Thus, where one set of statutes promote continued work (the ADA and state workers' compensation statutes), the other (the FMLA) provides employees with the opportunity not to work. The coordination problems are especially apparent in situations involving light duty.

The ADA, for example, requires that employers make reasonable accommodations to permit disabled employees to continue working or to return to work. These reasonable accommodations can range from the acquisition of specialized equipment to the restructuring of jobs or the creation of alternative "light duty" jobs. The FMLA, on the other hand, guarantees these same employees as much as a 12-week leave of absence and *prohibits* employers from requiring that the employees accept restructured or alternative "light duty" assignments during those 12 weeks. "If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position." 29 C.F.R. § 825.702(d)(1). Moreover, an employer cannot change the essential functions of a position in order to permit an injured or disabled employee to continue working if they would prefer an FMLA leave. *Id*. This is true regardless of whether the employee's health care provider believes that he or she is capable of performing "light duty" assignments. Accordingly, if an employer takes disciplinary action against an employee who refuses to perform light duty during a period when he or she is otherwise qualified for an FMLA leave, the employer will likely face liability under the FMLA.

(Continued on page 4)

COMMON FMLA MISTAKES

(Continued from page 3)

The same problems that arise in the reasonable accommodations context exist when light duty is offered to injured employees who are on workers' compensation. Under most state workers' compensation statutes, if an employee refuses to return to work on light duty when he or she is capable of doing so, the employee can be disqualified from receiving workers' compensation benefits. Under the FMLA, however, since the employee qualifies for 12 weeks of leave if he or she has a serious health condition that prevents the employee from performing *one* essential function of his or her job, the employer cannot during this 12-week period require the employee to return to light duty. Accordingly, during the period of a concurrent FMLA and workers' compensation leave, the employee can only be *offered* light duty. If the employee refuses to return to light duty, he or she may risk disqualification for workers' compensation benefits, but the employer cannot cut off the remainder of the period available to the employee for FMLA leave. The employee is still entitled to the full 12-week leave under the FMLA.

4. Properly Designating The Leave As FMLA Leave

Perhaps the most common mistake made by employers in administering FMLA leaves is failing to designate an absence as an FMLA leave in a timely fashion. Employers cannot wait for the employee to "request" an FMLA leave.

The DOL's regulations provide that employees need not state that they are seeking an FMLA leave. This designation must be made by the employer. 29 C.F.R. § 825.208(a); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 763-64 (5th Cir. 1995). The employee – or the employee's spokesperson if the employee is incapacitated – must simply provide the employer with enough information about the reason for the leave to permit the employer to designate the leave as an FMLA leave. 29 C.F.R. § 825.208(a). The courts have allowed considerable leeway to employees in giving "notice" of the need for an FMLA leave. *See, e.g., Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591 (7th Cir. 1998); *Price v. City of Fort Wayne*, 117 F.3d 1022 (7th Cir. 1997); *Barnett v. Revere Smelting & Refining Corp.*, 67 F. Supp.2d 378 (S.D. N.Y. 1999); *Stubl v. T.A. Systems, Inc.*, 984 F. Supp. 1075 (E.D. Mich. 1997); *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028 (M.D. Tenn. 1995). If the employee does not provide enough information to the employer about the reason for a leave to permit the employer to designate the leave as FMLA-qualifying, the burden is on the employer to "inquire further" to obtain additional information about the purpose of the leave. *Id*. When the employer has enough information to determine that the leave is for an FMLA- qualifying purpose, the employer has *two business days*, absent extenuating circumstances, to notify the employee that the leave will be designated and counted as an FMLA leave. 29 C.F.R. § 825.208(c).

Even when employers timely designate an extended absence as an FMLA leave, they often do so improperly. When an employee seeks a leave of absence for an FMLA-qualifying purpose, the employer must provide a written response to the employee that designates the leave as an FMLA leave, gives the employee information about his or her specific rights and obligations and explains any consequences of a failure to meet these obligations. 29 C.F.R. § 825.301(b)(1). The FMLA Regulations outline eight specific items that must be addressed in the Response to an FMLA Leave Request. 29 C.F.R. § 825.301(b)(1)(I)-(viii).

1. The leave will be counted against the annual FMLA entitlement;
2. Any requirement that the employee furnish medical certification and the consequences for failing to do so;
3. The employee's right to substitute paid leave for unpaid FMLA leave and whether the employer will require the substitution of paid leave, along with the conditions related to any substitution;
4. Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making these payments;
5. Any requirement for the employee to present a fitness-for-duty certificate before returning to work;
6. Whether the employee is a key employee who may be denied a restoration of his/her position under certain circumstances at the end of the FMLA leave;
7. The employee's right to be restored to the same or equivalent job at the end of the FMLA leave; and
8. Potential liability of the employee for payment of health insurance premiums during the leave if the employee fails to return to work at the end of the leave.

Department of Labor Form WH-381 (available on the DOL's website and reproduced in the side bar) has been prepared by the DOL to provide employers with a prototype "Employer Response" to a request for a leave that qualifies as an FMLA leave. The form provides employees with notice of their rights and responsibilities under the FMLA and can be tailored to address issues specific to the employer, such as the inclusion of information regarding the continuation of specific benefits.

If an employer fails to provide an employee seeking an FMLA leave with the required Employer Response designating the leave as an FMLA leave and setting forth the employee's rights and obligations under the FMLA, the employer will not be able to rely on the employee's failure to comply with the FMLA or the employer's policies regarding such leaves in order to deny an FMLA leave. *See Stubl v. T.A. Systems, Inc.*, 984 F. Supp. 1075 (E.D.Mich. 1997).

If an employer fails to provide a timely Employer Response during the two business day window period but later discovers the error, the employer cannot then issue the Employer Response and attempt to retroactively designate the time off that has already been taken as FMLA leave. The employer can only prospectively designate future time off as FMLA leave. 29 C.F.R. § 825.208(c). There are occasionally circumstances when an employer does not learn that a leave is for an FMLA-qualifying purpose until after the leave commences, such as when a sick leave for a seemingly minor ailment turns into a serious health condition or when an employee develops a serious health condition while on vacation. When this occurs, the employer may retroactively designate all or part of the leave as an FMLA leave. 29 C.F.R. § 825.208(d). FMLA Admin. Op. No. 43 (August 24, 1994).

The obligation to designate extended absences as FMLA leave and to inquire further when the employer lacks sufficient information to designate the absence as FMLA leave militates in favor of strong, centralized attendance control procedures and against no fault attendance programs. If the employer has sufficient knowledge of the need for a leave to inquire further or to make a designation as FMLA leave but fails to do so, the employee is protected by the FMLA. According to the DOL, however, the employer can-

not count any time off taken by the employee against the employee's FMLA entitlement until proper notice is given. 29 C.F.R. § 825.208(c); FMLA Admin. Op. No. 67 (July 21, 1995); *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294 (4th Cir. 1998).

5. Short-Term Disability And FMLA Leaves: No Good Deed Goes Unpunished

Many employers fail to provide a timely Employer Response to a request for an FMLA leave when paid sick leave or short-term disability leave covers the absence. Since sick or short-term disability leaves often provide employees with a paid benefit that may last considerably longer than 12 weeks, some employers do not worry about following the idiosyncratic notice regulations of the FMLA. In several cases, however, these employers have found themselves saddled with additional leave obligations under the FMLA because they failed to designate a sick leave or short-term disability leave as a concurrent FMLA leave.

The failure to provide an Employer Response designating sick leave or short-term disability leave as an FMLA leave can result in the "stacking" of leaves. *See* 29 C.F.R. § 825.208(c). An employee can exhaust his or her sick or short-term disability leaves and then seek an FMLA leave, provided that the employee continues to need the leave for an FMLA-qualifying purpose. In *Viereck v. City of Gloucester City*, 961 F. Supp. 703 (D. N.J. 1997), for example, the employer did not designate an extended medical leave as FMLA leave until after the plaintiff was off work for two months and had used up all of her available sick and vacation days. The court held that the employer could not retroactively designate a leave as an FMLA leave two months after learning that the leave was for an FMLA-qualifying purpose. The plaintiff therefore had 12 more weeks of leave entitlement and her termination for absenteeism during this 12-week period was unlawful. *See also,* FMLA Admin. Op. No. 12 (November 2, 1993). *See also, Dintino v. Doubletree Hotels Corporation*, 4 WH Cases 2d 413, 1997 WL 717208 (E.D.Pa. 1997); *Sherry v. Protection, Inc.*, 981 F. Supp. 1133 (N.D.Ill. 1997).

The enforceability of this aspect of the FMLA regulations, like the "deemed eligible" concept discussed earlier, has given rise to considerable disagreement among the courts. Recently, several courts have challenged the position adopted in cases such as *Viereck, Dintino* and *Sherry*. In *Cox v. Autozone, Inc.*, 990 F. Supp. 1369 (M.D. Ala. 1998), *aff'd*, 180 F.3d 1305 (11th Cir. 1999), the plaintiff was on a maternity-related disability leave for 15 weeks. When she returned to work, she was demoted. The plaintiff filed an FMLA claim arguing that she never received the Employer Response required by the FMLA regulations and was therefore never told that she was using up her 12 weeks of FMLA leave. She instead contended that she should have been able to exhaust the disability leave offered by the employer and then commence an FMLA leave. After a detailed examination of the notice regulations issued by the DOL, the district court concluded that the DOL had overstepped its authority by establishing a notice mechanism that, if not followed, can result in providing employees who take leaves lasting longer than 12 weeks with FMLA rights during their entire leave. *Id*. at 1381. "While an employer is free to grant its employees more than that, the Secretary of Labor is not." *Id*. Last year, in *McGregor v. Autozone, Inc.*, 180 F.3d 1305 (11th Cir. 1999), the Eleventh Circuit affirmed the district court's holding that the DOL exceeded its authority by enacting a regulation that expanded the FMLA's 12-week leave entitlement beyond Congress' intent. Since the plaintiff's leave lasted longer than 12 weeks, she was no longer protected by the FMLA when she returned to work and did not have the right to be restored to the identical or a similar position to the one she previously held.

Likewise, in *Covucci v. Service Merchandise Co.*, 178 F.3d 1294, *reported in full*, 1999 WL 115531 (6th Cir. 1999) (unpublished), the Sixth Circuit noted that the employer might have committed technical violations of the FMLA regulations by not, among other things, officially designating the plaintiff's leave as an FMLA leave. Nevertheless, the employer had already granted the plaintiff 12 months of unpaid leave, including 3 months during which the plaintiff did not provide a doctor's excuse. The court stated that it would be "an egregious elevation of form over substance" to allow the plaintiff additional leave designated as FMLA leave and that Congress surely did not intend the FMLA to grant 15 months of leave to an employee who had provided medical excuses for only 8 months. *See also, Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155 (2d Cir. 1999); *Donnellan v. New York City Transit Authority, 1999 WL 527901* (S.D. N.Y., July 22, 1999); *LaCoparra v. Pergament Home Ctr.*, 982 F. Supp. 213 (S.D.N.Y. 1997).

Earlier this year, however, in *Plant v. Morton Int'l, Inc.*, 212 F. 3d 929 (6th Cir. 2000), the Sixth Circuit reversed its position and held that the Department of Labor notice regulations were valid. Disagreeing with the *Autozone* line of cases, the Court held that 29 C.F.R. §825.208(c) is not inconsistent with legislative intent simply because it creates the possibility that employees could end up receiving more than 12 weeks of leave in one 12-month period due to the employer's failure to notify the employee that the leave was being counted toward his/her 12 week allotment of FMLA leave. The Court concluded that the DOL's notice regulations are "valid and forbid employers from retroactively designating FMLA leave if they have not given proper notice to their employees that their statutory entitlement period has begun to run." *Id.* at 936.

The Eighth Circuit recently chose not to follow the *Plant* decision in *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933 (8th Cir., 2000), which contains a particularly thoughtful analysis of the issue. The plaintiff requested a medical leave because she was diagnosed with cancer. The employer's policies provided employees with leave for up to seven months. The plaintiff was granted a leave in accordance with these policies, but was not notified of her eligibility under the FMLA or her right to have her leave designated as FMLA leave. The plaintiff was terminated after seven months of leave when she was unable to return to work. Holding that the "FMLA was intended only to set a minimum standard of leave for employers to provide to employees" and that the "provisions of the FMLA are noticeably bereft of any purpose to interfere with employer leave policies which grant greater leave rights than the FMLA," the Eighth Circuit rejected the plaintiff's FMLA claim. Agreeing with the *Autozone* line of cases, the court pointed out that Congress intended the FMLA to strike a balance between the demands of the workplace with the needs of families. *Id.* at 937. "The DOL regulations dispense with any pretense of balancing in favor of rigid and unnecessary regulations that penalize unwary employers." *Id.* at 939. The Eighth Circuit accordingly concluded that the pertinent DOL regulations are "not consistent with the purpose of the FMLA. Congress only intended to mandate a minimum of twelve weeks of leave for employees, it did not intend to construct a trap for unwary employers who already provide for twelve or more weeks of leave for their employees." *Id.* at 940.

(Continued on page 6)

COMMON FMLA MISTAKES

(Continued from page 5)

The employer notice and designation provisions of the FMLA will likely provide fertile ground for litigation in coming years. Employers must make a concerted effort to revamp their attendance control procedures so that information about absences that may be FMLA-qualifying is channeled to appropriate personnel for action in compliance with the FMLA. The FMLA regulations place most of the burden and virtually all of the risk on the employer when it comes to designating absences as FMLA-qualifying and providing notice of rights and responsibilities under the Act. Employers must therefore educate their supervisors and managers about their FMLA policies and provide clear channels of communication and reporting regarding potential FMLA claims to avoid facing the all too common situation of the employee who runs out of medical leave but cannot be replaced without considerable risk because they have never been placed on an FMLA leave.

6. Seeking Medical Certification

Employers can require an employee who is seeking a leave for a serious health condition or to care for a seriously ill child, parent or spouse to obtain medical certification of the serious health condition from a health care provider. 29 U.S.C. § 2613(a). This can be a problematic area for employers, particularly if they regularly seek medical certifications for paid leave programs such as salary continuation or short-term disability. Employers *cannot* substitute their paid leave medical certification for FMLA medical certification unless the requirements for the paid leave certification are less stringent than those permitted under the FMLA, which will not typically be the case. Moreover, in the unlikely event that an employer's medical certification requirements for paid leave are *less* stringent than those permitted under the FMLA, the less stringent paid leave certification is the *only* certification permitted. 29 C.F.R. § 825.305(e).

As a practical matter, employers should not rely on the same medical certification forms they use in approving paid disability leave in approving FMLA leave, unless those forms have been carefully reviewed for compliance with the FMLA regulations. These regulations limit the types of medical information that can be sought in order to approve FMLA leaves. For example, the regulations prohibit employers from requesting medical records as part of the certification process. 29 C.F.R. § 307(a). The DOL has prepared a prototype medical certification form (Form WH-380 – available from the DOL's website), which contains all of the information that can be requested by the employer in obtaining medical certification of an FMLA leave. No additional information may be requested of a health care provider. 29 C.F.R. § 825.306(b).

Since an employer's medical certification requirements for paid leave are often more stringent than those permitted under the FMLA, and since an employer will usually be addressing both paid leave and FMLA leave at the same time, the best practice is to request both forms of certification at the time the leave is requested. Although this may seem cumbersome, the only practical alternative for employers is to lessen their requirements for medical certification under paid leave programs so that the information sought and time limits applied are identical to those permitted under the FMLA.

Employers must give employees specific notice of the requirement for medical certification and the consequences for failing to obtain medical certification. 29 C.F.R. § 825.305(a); *Henderson v. Whirlpool Corp.*, 17 F. Supp. 2d 1238 (N.D. Okla. 1998); *Stubl v. T.A. Systems, Inc.*, 984 F. Supp. 1075 (E.D. Mich. 1997); *Reich v. Midwest Plastic, Engineering, Inc.*, 66 EPD Cases ¶ 43,701 (W.D. Mich. 1995), *aff'd without op.*, 113 F.3d 1235 (6th Cir. 1997).

The FMLA regulations prohibit employers from having direct contact with an employee's physician. If an employer has a concern about a medical certification, a *health care provider* representing the employer may contact the employee's health care provider, *but only with the employee's permission* and only for purposes of *clarifying and authenticating* the medical certification. 29 C.F.R. § 825.307(a); FMLA Admin. Op. 75 (November 14, 1995). The only exception to this rule is when an employee is on a workers' compensation leave and the workers' compensation statute permits the employer to have direct contact with the employee's health care provider. In that case, the employer can follow the workers' compensation statute. 29 C.F.R. § 825.307(a)(1).

Under the FMLA, if an employer contests a health care provider's determination that a serious health condition exists, it may seek to challenge the certification using the following procedure. 29 U.S.C. § 2613(c)-(d). The employer can require a second opinion. The second opinion may be obtained from any health care provider selected and paid for by the employer. The selected health care provider cannot, however, be employed or consulted on a regular basis by the employer. 29 C.F.R. § 825.307(a)(2)-(b). If the second opinion disagrees with the employee's medical certification, a third opinion can be obtained, once again at the expense of the employer. The employer and employee must mutually agree on the third health care provider. The opinion of the third health care provider is final and binding. 29 C.F.R. § 825.307(c).

What happens, however, when an employer initially approves an FMLA leave based on the employee's medical certification without contesting it and then finds out the employee has been engaged in activities during the leave that are inconsistent with the need for the leave? According to 29 C.F.R. § 825.308, the employer's only recourse is to request a recertification based on information about a changed condition. Moreover, the recertification can only be requested of the employee's health care provider. The employer *cannot* require second or third opinions regarding a recertification. 29 C.F.R. § 825.308(e).

7. Fitness for Duty Certifications

Many employers require that employees on extended leaves of absence for medical reasons provide a fitness for duty certification or submit to an examination by the employer's health care professional before returning to work. These policies can be problematic when dealing with an employee who is also on an FMLA leave.

In order to apply a fitness-for-duty certification requirement to a leave under the FMLA, the requirement must be applied to all similarly-situated employees (same position, same serious health condition). The employer cannot dictate the content of the certification. The certification can be as simple as a statement that the employee is able to return to work. The employer cannot contest the fitness-for-duty certification through second and third opinions. 29 C.F.R. § 825.310; *Albert v. Runyon*, 6 F. Supp. 2d 57 (D.Mass. 1998). The employee must bear the cost of the certification. 29 C.F.R. § 825.310. Employers can delay an employee's return to work until a fitness-for-duty certification is provided, but only if the employer has provided notice of this requirement in its Employer Response to a request for an FMLA leave. Employers should also include any such requirement in their FMLA policy. 29 C.F.R. § 825.310(e). If notice of the requirement for a fitness-for-duty certification is given, but the employee does not provide

the certification, the employee may be terminated. 29 C.F.R. § 825.311(c). No fitness-for-duty requirement can be imposed for intermittent leaves. 29 C.F.R. § 825.310(g).

Employers cannot insist on *independent* fitness for duty certifications. *Routes v. Henderson*, 58 F. Supp.2d 959 (S.D. Ind. 1999) (the postal service violated the FMLA when it refused to reinstate a plaintiff after he took FMLA leave even though he provided a certification from his doctor that he was capable of returning to work. The postal service wanted the plaintiff to submit to a medical examination first. *See also, Underhill v. Willamina Lumber Co.*, 1999 WL 421596 (D. Or. 1999).

On the other hand, when a fitness for duty examination is also being undertaken pursuant to the ADA, employers may have greater flexibility. In *Porter v. U.S. Alumoweld Co., Inc.*, 125 F.3d 243 (4th Cir. 1997), the plaintiff, who had a history of back problems, submitted a doctor's note at the end of an FMLA leave due to a back injury stating that he was able to return to work without restrictions. The company did not accept this note and insisted that the employee complete a functional capacity evaluation. The plaintiff was terminated when he refused to have this evaluation performed. The plaintiff claimed that the FMLA was violated based on the regulation stating that a fitness-for-duty certification need only be "a simple statement of an employee's ability to return to work." The Fourth Circuit disagreed, stating that the fitness for duty examination requested by the employer was both job related and consistent with business necessity and therefore consistent with the ADA. According to the court, the regulations suggest that the fitness requirements of *both* the FMLA and the ADA can be applied by employers. "Under [the plaintiff's] reading of the FMLA, the FMLA would be violated every time an employer requested a fitness for duty exam under the ADA, a request which requires the disclosure of more medical information than would be available from the FMLA's 'simple statement of an employee's ability to return to work.' We reject [the plaintiff's] attempt to so restrict the operation of the ADA." *Id*. at 247.

CONCLUSION

The FMLA can quickly become a quagmire for unwary employers. Attorneys should be especially proactive in helping their employer-clients address FMLA issues. Work with your clients to draft effective FMLA policies; make sure that your clients have appropriate Employer Response forms and Medical Certification forms and that they know when and how to use them; work with your clients to modify any vacation, short-term disability, sick leave, no-fault attendance, or related policies that may need to be reworked in light of the FMLA; and provide training to human resources or supervisory staff members who will be responsible for administering leaves of absence. Through effective, proactive counseling, you can minimize and perhaps eliminate most, if not all, of the common mistakes made by employers in administering leaves under the FMLA. ■

FMLA SURFING

While Dave Calzone provides a seven-year history of the FMLA, don't forget the Department of Labor's web site in case you lose those bulky FMLA regulations or can't find those forms. www.dol.gov/dol/esa/fmla.htm.

the editors

NLRB BEDTIME READING

While we don't generally cite our competitors, those of you who practice before the NLRB will find the Summer 2000 edition of *The Labor Lawyer* to be necessary reading. All 150 pages are devoted to the Clinton NLRB. You will find articles by Chairman Truesdale, former General Counsel Feinstein, and a joint article by Members Liebman and Hurtgen. Vol. 16, Number 1 (Summer 2000). In addition, there are articles from the perspective of management, labor and academician with titles, respectively, "The Clinton Board: Difficult Time for a Management Representative," "Drift and Division on the Clinton Board" and "The Clinton Board: Continuing a Tradition of Moderation and Excellence." Of course, as the union attorneys point out, the term Clinton Board is a "misnomer" as there has been not Clinton Board due to the "Republican-controlled senate." 16 Labor Lawyer at 103. Of the13 different NLRB members during the Clinton administration, four were carry-overs from President Bush. Members Liebman and Hurtgen describe eight different Clinton Boards, due to changing composition. They write: "While this amalgam of personalities and backgrounds does not constitute a case for 'chaos theory' analysis, it both contributes to, and is beset by, the challenges facing the Board as its sits in the middle of its seventh decade."

On the other hand, a "memoir" by William B. Gould IV, NLRB Chairman from 1994-98, may provide other theories. "Labored Relations, Law, Politics, and the NLRB— A Memoir," to be published October 16, 2000, may be great reading and a great gift. (At $37.50, perhaps someone can buy the book for the editors so we can review it) According to Amazon.com , "Gould describes the tribulations of trying to assure impartial administration of federal labor laws while faced with a hostile, Republican Congress. He describes his difficult confirmation process and wrenching Congressional hearings, particularly the one over Proposition 226, a ballot initiative that required unions to get explicit authorization from all represented workers prior to expending dues for political purposes. He tells how the behavior of both Board members and members of Congress, guided by self-interest and rigid ideology, contributed to the Board's problems. He also recounts the positive strides the NLRB made during his tenure, despite the turmoil. The book provides an insider's view of what goes on behind the closed doors in our nation's capital, including discussions with members of Congress, the White House, and President Bill Clinton." Can't wait. But what does "politics" have to do with the "Law"?

Speaking of Congress and the NLRB, Detroit's own Leonard R. Page, NLRB General Counsel, had the pleasure of testifying on September 19 before the U.S. House of Representatives, Subcommittee on Employer-Employee Relations, Committee on Education and the Workforce. The speech is on the NLRB web site, www.nlrb.gov, under "press Releases." Mr. General Counsel spoke about the steps taken to improve NLRB efficiency and updated Congress on a number of topics, including one of my favorites, 10(j) (against employers). Apparently, it is of interest to Congress, too:

> Finally, because I am aware of the interest in section 10(j), I provide this update. During the current fiscal year, as of the end of August, the Board has authorized a total of 66 cases. Of those, there have been 15 litigated wins, 8 losses, and 24 settlements, for an overall success rate of 83 percent. (Fourteen cases are currently pending in court and five others were not pursued due to changed circumstances after the Board authorized litigation.)

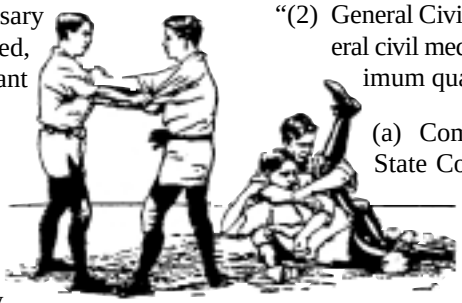
If you need more NLRB reading, you need a new job!

John G. Adam

MICHIGAN WELCOMES ALTERNATIVE DISPUTE RESOLUTION

Martin I. Reisig
Law Offices of Martin I. Reisig

A new era of resolving disputes began in Michigan on August 1, 2000. This does not signal the end of the adversary system, but it is a reinforcement of a more civilized, less "gun slinger," mentality. Here are the important highlights.



"Old-fashioned Dispute Resolution"

RULE 2.403 IS NOW CALLED CASE EVALUATION (FORMERLY MEDIATION)

This title change brings Michigan in line with most other jurisdictions. The quick and dirty three-lawyer evaluations survive, but are renamed Case Evaluation. Significantly, the rule changes did not end this process; case evaluation remains a member of the enlarged alternative dispute resolution family. This evaluation process still presents a reality check for attorneys and clients.

NEW RULE 2.410 — ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution is defined as ". . . any process designed to resolve a legal dispute . . ." A critical aspect of the new rule is that the ". . . court may *order* that a case be submitted to an appropriate ADR process . . ." This power to order mandatory participation in a non-binding ADR process was by far the most difficult and probably most important aspect of the new rule. Some argued that ADR processes should be strictly voluntary; however, the prevailing position was to give judges the flexibility to refer cases to ADR. Initially, this may be awkward, but slowly there should be a mind-set change in favor of earlier and more peaceful case resolution. It is anticipated that creative attorneys will continue to explore a myriad of alternatives. The new rules specifically discuss mediation, but all roads to dispute resolution are encouraged. One very real issue is the cost for indigents. The rule requires that every trial court have a plan which provides ADR access for indigents. Lacking such a plan an indigent "shall not" be ordered into an ADR process.

"Alternative Dispute Resolution"

NEW RULE 2.411 — MEDIATION

The definition of "mediation" is: "a process in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator has no authoritative decision-making power." Personal experience, along with numerous statistics, support that facilitative mediation works. The rule allows the parties to select their own mediator, free of any mandated qualifications. In the alternative, the court shall appoint the mediator pursuant to a court ADR plan. The local plan ". . . shall assign mediators in a rotational manner . . ."

MEDIATOR QUALIFICATIONS

The parties may agree on anybody. However, inclusion on court-approved lists from which appointments are made requires specific qualifications:

> "(2) General Civil Mediation. To be eligible to serve as a general civil mediator, a person must meet the following minimum qualifications:
>
> (a) Complete a training program approved by the State Court Administrator providing the generally accepted components of mediation skills;
>
> (b) Have one or more of the following:
>
> (i) Juris doctor degree or graduate degree in conflict resolution; or
>
> (ii) 40 hours of mediation experience over two years, including mediation, co-mediation, observation, and role-playing in the context of mediation.
>
> (c) Observe two general civil mediation proceedings conducted by an approved mediator, and conduct one general civil mediation to conclusion under the supervision and observation of an approved mediator."

Henceforth, non-lawyers may be court-approved mediators. This was also controversial. Time will tell, but my experience with Community Dispute Resolution Centers encourages a belief in being more inclusive.

Does a law degree really prepare someone to be a mediator? Not in my opinion. I strongly recommend that any lawyer interested in this process obtain as much de-clawing mediation training as possible. The facilitative mediation form of ADR is about listening and having patience. The key to the mediation process is allowing the parties to resolve their conflict. The mediator assists the process, but does not own the case or the result. The goal is that cases settle sooner and more economically. The main tool, now called "mediation," is very old fashioned: listen, understand, compromise, and when appropriate, resolve.

Although most cases will eventually settle, these rule changes will encourage earlier resolution, greater client participation, and less adversarial posturing. Attorneys will not have to worry about who blinks first to begin settlement; now we all blink first. On balance, this encouragement of ADR should lead to both greater client and attorney satisfaction. ■

Editor's Note: *Martin I. Reisig served on the Michigan Supreme Court Dispute Resolution Task Force and devotes a major portion of his practice to work as a facilitative mediator.*

HOW FACILITATIVE MEDIATION WORKS

The following highlights critical aspects of the facilitative mediation process contemplated by MCR 2.411.

- SELECT A MEDIATOR. You can agree upon anyone. The court administrator's office in your county should maintain a list of qualified mediators.

- TYPES OF MEDIATORS. Some mediators, often former judges, are willing to tell you what the case is worth and work hard to move the parties. This directive approach can be helpful; however, a person trained in facilitative mediation will strive to encourage the parties to work out their own solution. This second approach is often more satisfying, as it gives the parties ownership of the settlement. With the assistance of a mediator working as an active host, listening will occur, positions can be clarified, alternative resolutions can be explored, and there will almost always be a resolution in the end.

- MEDIATOR ATTRIBUTES. If there is a perfect mediator, that person would be: likable, of the highest integrity and trustworthiness, calm, an optimist, respectful, capable of maintaining neutrality, able to understand the issues, and committed to working as long as there is a reasonable opportunity for a resolution.

- PRE-FILING FACILITATIVE MEDIATION. You do not have to wait to file pleadings to initiate a resolution. A letter to the other party outlining the problem and suggesting a facilitative mediation can lead to a resolution and avoid the war-like atmosphere of litigation.

- SELECT A CONVENIENT TIME AND PLACE. I strongly recommend choosing a neutral site and reserving enough time to allow a settlement to occur.

- WORKING WITH THE MEDIATOR. Agree on what, if any, written material should be provided to the mediator. Prior pleadings often are adequate. Under some situations it may be better not to begin with pleadings, which may antagonize and lock in positions. The purpose is simply to give the mediator some familiarity with the problem.

- PARTIES AND DECISION MAKERS SHOULD BE PRESENT AND INVOLVED AT THE MEDIATION SESSION. It is disrespectful for the key players not to be present. This is the opportunity to learn, to educate, and to compromise. It is a waste of time if the necessary parties are not present.

- TYPICALLY ATTORNEYS OUTLINE THE SITUATION. The tone should be as polite as possible; the goal is not to start new disputes or add heat to old ones. We are trying to mutually settle a problem — not to win a case.

- CLIENTS SPEAK. There are no hard and fast rules for this process and different mediators approach this differently. Often the chance to be heard and understood is the key ingredient towards a resolution. When the fires are too hot it may be better to have the client speak only to the mediator. The goal is not to add to the polarization. Whether it is speaking to the other party or only to the mediator, client participation is a critical factor in finding a resolution and achieving client satisfaction.

- PATIENCE. This is not the forum in which to nit-pick and challenge every statement. The mediator will encourage a civilized atmosphere.

- CONFIDENTIALITY. The process is confidential. All that a mediator will report is that mediation took place and there was or was not a resolution. Statements made during mediations may not be used in any other proceeding.

- CAUCUS. At some point the parties may separate and meet with the mediator. The mediator will at times talk "sense" to a client. At other times the mediator will talk with an attorney. Sometimes the mediator will serve as an empathetic sounding board. The hope is to provide an atmosphere in which ideas can be safely explored. Neither side is likely to change its belief that it is "more right," but each party should be able to better understand the other point of view and that others (judge/jury) could be persuaded to the other perspective.

- GAMES AND POSTURING. While it's hard to give up "games and posturing," the more quickly you can come to understand the needs and perspectives of the other side and establish an atmosphere of trust and respect, the sooner the case will be resolved.

- FOCUS. If the focus of a trial is on what happened and assessing responsibility, the focus of a facilitative mediation is really on the future. The minutiae of the past is not as important as finding a satisfactory resolution which will allow the parties to move on with their lives.

- FLEXIBILITY. None of the above may specifically apply to your case. The mediator should be willing to work with the attorneys and parties to structure a process which meets their needs, is within their comfort level, and creates an atmosphere in which a resolution is most likely to occur.

Martin I. Reisig

COACHING WITNESSES

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

In my article, "The Ethics of Witness Preparation," Vol. 9, No. 2 *Labor and Employment Lawnotes* 6 (Summer 1999), I cited varying views on the propriety of "coaching" witnesses.

Pro: "[T]here is nothing unethical about an attorney making suggestions about the witness's wording as long as those suggestions do not encourage what the attorney knows or reasonably believes is false or misleading testimony." James M. Altman, "Witness Preparation Conflicts," 22 *Litigation* 38 (Fall 1995).

Con: "It is not ethical to use the role play to 'script,' 'polish,' 'suggest wording,' or repeatedly 'rehearse' the witness's testimony." Janeen Kerper, "Preparing a Witness For Deposition," 24 *Litigation* 11 (Summer 1998).

Cynical: "A lawyer cannot tell his client to lie, or sit quietly if he does. But a lawyer can shape and mold and revise and cajole a witness into the party line." Cameron Stracher, *Double Billing—A Young Lawyer's Tale of Greed, Sex, Lies, and the Pursuit of a Swivel Chair* (William Morrow & Co. 1998) at 178-179.

What I suspect is the prevailing view among litigators is captured by David H. Berg, "Preparing Witnesses," in *The Litigation Manual* (ABA 1989) at 469: "There are lawyers who refuse to woodshed witnesses at all, who just throw them up on the stand and let them tell their story. Their clients most often are referred to as 'appellants.'" Berg continues: "Everyone who testifies has to be woodshedded. It is probably unethical to fail to prepare a witness, and it is undoubtedly cruel to subject anyone to cross-examination without preparation."

Still, many lawyers (and witnesses) think there is something unsavory about what Professor Kerper disparages as scripting, polishing and rehearsing. Their unarticulated premise seems to be that a witness' first and untutored expression of "their story" is immutable, inviolable, pure Truth, and that any effort to refine that expression taints The Truth. Of course, as the saying goes, nothing could be further from the truth.

First, past events are not indelibly and unerringly recorded in the mind, subject to recall on demand. Recall is a creative process.

Research psychologist Elizabeth Loftus writes that the proper "paradigm of memory" is not a "video-recorder model, in which memories are interpreted as the literal truth" but a "reconstructionist model, in which memories are understood as creative blendings of fact and fiction." Elizabeth Loftus and Katherine Ketcham, *The Myth of Repressed Memory* (St. Martin's Press 1994) at 5.

"The limits of memory."

In *Witness for the Defense — The Accused, the Eyewitness, and the Expert Who Puts Memory on Trial*, Loftus explains:

> When we want to remember something, we don't simply pluck a whole memory intact from a "memory store." The memory is actually constructed from stored and available bits of information; we unconsciously fill in any gaps in the information with inferences. When all the fragments are integrated into a whole that makes sense, they form what we call a memory. (at 22)

* * *

> Even if we are careful observers and take in a reasonably accurate picture of some object or experience, it does not stay intact in memory. Other forces begin to corrode the original memory. With the passage of time, with proper motivation, or with the introduction of interfering or contradictory facts, the memory traces change or become transformed, often without our conscious awareness. We can actually come to believe in memories of events that never happened. (at 17)

* * *

> Memories don't just fade, as the old saying would have us believe; they also grow. What fades is the initial perception, the actual experience of the events. But every time we recall an event, we must reconstruct the memory, and with each recollection the memory may be changed — colored by succeeding events, other people's recollections or suggestions, increased understanding, or a new context.
>
> Truth and reality, when seen through the filter of our memories, are not objective facts but subjective, interpretative realities. (at 20)[1]

Mark Twain, too, remarked on the limits of memory: "When I was younger I could remember anything whether it happened or not; but my faculties are decaying, now, and soon I shall be so I cannot remember any but the latter."

In short, unassisted memory may distort the truth. It is the lawyer's responsibility to assist the witness to avoid unwarranted inference and other correctable errors to which all fallible humans are susceptible. To do this, the lawyer must not always uncritically accept the witness' first expression; rather, the lawyer should apply what Loftus calls a "healthy skepticism about holding up any memory, even a piece of memory, as the literal truth."[2]

Second, even witnesses with detailed and complete memory profit from educated and experienced advice on what remembered facts are relevant and how to present those facts clearly, logically,

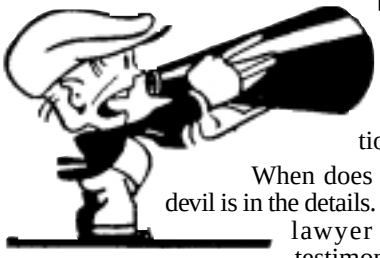
THE OATH

"Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." Federal Rule of Evidence 603.

Whenever I hear the oath, I remember a vignette from the TV show *Taxi*. Of course, because recall is a creative and imperfect process, my memory may not be entirely accurate. Anyway, as I remember it, the taxi drivers are discussing dispatcher Louie DePalma's upcoming obligation to testify in court. Louie, played by Danny DeVito, is known to be somewhat less than scrupulously committed to the truth. One of the drivers warns: "Louie, you're gonna be under oath. You know what that means." Louie smirks and responds, "Yeah, it means they've *got* to believe me."

Stuart M. Israel

and persuasively. Such preparation serves the truth, and is an ethical component of zealous advocacy. "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Michigan Rule of Professional Conduct 1.3, Comment. There is nothing admirable, or ethically required, about disorganization, vagueness and prolixity.[3]



"coaching witnesses"

When does coaching cross the line? The devil is in the details. Consider this meeting between lawyer and client, preparing for testimony:

Lawyer: Pat, now we'll go over your testimony about your supervisor's remarks. As we've discussed, this is very important to support our legal claim that you were fired because of your age. Let's try it.

Q. *Pat, did anyone else make any remark about your age?*

A. *Yes, my supervisor, Ralph Cheatham.*

Q. *When and where?*

A. *It was on July 3, right before the July 4 holiday. I was planning to go West Virginia over the holiday, to a family reunion. I was not looking forward to going. My brother-in-law and I have never gotten along. Anyway, it was on July 3 and that S.O.B. Cheatham came up to me near the break room. I was thinking about the trip and ...*

Lawyer: Uh, hold it, Pat. Let's go through this just like at trial, okay. There's no reason to testify to irrelevant details. There certainly is no reason to dredge up friction with your brother-in-law. And we don't want you to say Cheatham is an S.O.B. We want the jury to conclude that from the facts. You've got to stick to the point. We together on this? Okay, back to it.

Q. *When and where did Cheatham make a remark about your age?*

A. *On July 3, near the break room.*

Q. *What did he say?*

A. *He said he didn't know why an old relic like me was still working, that this was a young person's game, and that I ought to be put out to pasture.*

Q. *Was anyone else present?*

A. *Yes, two co-workers. There was that fat guy, oh, what's his name. I can't think of it now. And there was Irma Black, the woman with the "Property of Hell's Angels" tattoo.*

Lawyer: Hold it, again. The guy, isn't his name Ronnie Martinez.

Witness: Yeah, that's it. I forgot. Ronnie Martinez.

Lawyer: It's not necessary to mention his weight, is it? You referred to him as "the fat guy."

Witness: Well, it's true. He's fat. He's about 5' 7" and goes 270. That's fat. I'm just telling it like it is. It's the truth. Fat. I'm just telling the whole truth and nothing but.

Lawyer: Well, his weight is totally irrelevant to our case. And some jurors might be offended by your commenting that he is overweight, even if it is true. It's not necessary to mention it. Get it? It's also unnecessary to mention Irma's tattoo.

Witness: Well, it's her most memorable feature. Okay, I get what you're saying. Try it again.

Q. *Was anyone else present?*

A. *Yes, two co-workers. Ronnie Martinez and Irma Black.*

Witness: What if I forget Ronnie's name again. My memory's not that great. Getting old.

Lawyer: I'll help if you forget his name. You'll say something like "Another co-worker was there but his name just momentarily escapes me" and I'll say "Was it Ronnie Martinez" and you'll say "Yes." By the way, if you say something in front of the jury about getting old or about your memory going, you'll be shooting yourself in the foot. Keep your eye on the ball, okay?

Witness: Okay, sorry. I won't say anything like that again.

Lawyer: Good. By the way, what was Cheatham's tone, his attitude?

Witness: You know, the usual. He just made his comments matter of fact. Nothing unusual.

Lawyer: Well, did you think he was just joking with you, being humorous?

Witness: No way. That guy doesn't joke with me.

Lawyer: Well, would you say he was hostile, that his tone was hostile?

Witness: Hostile?

Lawyer: You know, hostile, unfriendly, nasty.

Witness: Yeah, I suppose. Right. Hostile.

Lawyer: Okay, that's good. We want to communicate to the jury Cheatham's prejudice against you because of your age. We want to show that he was hostile to you because of your age. That's our case, right?

Witness: Right. Hostile. Gotcha.

Lawyer: Okay, let's try it.

Q. *Pat, what was Cheatham's tone when he made the remarks about your age?*

A. *He wasn't joking with me. Oh, no. He was hostile. He was very hostile.*

Lawyer: Okay, great. Let's break for a few minutes so I can return phone calls. Oh, one more thing. On cross, you may be asked if you prepared your testimony. What's your answer?

Witness: I'll say no, I didn't prepare my testimony.

Lawyer: That wouldn't be right, would it? We're preparing your testimony right now, although our discussion is privileged. Anyway, there's nothing wrong with preparing. In fact, you'd be crazy not to prepare. This case is important to you, and you have the right to prepare. So if you're asked, you look the other lawyer in the eye and say something like "Yes I prepared to testify here today to the truth and that's just what I'm doing." Understand? Okay, we'll come back to this.

Witness: I'm looking forward to it. By the way, as long as you're giving me tips on how to behave when I testify, do you think I ought to wear my marijuana leaf earring to court or leave it home?

Did the lawyer unethically "script," "polish," "suggest wording" and "rehearse"? Or was this proper preparation for focused, clear, truthful testimony? While lawyers may differ over the boundaries of coaching, it remains that every truthful witness needs a good coach.

— END NOTES —

[1]Elizabeth Loftus and Katherine Ketcham, *Witness for the Defense–The Accused, the Eyewitness, and the Expert Who Puts Memory on Trial* (St. Martin's Press 1991).

[2]Elizabeth Loftus and Katherine Ketcham, *The Myth of Repressed Memory* (St. Martin's Press 1994) at 5.

[3]*See* Steven Lubet, *Modern Trial Advocacy–Analysis and Practice* (Second ed.) (NITA 1997) at 79: "[I]t is generally considered incompetent for a lawyer to fail to meet with and prepare a witness in advance of offering her testimony. The practice of witness preparation is so widespread and entrenched as to be unassailable. It is justified on the theory that witnesses, especially clients, are entitled to the lawyer's help in ensuring that their testimony is presented accurately and persuasively. The justification is compelling. A witness, left to her own devices, might be forgetful, inarticulate, or unaware of the significance of the facts that she

NON-UNION EMPLOYERS MUST UNDERSTAND IMPACT OF NLRA

Russell S. Linden
Honigman Miller Schwartz & Cohn

Non-union employers do not confront issues under the National Labor Relations Board with the frequency of their unionized counterparts. While NLRB litigation is not common in the non-union setting except in organizing drives, it would be a mistake for the non-union employers to ignore the National Labor Relations Act, 29 U.S.C. 141 et seq., when dealing with certain labor relations issues. Indeed, the right to withhold labor even in a nonunion setting has been recognized. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (walkout over workplace temperature was protected; involved were a "small group of employees who were totally unorganized. They had no bargaining representative and, in fact, no representative of any kind.... Under these circumstances, they had to speak for themselves as best they could.").

Two recent decisions — one by the NLRB that overturned a 1985 decision, and one by the Sixth Circuit that applied basic legal rules — (1) highlight how the NLRA applies to the non-union employers; (2) remind us to think about NLRA issues in a non-union setting; and (3) illustrate why employers need guidance from management attorneys.

1. Right to Representation Applies to Non-union Employees. *Epilepsy Foundation of Northeast Ohio,* 331 NLRB No. 92 (July 10, 2000) involves application of the so-called *Weingarten* right, an eponymous rule derived from a 1975 Supreme Court decision. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975) recognized in the unionized setting that an unit employee was entitled to representation in an "investigatory interview" which the employee reasonably believed could result in disciplinary action, if the employee requested representation. The *Weingarten* right established the labor law mini and watered-down version of *Miranda*, the right to representation during interrogations. Unlike *Miranda*, however, the penalties or remedies attached to a violation usually are not severe. And *Weingarten* did not address a nonunion setting.

In *Epilepsy Foundation*, the NLRB overruled a 1985 decision and held in that nonunion employees are entitled to have present a co-employee during investigative interviews. That 1985 case, *Sears Roebuck & Co.*, 274 NLRB 30 (1985), had itself reversed a 1982 decision, *Materials Research Corp*., 262 NLRB 1010 (1982). *Materials Research* had applied the *Weingarten* right to nonunion settings. In short, the NLRB overruled a case that had overruled a 1985 case and reverted back to its original, but short-lived 1982 position. Chairman Truesdale and members Fox and Liebman were in the majority. Members Hurtgen and Brame filed dissenting opinions.

In *Epilepsy Foundation*, two unrepresented employees sent memos to their superiors complaining about their supervisor. Subsequently, one of the employees was requested to attend a meeting with three supervisors. The employee requested the presence of a fellow employee. When his request was denied, the employee refused to attend the meeting, resulting in his termination for gross insubordination.

The NLRB extended *Weingarten* rights to nonunion employees reasoning that rights under NLRA Section 7 to engage in protected concerted action are not limited to union employees. The NLRB explained that a co-worker's presence at an investigatory interview greatly enhances the employees' opportunities to act in concert to address their concern that the employer does not initiate or continue a practice of imposing punishment unjustly. Consequently, Epilepsy Foundation's termination of the employee violated NLRA § 8(a)(1) and reinstatement was ordered. Reinstatement of an employee denied his *Weingarten* rights is not the usual remedy under NLRB law (see slip op. at 5, n. 14), but here the employer fired the employee for "insisting on having his coworker" present at an investigatory interview and for no other reason. The majority had no problem applying this new rule retroactively for reasons that are, to say the least, not very persuasive, including the fact that there was no "evidence in the record even remotely suggesting that the Respondent was relying on the state of Board law when it decided to take action against" the one employee. Slip Op. at 5.

The NLRB rejected the concern that the presence of a fellow employee might impair the ability to conduct a meaningful and effective investigation. Nevertheless, as noted by the two dissenting Board members, *Weingarten* rights granted to unionized employees provided for knowledgeable, elected union representatives to be present to prevent contractual violations. *Epilepsy Foundation* possibly invites chaos through allowing the presence of untrained co-workers inexperienced in disciplinary interviews and personnel policies.

2. **Employers Can't Ban Discussion of Wages**. In *NLRB v. Main Street Terrace Care Center*, 218 F. 3d 531 (6th Cir., 2000) the court enforced an NLRB order finding that the employer may not maintain a rule or policy that prohibits employees from discussing their wages as such discussions constitute protected concerted activity under NLRA Section 7. "Therefore, we affirm the Board's conclusion that Main Street's rule prohibiting employee wage discussions violates § 8(a)(1) despite the fact that the rule was unwritten and routinely unenforced." 218 F. 3d at 539. *See also NLRB v. Vanguard Tours, Inc*., 981 F.2d 62, 66-67 (2d Cir.1992) ("Vanguard's employee handbook contained a rule prohibiting employees from making statements concerning wages, hours, the condition of buses, etc.... Because of the likely chilling effect of such a rule, the Board may conclude that the rule was an unfair labor practice even absent evidence of enforcement.")

Main Street addressed the scope of protection of the Act provided to nonunionized employees. In that case, an employee was told not to discuss her wages with fellow employees because "hard feelings" often result from such discussions. Following this, the employee assisted several co-workers with a variety of wage-related problems. The employee was later terminated allegedly because she could not get along with other employees and for disrupting the work place § 8(a)(1).

The court rejected the employer's argument that the supervisor who informed the employee of this "rule" had no authority to establish policy. The employer also unsuccessfully argued that no rule existed and none was routinely enforced. The court explained it is the "tendency . . . to coerce" and the possibility that employees "reasonably could have concluded that the employer was coercing them," that creates the § 8(a)(1) violation.

In addition to the NLRA , the Michigan Wages and Fringe Benefits Act prohibits an employer from taking any action against an employee who discloses his or her own wages. MCLA 408. 483a.

Non-union employers will now confront new NLRA duties when they conduct investigatory interviews of non-supervisory employees and when invoking unwritten rules or policies. And while the employers may decide to forgo such interrogations if the employees invokes the *Weingarten* right, the ability to gather information will be impaired. These cases are a good reminder to non-union employers and attorneys that the NLRA and the NLRB are out there. ■

U.S. SUPREME COURT CLARIFIES BURDEN OF PROOF IN DISCRIMINATION CASES

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

In a unanimous opinion, the United States Supreme Court recently clarified the requisite burden of proof in age discrimination cases. In *Reeves v Sanderson Plumbing Products, Inc*, 120 S Ct 2097 (2000), the court held that a plaintiff may sustain his or her burden of proof by presenting a prima facie case of discrimination and sufficient evidence for the fact-finder to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action.

In *Reeves*, the plaintiff was a 57 year-old man whom the defendant had terminated for the ostensible reason of failing to maintain accurate attendance records. The plaintiff brought suit under the Age Discrimination in Employment Act (ADEA), 29 USC 691 et seq, and produced evidence at trial that the defendant's stated reason for his discharge was pretext for age discrimination. The plaintiff also introduced evidence that the decision-maker in his discharge had demonstrated age-based animus against him. The jury returned a verdict for the plaintiff after the district court had instructed it as follows: "if the plaintiff fails to prove age was a determinative or motivating factor in the decision to terminate him, then your verdict shall be for the defendant." *Id*. at 2104.

The Fifth Circuit reversed. The Court held that although the plaintiff had produced sufficient evidence that the defendant's stated reason was pretext for age discrimination, he did not produce sufficient evidence on the ultimate issue of whether age had motivated the employer's decision.

The Supreme Court granted *certiorari* to resolve the following conflict among the circuits: whether a plaintiff's prima facie case of discrimination, as defined in *McDonnell Douglas Corp v Green*, 411 US 792, 802 (1973), combined with sufficient evidence for a reasonable fact-finder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination. The court noted that the Sixth Circuit had answered that question in the affirmative. *Kline v TVA*, 128 F3d 337 (6th Cir 1997).

The Court explained that the courts of appeals have used a shifting burden of proof based on circumstantial evidence in discrimination cases, enunciated in *McDonnell Douglas*, because "'the question facing triers of fact in discrimination cases is both sensitive and difficult,' and that 'there will seldom be 'eyewitness' testimony as to the employer's mental processes.'" *Reeves*, 120 S Ct at 2105, quoting *Postal Service Bd of Governors v Aikens*, 460 US 711, 716 (1983). The court stated that although it had not yet specifically addressed the issue, it assumed that the *McDonnell Douglas* framework applies in ADEA cases since the parties had not disputed the issue.

Under *McDonnell Douglas*, the plaintiff must first establish a prima facie case of discrimination. The plaintiff in *Reeves* did so by showing that: (1) at the time he was fired, he was a member of the class protected by the ADEA ("individuals who are at least 40 years of age," 29 USC 631(a)), (2) he was otherwise qualified for his position, (3) the employer discharged him, and (4) the employer had successively hired three persons in their thirties to fill the plaintiff's position.

After the plaintiff sets forth a prima facie case, the burden shifts to the employer to "produce evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Reeves*, 120 S Ct 2106, quoting *Texas Dept of Community Affairs v Burdine*, 450 US 248, 254 (1981). In *Reeves*, the employer met that burden by offering admissible evidence sufficient for the trier of fact to conclude that the plaintiff was fired because of his failure to maintain accurate attendance records.

Once the employer produces sufficient evidence to support a nondiscriminatory explanation for its decision, the plaintiff must be afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 US at 253. That is, the plaintiff may attempt to establish that he or she was the victim of intentional discrimination "by showing that the employer's proffered explanation is unworthy of credence." *Id*. at 256. Although the presumption of discrimination "drops out of the picture" once the defendant meets its burden of production, *St. Mary's Honor Center v Hicks*, 509 US 502, 511 (1993), the trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual," *Burdine*, 450 US at 255, n. 10.

The court in *Reeves* noted that the plaintiff had made a substantial showing that the defendant's stated reasons for his discharge were false. The Court of Appeals had concluded that the plaintiff "very well may [have been] correct" that "a reasonable jury could have found that [the defendant's] explanation for its employment decision was pretextual." *Id*. at 2107-2108. However, the court held that this showing, standing alone, was insufficient to sustain the jury's finding of liability, stating: "We must, as an essential final step, determine whether Reeves presented sufficient evidence that his age motivated [the defendant's] employment decision." *Id*. at 2108. In making that determination, the Court of Appeals ignored the evidence supporting the plaintiff's prima facie case and challenging the defendant's explanation for its decision. Instead, the Court had confined its review of evidence favoring the plaintiff to that evidence showing that the decision-maker had directed derogatory, age-based comments at the plaintiff, and that he had singled out the plaintiff for harsher treatment than younger employees. The Court did so because it believed that only this additional evidence of discrimination was relevant to whether the jury's verdict should stand.

The Supreme Court reversed and rejected the Court of Appeals assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination. The Court stated that it is not enough for the fact-finder to disbelieve the defendant's stated reasons for the alleged discriminatory act. Rather, the plaintiff must present evidence of the employer's intentional discrimination. However, that evidence may consist of the plaintiff's showing of the prima facie case together with evidence discrediting the defendant's stated reasons for its employment decision. The plaintiff need not always present additional, independent evidence of discrimination. Whether a plaintiff has presented sufficient evidence will depend on "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id*. at 2109. ■

SIXTH CIRCUIT CONFRONTS FMLA, TITLE VII, AND NLRA ISSUES

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

From May of 2000 through July of 2000, the Sixth Circuit published approximately 22 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".

FMLA – Leave Time Does Not Begin To Run Until Properly Designated

In *Plant v. Morton International, Inc.*, 212 F3d 929 (6th Cir. 2000), the Sixth Circuit reversed a district court ruling dismissing the plaintiff's FMLA claim because he was unable to return to work within twelve weeks of the beginning of a paid disability leave. In so holding, the court acknowledged that under *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775 (6th Cir. 1998), an employee who is unable to return to work at the end of an FMLA leave cannot show a violation of the FMLA as a matter of law. However, the court held that *Cehrs* was not applicable since the employer did not properly designate the plaintiff's leave as FMLA leave at the start of his leave. Rather, the Sixth Circuit held that Department of Labor (DOL) regulations are controlling. The applicable DOL regulations state that that an employer wishing to count paid leave against the twelve-week minimum must so inform the employee within two days of learning of the employee's FMLA-qualifying reason for requesting leave. If the employer fails to give notice to the employee within this period of time, the employer may not designate the leave as FMLA leave retrospectively; only that portion of the leave following notification by the employer may be designated as FMLA leave and counted against the twelve-week entitlement.

ARBITRATION – Sixth Circuit Refuses To Order Plaintiff To Arbitrate

In *Floss v. Ryan's Family Steakhouse*s, 211 F.3d 306 (6th Cir. 2000), the Sixth Circuit reversed a lower court ruling requiring arbitration of the plaintiffs' ADA and FLSA claims. In so holding, the court stated that an "employer may enter an agreement with employees requiring the arbitration of all employment disputes, including those involving federal statutory claims. Yet an employer cannot seek to do so in such a way that leaves employees with no consideration for their promise to submit their disputes to arbitration." In *Floss*, the Sixth Circuit found that the arbitration agreements that the plaintiffs signed as part of their employment applications were unenforceable under the applicable state law and as such they were not obligated to arbitrate their federal statutory claims. The court found that the employer's only promise was to provide an arbitrable forum. This promise, however, was illusory and thus unenforceable since the nature of the forum, the applicable rules, and procedures could be changed at any time without the consent of, or notice to, the employees.

TITLE VII – Court Finds No Religious Discrimination

In *Hall v. Baptist Memorial Health Care Corporation*, docket no. 98-6761 (June 13, 2000), the plaintiff 9alleged that she was fired because of her leadership role in the Holy Trinity Community Church, which is a congregation that publicly supports homosexual lifestyles. The Southern Baptist Church opposes homosexual lifestyles. The Sixth Circuit held that dismissal of the plaintiff's claims was required since she failed to show that her termination was based on her religion. No evidence was presented to show that it was the religious aspect of her leadership position that motivated her employer's actions. In fact, the plaintiff admitted that the defendant would have fired her if she had been elected president of a local gay and lesbian coalition, or if she had made a televised speech opposing the Southern Baptists' position on the issue of homosexuality. The fact that the organization in which she assumed a leadership position is a church does not transform her dismissal into one based on religion said the court.

NLRA – Rule Prohibiting Discussion of Wages Violates The NLRA

In *NLRB v. Main Street Terrace Care Center*, docket nos. 99-5526/5628 (July 6, 2000), the Sixth Circuit enforced an NLRB order finding that the employer's rule prohibiting employees from discussing wages among themselves violated Section 8(a)(1) of the National Labor Relations Act. The court further enforced the Board's order finding that the employer unlawfully discharged an employee who violated this rule.

FMLA – Suits Against States May Not Be Brought In Federal Court

In *Sims v. The University of Cincinnati*, docket no. 99-3274 (July 17, 2000), the court was faced with the issue of whether the FMLA is a valid exercise of Congress' powers under the Fourteenth Amendment and thus abrogates the States' Eleventh Amendment immunity. The Sixth Circuit concluded that the FMLA is not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment. The court further held that the FMLA does not abrogate a State's sovereign immunity. However, the court emphasized that this ruling was limited to the finding that "private litigation to enforce the FMLA against the states may not proceed in federal court." The court further stated "we express no view as to whether the FMLA was properly enacted pursuant to Congress's commerce power."

SEXUAL HARASSMENT - Tangible Employment Action

In *Bowman v. Shawnee State University*, docket no. 99-3255 (July 17, 2000), the Sixth Circuit held that the a ten-day loss of responsibilities without a reduction in pay does not constitute an adverse employment action. The court stated, "The removal of Bowman from the Coordinator position for only approximately ten days with no loss of income is properly characterized as a *de minimis* employment action that does not rise to the level of a materially adverse employment decision." The court also held that evidence of perceived slights or abuses that are not sexual in nature and which have no "anti-male [or female]" bias cannot support a sexual harassment claim. In so holding the court stated, "Bowman has not shown that the non-sexual conduct he complains of had anything to do with his gender. While he may have been subject to intimidation, ridicule, and mistreatment, he has not shown that he was treated in a discriminatory manner because of his gender."

UNION DUES - Michigan Law Requiring Approval Of The Use Of Dues Is Upheld

The Sixth Circuit recently upheld a Michigan law that requires labor unions to obtain permission from their members at least once per year before using their dues for political contributions. Michigan's "paycheck protection" law requires the annual written consent of any person who has an automatic paycheck deduction that is used for political purposes. In 1998, the Michigan AFL-CIO challenged Michigan's "paycheck protection" law, arguing that the burden placed on the unions' political speech was excessive and unconstitutional in that it violated the first amendment. The district court ruled against the union and dismissed the case. The Sixth Circuit upheld the district court's ruling and held that even if contributions were to decline, the cause would be the exercise of informed choice by individuals, not the government suppression of political advocacy. *Michigan State AFL-CIO v. Miller*, docket no. 98-2025 (May 23, 2000). ■

TWO FIGHTS IN ONE DAY AND OTHER TRUE STORIES FROM THE WESTERN DISTRICT

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

Women Involved In Two Fights In One Day Fails To Establish Gender Discrimination Claim

Green v. General Motors Corporation, 95 F. Supp.2d 698 (April 20, 2000), Judge Miles granted summary judgment in favor of defendant because plaintiff failed to establish a prima facie case of gender discrimination. After being involved in two fighting incidents in one day, General Motors placed Green on a 44-day suspension. Green filed charges with the Michigan Department of Civil Rights and the Equal Employment Opportunity Commission. After these charges were dismissed for lack of evidence, Green sued her employer.

Green claimed her suspension was more severe than discipline given to male employees. "To make out a prima facie case for discriminatory discipline, the plaintiff must establish that similarly situated employees engaged in conduct that was comparably serious to plaintiff's conduct." *Noland v. Lorain Bd. of Education*, 869 F.Supp. 529, 531 (N.D. Ohio 1994). While plaintiff Green presented evidence that male employees received one-week suspensions for fighting, the evidence also revealed other female employees had only received one-week suspensions. More importantly, plaintiff presented no evidence of other employees who were disciplined for two fighting incidents in one day. Since plaintiff's situation was unique, General Motors was justified in treating her uniquely. Thus, the Court found plaintiff failed to establish a prima facie case for gender discrimination.

EEOC Lawsuit Not Prohibited Under Arbitration Agreement

In *Circuit City Stores, Inc. v. Shelton*, Case No. 1:99-cv-561 (May 16, 2000), Defendant Shelton signed an agreement to arbitrate and that she could not file suit against her employer. The Equal Employment Opportunity Commission's lawsuit on behalf of Shelton was not covered by the arbitration agreement. Judge Wendell A. Holmes allowed the case to proceed, stating "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986). The arbitration agreement only required her to arbitrate "upon receipt of a right-to-sue letter or similar administrative determination." The EEOC, however, decided to file its own action against Circuit City rather than issuing a right-to-sue letter. Thus, the Court ruled the scope of the arbitration agreement did not extend to the EEOC action. This decision is consistent with Circuit's *EEOC v. Frank's Nursery & Crafts, Inc.*,177 F.3d 448 (6th Cir. 1999) where the court ruled that "the FAA does not apply to Title VII actions brought by the EEOC on behalf of an employee who has signed an arbitration agreement."

Quid Pro Quo Claim Survives Summary Judgment

Eaves-Wymer v. Wal-Mart Stores, Inc., Case No. 1:99-CV-763 (June 15, 2000). After the plaintiff ended her sexual relationship with a supervisor, the supervisor demoted her. The reason given was excessive absenteeism. Plaintiff temporarily resigned and was rehired after she informed a manager her absences were due to a work-related injury and her record showed no evidence of an attendance problem. Subsequently, plaintiff was terminated after making an inappropriate comment when she learned her supervisor prevented a co-worker from purchasing a drink for her.

Plaintiff sued under a quid pro quo and hostile environment sexual harassment claims. Judge Richard Enslen denied the employer's sj motion. He noted that under the quid pro quo theory, "an employer is vicariously liable when one of its supervisors makes an adverse employment decision in retaliation for a subordinate employee's refusal to accede to the supervisor's sexual advances." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 70-71 (1986). As there was a sexual relationship between plaintiff and her supervisor and the supervisor demoted the plaintiff shortly after she ended the relationship, there was evidence to show plaintiff's pay was connected to the relationship. While defendant offered a non-discriminatory reason, demoting plaintiff for excessive absenteeism contradicted defendant's policy not to discipline employees for absences due to work-related injuries. The Court found plaintiff "has presented sufficient evidence to enable a reasonable jury to conclude that she was demoted because she refused to continue a sexual relationship with [her supervisor] and that Wal-Mart is vicariously liable for that demotion."

Age Discrimination Case Failed Where Plaintiffs' Duties Assigned to Existing Employees.

Dzierwa v Smith Industries Aerospace & Defense Systems, Inc., Case No. 4:99-CV-103 (May 3, 2000). Plaintiffs alleged their employer discharged them and replaced them with younger persons in violation of Michigan's Elliott-Larsen Civil Rights Act. After their discharge, plaintiffs' duties were assumed by younger subcontractor employees who were already employed at the time of the plaintiffs' termination.

Judge Robert Holmes Bell granted the employer's sj motion because they offered no authority that the Court should consider the ages of a subcontractor's employees when an employer has contracted work out to an independent contractor. Furthermore, after the termination, the subcontractor employees assumed plaintiffs' duties in addition to other duties. The Court, citing *Barnes v. GenCorp Inc.*, 896 F2d 1457 (6th Cir 1990), concluded plaintiffs could not make out a prima facie case of age discrimination because they were not "replaced by younger employees." Rather, plaintiffs' duties were assumed by subcontractor-employees who were already working for the defendant and who had duties in addition to the newly added responsibilities assigned after plaintiffs' termination.

Summary Judgment Denied In "Protected Conduct" Termination Case.

Smith v City of Holland Board of Public Works, 2000 Westlaw 745458 (June 8, 2000). Judge Richard Enslen denied defendants Morawski and City of Holland's sj motion as to plaintiff's claim that his free speech rights were violated. Plaintiff claimed defendants retaliated against him for criticizing the defendants on-

(Continued on page 16)

TWO FIGHTS IN ONE DAY AND OTHER TRUE STORIES FROM THE WESTERN DISTRICT

(Continued from page 15)

the-air during a public access television show on Holland Community Television ("HCTV"). After alleging fraudulent activity on behalf of the Holland Board of Public Works ("BPW") meter readers and blaming a BPW employee for a labor-management dispute at HCTV, plaintiff was warned to be careful about the comments and a BPW representative began monitoring his show.

Approximately six months later, plaintiff was called into a meeting for an entirely separate incident and was instructed to "immediately desist of any behavior that is demeaning toward women." He was also ordered to keep the meeting confidential. One day later, plaintiff told co-workers and others he was falsely accused of sexual harassment. Plaintiff was terminated shortly after disclosing the warning.

The Court found that plaintiff's on-the-air comments constituted "protected conduct" because they related to matters which had been discussed in the popular media. The Court also concluded that there was some proof that a causal connection existed between plaintiff's termination and the protected conduct, although the evidence was far from conclusive. Defendants argued that plaintiff's conduct toward women was completely independent of any protected speech and his termination was justified by his flagrant disregard for the failure to keep the "warning meeting" confidential. The Court noted that there was circumstantial evidence that defendants were already unhappy with plaintiff's comments and desired to have those comments stop. Judge Enslen refused to grant summary judgment to defendants because a reasonable jury might conclude plaintiff's protected conduct was the motivating force behind the termination.

Court Dismisses Refusal to Bargain Case Disguised as "Fair Representation" Case.

Dykstra v General Teamsters' Local 406, Case No. 1:99-CV-893 (May 12, 2000). Judge Robert Holmes Bell granted defendant/union's sj motion because the plaintiff engaged the NLRB in the review of his allegations that the union breached its duty of fair representation. The union argued although plaintiff's case was cast as a duty of fair representation claim, plaintiff's allegations were that the defendant bargained in bad faith, which is an unfair labor practice under §8 of the NLRA and within the exclusive jurisdiction of the NLRB.

The Court found that the semantic label of "fair representation" could not disguise the fact that the crux of the complaint was that defendant refused to bargain. The Court held that its jurisdiction was pre-empted by the NLRA and that NLRB had jurisdiction over plaintiff's claims. Finally, Judge Bell noted that even assuming that plaintiff's allegations constituted a duty of fair representation claim, dismissal was still appropriate because plaintiff had engaged the NLRB in the review of the same allegations as presented to the Court. ■

WEST SIDE WEB SURFING

It is not that I don't like Grand Rapids or don't want to visit the Gerald R. Ford Museum, www.lbjlib.utexas.edu/ford/museum/aboutmus.htm, but I don't get to the Western District that often. So instead I took an Internet journey and reviewed the web site for the United States District Court for the Western District of Michigan, www.miwd.uscourts.gov. The District maintains its headquarters in Grand Rapids, with branches in Kalamazoo, Lansing and Marquette. For those interested (anybody?), the first judge to serve the Western District was Solomon L. Withey, who was appointed by President Lincoln in 1863 and served 23 years. The district has six Article III Judges and three Magistrate Judges. The Chief Judge is Richard A. Enslen.

The site contains selected opinions, the local rules, chambers information, rates and fees, forms, and maps for those of us who are direction-challenged.

The site has opinions from "high profile cases," including the opinion by Judge Gordon Quist in the so-called Taco Bell case. *Wrench LLC, Joseph Sheilds and Thomas Rinks vs. Taco Bell Corp*. The memorable opening paragraph reads:

> This case is about two dogs: Gidget, a live female Chihuahua who stars in Defendant, Taco Bell Corp.'s ("Taco Bell"), popular television commercials as the suave male Chihuahua with a taste for Taco Bell food and known for the line, "Yo quiero Taco Bell" ("I want some Taco Bell"), and "Psycho Chihuahua," Plaintiffs' caricature of a feisty, edgy, confident Chihuahua with a big dog's attitude. The question at the bottom of this dispute is whether Taco Bell's live Chihuahua is Psycho Chihuahua incarnate. Plaintiffs contend that Taco Bell used their ideas based on Psycho Chihuahua to create the live Chihuahua character featured in Taco Bell's current advertising campaign and have sued Taco Bell alleging claims for breach of implied contract, misappropriation, conversion, and unfair competition. Now before the Court is Taco Bell's motion for summary judgment.

While Taco Bell won summary judgment in the district court, the Sixth Circuit heard argument on September 20. There appears to be, to me, a question of "standing" since four legged creatures generally lack standing.

So if you get a chance to sue or be sued in the Western District, don't miss out on the district's web site. Maybe your case will be a "high profile" case right up there with the Psycho Chihuahua. "Yo quiero Western District!"

John G. Adam

EASTERN DISTRICT UPDATE

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

Advances Toward Other Women Can Sustain Hostile Environment Suit.

Smith v Chrysler Financial Corp, 101 F Supp2d 534 (ED Mich, 2000). The plaintiff was removed from her paralegal position and transferred to a different position shortly after filing a sex discrimination lawsuit against her employer. She eventually sued her employer in federal court, claiming sexual harassment and retaliation in violation of Title VII.

The employer moved to compel arbitration on the basis of a mandatory arbitration policy it had mailed to all non-union employees, including the plaintiff. Judge Steeh refused to enforce the agreement, however, because the policy was not a binding contract. Relying primarily on ***Heurtebise v Reliable Business Computers,*** 452 Mich 405, 413 (1996), Judge Steeh ruled that the requisite "mutuality of obligation" element was lacking where the employer "reserve[d] the right to amend, modify, suspend, or terminate all or part of [the mandatory arbitration policy] at any time in its sole discretion." Thus, and where there was no evidence that the plaintiff expressly agreed to arbitrate, the arbitration policy was not enforceable under Michigan law.

Judge Steeh then denied the plaintiff's motion for summary judgment as to liability on her retaliation claim. Although the employer appeared to admit that the plaintiff was removed from her paralegal position because she filed a discrimination complaint against her employer, the employer argued that the plaintiff, a disgruntled employee who had filed a civil rights complaint against the company, might leak confidential and sensitive legal information if she remained in the legal department. Judge Steeh reasoned that the employer's position that "plaintiff posed a potential threat to corporate security if she occupied a paralegal position while her lawsuits remained pending" could, if believed, be a legitimate, nondiscriminatory reason for the employer's decision to transfer her out of the legal department.

Finally, Judge Steeh ruled that the plaintiff's allegation that her supervisor had made "repeated sexual advances" toward another female employee created a material factual dispute whether the plaintiff sustained "severe and pervasive" harassment. In so ruling, Judge Steeh relied on recent Sixth Circuit cases, including ***Williams v General Motors Corp,*** 187 F3d 553 (CA 6, 1999) and ***Jackson v Quanex Corp,*** 191 F3d 647 (CA 6, 1999), for the proposition that the "[t]he fact that [the supervisor's] alleged sexual comments were not directed at plaintiff is relevant to the determination of whether a objectively hostile work environment existed, but is not dispositive."

Issue of Fact Whether Employer Could Split Duties to Accommodate Employee's Arthritis

Roubal v Dr. Reynolds Associates, PC, 2000 WL 79162 (ED Mich, 2000). The plaintiff performed both radiology and neuro-radiology work for her employer, the latter work being more strenuous. The plaintiff was diagnosed with rheumatiod arthritis in 1995 and her symptoms worsened to the point where her doctor recommended a leave of absence. The plaintiff claimed that her workload intensified after returning from leave and that her employer unreasonably failed to honor her request that she not be required to perform both radiology and neuro-radiology work during the same shift. After the employer refused the plaintiff's request, the plaintiff took a second leave of absence. The plaintiff was ultimately terminated when she could not return to work after exhausting her leave.

Because there was no evidence that the plaintiff could return to work full time after her second leave, Judge Edmunds limited the issue to whether the employer refused to reasonably accommodate and retaliated against the plaintiff for requesting an accommodation. Judge Edmunds dismissed the retaliation claim on the basis that the plaintiff failed to establish that she was treated differently from other radiologists. However, Judge Edmunds ruled that a question of fact existed as to whether the employer could have reasonably accommodated the plaintiff in between the two leaves of absence by separating her radiology and neuro-radiology her duties. Although the employer contended that the functions could not be split because neuro-radiology was an essential function of the plaintiff's job, the plaintiff created a material factual dispute on the issue by offering evidence that her position was not created for performance of neuro-radiology, that the employer had split radiologist duties in the past and that "radiologists were routinely assigned to perform tasks in areas in which they did not specialize."

Transfer to a "Less Desirable" Position Is Not An Adverse Employment Action; No Whistleblowers Action Without Proof Employer Knew of Protected Activity

Richards v Sandusky Community Schools, 2000 WL 815372 (ED Mich, 2000). The plaintiff, a former school bus driver, became upset when a mentally impaired child who had been assigned to her bus began spitting at the plaintiff and other children. Upset because the school decided to have the child continue riding the bus despite the plaintiff's complaint, the plaintiff's husband began calling the parents of other children claiming that the mentally impaired child's spitting could transmit Aids or Hepatitis B. The plaintiff was then suspended for disclosing confidential information (the identity of the children on her bus) to her husband and transferred to another bus route. Subsequently, the plaintiff quit her job and applied for a position with a different school district. In response to inquiry, the former employer provided the prospective employer a copy of the letter disciplining the plaintiff for breaching confidentiality.

Judge Duggan rejected the plaintiff's § 1983 claim on the basis that there was no evidence that the suspension for breaching confidentiality was connected to the plaintiff's alleged First Amendment activity of informing others about the child's spitting. Also, where the plaintiff was neither demoted nor given a pay cut, Judge Duggan ruled that plaintiff's claim that her new route was "less desirable" could not fulfill the adverse employment action element. Judge Duggan then rejected the plaintiff's Whistleblowers claim on the basis that it was time-barred and because the plaintiff failed to show that the employer had "objective notice" of the alleged protected activity. Finally, Judge Duggan rejected the

(Continued on page 18)

EASTERN DISTRICT UPDATE

(Continued from page 17)

plaintiff's defamation claim because there was no evidence that there was anything false about the disciplinary letter the former employer provided the prospective employer.

EEOC Reprimanded and Sanctioned for Bringing and Pursuing a Meritless Lawsuit

EEOC v EJ Sacco, Inc, 102 F Supp2d 413 (ED Mich, 2000). With a stern reprimand of the EEOC attorneys who chose to bring and purse a meritless lawsuit, Judge Cleland awarded the defendant employer $55,511.73 in costs and attorney fees pursuant to Rule 11. The employer had terminated two employees, one of whom the employer offered a chance to return, based on "credible information" that the two employees embezzled money. Nevertheless, based on nothing but the fact that the two employees were black, and "despite there being not a shred of evidence of racial animus, disparate treatment, or unjustified adverse employment action," the EEOC, after five months of investigation, placed "the full weight of the government's resources" behind and "unremittingly prosecuted" the case. Noting that it "one of the most unjustifiable lawsuits over which the undersigned judge has presided in the decade he has been on the federal bench," Judge Cleland, "dismayed by the wholly unjustified wielding of prosecutorial power," identified the attorneys responsible for bringing the litigation and ordered each named attorney to circulate copies of the opinion to their supervisors and staff. ■

CUTTING EDGE CLE!

The 26th Labor and Employment Law Seminar will be April 25-26, 2001 at the MSU Management Education Center in Troy, cosponsored by the Labor and Employment Law Section, the Institute of Continuing Legal Education, and the Federal Mediation and Conciliation Service.

Labor and Employment Law Section members save $30 on the registration fee. That $30 savings is the same as the cost of your annual Section 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.

NLRB PRACTICE AND PROCEDURE

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

Recently a situation arose in Region Seven where an attorney for one of the parties to a case sought also to represent non-party employee witnesses, and to be present while their affidavits were taken. While generally witnesses in NLRB proceedings are entitled to a representative of their own choosing, the Board's Casehandling Manual, section 10056.2, gives regional directors the discretion to deny such representation. In this case, we subpoenaed the employee witnesses to provide testimony and refused the employer attorney's request to represent these employee witnesses. The attorney filed a petition to revoke my subpoena with the Board. The Board issued an order denying the petition to revoke, finding that my refusal to allow the attorney to represent both a party and employee witness was not "unreasonable nor an undue interference with the employee witnesses' right to counsel." The Board went on to note that my decision "was consistent with [the regional director's] obligation to protect the investigative process." *See S.E. Nichols Inc.*, 284 NLRB 556, 557 n.9 (1987). The final word in this matter is yet to be heard as we are presently in federal district court on my petition seeking an order requiring obedience with the subpoenas. However, it is my intention henceforth to deal with all situations such as that noted above on an case-by-case basis. While I generally believe that it is best if counsel who represents a party does not also seek to represent non-party witnesses, there are situations where exclusion may not be necessary and indeed might not be in the best interest of the investigative process. ■

TRAGIC NEWS

Margrette Ann Taylor, a Field Attorney with the Detroit Regional Office of the National Labor Relations Board since 1997, died on September 6 in an automobile accident on her way to work. She was 33 years old.

A native of Benton Harbor, and the seventh of 12 children, Taylor graduated from Michigan as a political science major in 1989. She joined the NLRB after receiving her J.D. degree from Wayne State Law School in May 1997. During law school she clerked at Sachs, Waldman, O'Hare, Helveston, Bogas & McIntosh and Warner, Norcross & Judd and served as an intern for Judge Anna Diggs Taylor. She was active in the Wolverine Bar Association and recently received its Member of the Year award. She was a member of the Labor and Employment Section.

NLRB Regional Director William C. Schaub, Jr. stated: "Margrette was an outstanding young attorney who was rapidly becoming one of our best litigators. She was a wonderful person, very caring, full of life and always wearing a big smile. She will be missed by the entire staff of Region Seven and I'm sure by all who knew her."

MERC UPDATE

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

Since the previous issue of *Lawnotes*, the Michigan Employment Relations Commission has issued several decisions and orders in a variety of cases. A brief summary of four cases follows. Recent decisions of the Commission can be reviewed on the Bureau of Employment Relations' web site at www.cis.state.mi.us/ber.

***Parchment School District*, Case No. C98 L-248 (April 28, 2000)**

The Kalamazoo County Education Association filed ULP charges against the Parchment School District alleging that the District unlawfully decided to subcontract its food service department and terminate its food service employees in retaliation for their union activities protected by PERA. The ALJ issued a decision and no exceptions were filed.

Throughout the years, the District had gone back and forth from managing its own food service operation to hiring a private contractor to do so. The food service department had continually operated at a deficit since 1982. In January of 1997, the KCEA grieved a reduction in hours for food service employees which was eventually settled by reinstating the original work schedule. The food service deficit at the end of 1997 was over $75,000. At this point the District hired a private contractor to run food service, with the intention of having that company take over the entire operation eventually. At the same time, the KCEA filed 11 grievances on behalf of the food service employees.

At the end of the first year of the contract with the private company, food service was still operating at a deficit of $23,000. At this point, the School Board discussed with the assistant superintendent the possibility of turning over the entire food service operation, not just management, to a private company. The assistant superintendent then prepared a memo where he broke down the costs of labor and how much the District would save if it were to privatize. In his memo, the assistant superintendent listed the administrative costs of handling the grievances separate from the other administrative costs. At the next Board meeting, when asked whether the move to completely privatize food service was purely financial, the assistant superintendent replied that he would probably recommend it anyway, in light of all the grievances filed by the KCEA.

The employer subsequently informed the KCEA of its decision to privatize all of food service and later informed the employees that they would be laid off at the end of the year. The KCEA then filed this charge.

The ALJ addressed two separate issues in this case. First, the ALJ discussed whether Sections 15(3) and (4) – a 1994 amendment to PERA – which made the decision to subcontract noninstructional support services a prohibited subject of bargaining, was intended to allow the employer to engage in unlawful discrimination – an issue of first impression before MERC. Finding that the Commission has long held that a decision made to subcontract constitutes a 10(1)(a) and (c) violation of PERA if the employer's motive was to encourage or discourage union activity, *City of Flint (Law Dept)*, 1973 MERC Lab Op 625, the ALJ determined that, absent a more explicit indication of the Legislature's intent, the 1994 amendment did not allow a public school employer to engage in what would otherwise be unlawful discrimination under the statute.

The ALJ then addressed the issue of whether the District's decision to subcontract was based on anti-union animus or on a legitimate desire to improve the financial situation of the food service department. The ALJ, concluding that the KCEA had made a sufficient showing of anti-union animus to make a prima facie case of discrimination, found that the employer does not have to have a "violent, irrational hatred of unions" and that irritation at a union can suffice. Nevertheless, the ALJ determined that, while the District's decision to subcontract was motivated in part by hostility toward the KCEA because they had filed so many grievances, the District's concern about the food service operation deficits were also a legitimate motivation for the decision and not mere pretext. The ALJ held that "an employer's legitimate desire to achieve cost savings does not become unlawful simply because the employer's costs have recently risen due to some union action."

Despite finding that the decision to subcontract was motivated by both reasons, the ALJ subsequently concluded that the assistant superintendent's comments to the Board revealed that his desire to get rid of the KCEA and the grievances it was filing on behalf of the food service employees was the predominate reason for the decision to subcontract. But for the "plethora" of grievances filed by the union, the School District would not have decided to subcontract all of its food service operation. Consequently, the District violated 10(1)(a) and (c) of PERA.

***Township of Argentine*, Case No. C99 A-9 (May 31, 2000)**

Police Officers Association of Michigan (Union) filed unfair labor practice charges against the Township of Argentine (Employer) alleging that the township had violated Section 10 of PERA by "unilaterally dismissing a mutually selected arbitrator" in violation of the collective bargaining agreement between the parties. The ALJ issued her decision and no exceptions were filed.

The Union represents a bargaining unit of all full-time and regular part-time police officers for the Township of Argentine. The Employer and the Union are parties to a collective bargaining agreement which contains a grievance procedure ending in arbitration. On January 23, 1998, the Union filed a grievance regarding the discipline of an officer. Upon the conclusion of the internal grievance process, the Union requested arbitration through the Federal Mediation and Conciliation Services (FMCS) as provided for in the collective bargaining agreement. Rather than waiting for a list of arbitrators from FMCS, the Union and the Employer mutually agreed to utilize a specific arbitrator.

FMCS was notified by the parties of their selection. The arbitrator wrote to both parties indicating acceptance of the appointment and offering a hearing date for October 19, 1998. Enclosed with the arbitrator's letter was a copy of his fee schedule, including cancellation and postponement fees. The October hearing date was, at the time, acceptable to both the Union and the Employer.

(Continued on page 20)

MERC UPDATE

(Continued from page 19)

On September 8, 1998, the attorney for the Employer wrote to the arbitrator explaining that a conflict had arisen in his schedule and he needed to adjourn the October hearing date to a mutually acceptable date. The arbitrator acknowledged receipt of the Employer's request, offered other dates, and enclosed a bill for $300 to the Employer for the postponement. The parties subsequently attempted to find another date that was acceptable.

On November 20, 1998, the attorney for the Employer wrote to the arbitrator expressing dissatisfaction with the postponement fee of $300. By way of this letter, the attorney also advised the arbitrator and the Union that the Employer no longer wished to utilize this mutually agreed upon arbitrator because of the "inflexibility" of his postponement fees. Following this correspondence, the Union's attorney wrote to the Employer indicating that they would not stipulate to the unilateral decision to change arbitrators.

The Union alleged that the Employer's unilateral decision to dismiss the mutually agreed upon arbitrator violated Section 10(1)(e) of PERA by repudiating and renouncing the arbitration procedure in the collective bargaining agreement. Employer maintained that its actions did not rise to the level of an unfair labor practice, as the Employer had not refused to arbitrate the case nor had the Employer withdrawn its acceptance of the arbitrator to delay the arbitration process.

The ALJ noted that the Commission has consistently held that an Employer's alleged breach of contract will not constitute an unfair labor practice unless repudiation of the contract can be demonstrated. Repudiation exists only when there is a substantial abandonment of the collective bargaining agreement or relationship. *Cass City Public Schools,* 1998 MERC Lab Op 956, 960.

The ALJ found no repudiation of the contract by of the Employer. Further, the ALJ found that the actions of the Employer and its counsel in this matter were not unreasonable under the circumstances and were not intended to delay or frustrate the grievance procedure.

***Regents of the University of Michigan*, Case No. C99 C-43 (June 30, 2000)**

On March 4, 1999, an unfair labor practice charge was filed by the American Federation of State, County and Municipal Employees (Union) against the Regents of the University of Michigan (Employer) alleging violation of Section 10(1)(a) and (c) of PERA. The charge arose out a meeting between the Union and the Employer at which time two employees referred to the reclassification of a position as "a scam job" and "a con job." The Employer terminated the meeting and later disciplined the employees. The ALJ issued his decision and no exceptions were filed.

The Union is the collective bargaining representative for all service maintenance employees. In 1997, a number of positions were reclassified. Based on these reclassifications, the Union filed a series of grievances claiming that certain job classifications were working out of class and should be reclassified to a higher pay grade. Attempts were made to resolve the reclassification issue. Although the employees' and the Employer's version of the meeting at issue differed slightly, the employees admitted to stating that the reclassified position was "a con job" and "a scam job." The Employer alleged that the employees also used profanity during this meeting. The Employer terminated the meeting and the employees received letters of discipline for their comments.

As noted by the ALJ, the Commission has repeatedly found conduct which is merely rude or insulting to be protected when made in the course of otherwise protected activity. *Sanilac County Board of Commission,* 1967 MERC Lab Op 107; *Reese Public Schools,* Case No. 1967 MERC Lab Op 489. In this case, the employees were engaged in protected activity when the statements were made. The ALJ found that the statements were "rather mild and their actions were not so flagrant as to remove them from PERA's protection." As such, the letters of discipline issued to the employees violated Section 10(1)(a) and (c) of PERA.

***Suburban Mobility Authority for Regional Transportation (SMART)*, Case No. C99 G-124 (June 30, 2000)**

This matter is based on an unfair labor practice charge filed by an individual charging party, Mazyn Barash, against SMART (the Employer) on July 16, 1999. The Charging Party claimed that the Employer engaged in activity to harm him because of his union activity by denying him rights due and owing under the collective bargaining agreement. The Employer did not file an answer nor appear at the hearing.

The Charging Party is employed by SMART as an assistant mechanic, and he is a committee person for UAW Local 417. The Union and Employer are parties to a collective bargaining agreement.

In November 1998, Charging Party experienced an on-the-job back injury and was on workers' compensation disability leave for several months thereafter. The Charging Party maintained that his doctor released him to return to work with restrictions on May 22, 1999. After returning to work, he was nominated to be a candidate for a union committee position.

In the meantime, the Employer received a letter from its physician which recommended that Mr. Barash be placed on a 4-6 week work-hardening program. The Employer informed the Charging Party of the doctor's recommendation and instructed him not to report to work the following day. The Charging Party indicated that he felt the Employer was interfering with the election by not allowing him to return to work. Despite the Employer's order, Charging Party returned to work the next day. After a few hours, the Charging Party was told that he would not be paid for that day and was issued a written reprimand for willfully disregarding an order not to return to work. The Charging Party was elected committee person, and he was approved to return to work, without restrictions, on June 14, 1999.

The Charging Party maintained that the Employer interfered with his right to engage in protected activity by placing him on medical leave during a union election. The ALJ found that Charging Party offered no evidence that the Employer's decision to place him on medical leave interfered with his right to engage in protected activity. The evidence showed that he was placed on a medical leave because of a physician's recommendation. The Charging Party offered no evidence to show that the Employer's decision to place him on a leave of absence was designed to interfere with his right to compete for a union office. Therefore, the ALJ dismissed the unfair labor practice charge. ■

THAT REMINDS ME OF A "WAR STORY"

We all know that our own legal war stories are perfect gems: instructive, humorous, justice triumphs, no gratuitous nudity and violence. So why won't our colleagues listen?

They say they've heard our stories before. Or they get that glazed look and ask which client can be billed for this "conference." Or worse, they subject us to their own long-winded, pointless, self-aggrandizing war stories as the price of listening to our gems. Have they no self-awareness? Philistines!

Now there is an outlet for your wisdom: *Lawnotes*. Send us your best war stories for possible publication (at the whim and caprice of the editors). Your stories should be instructive and succinct. They can be humorous or serious. They can change the names to protect the innocent and the guilty, or not. They can be practical to the nth degree or the stuff that myths are made of. They can be impeccably true or filtered through your self-interested prism. They are WAR STORIES!

Contact us to discuss format, length, content and the bounds of good taste. In the tradition of Aesop, tell your story and get your name in print. Call *Lawnotes* editor Stuart M. Israel at (248) 559-2110 or write or e-mail: Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., 1400 North Park Plaza Building, 17117 West Nine Mile Road, Southfield, Michigan 48075 or israel@martensice.com.

MICHIGAN COURT OF APPEALS DECIDES THREE SIGNIFICANT HANDICAP DECISIONS

Rosemary G. Schikora
Dykema Gossett PLLC

Kerns v. Dura Mechanical Components, Inc., Docket No. 198393 (July 21, 2000)

This is perhaps the most important employment case decided this quarter. On remand from the Michigan Supreme Court for reconsideration in light of *Tranker v. Figgie Int'l, Inc.* (on remand), 21 Mich. App. 115 (1998), and *Cleveland v. Policy Management Systems Corp*., 526 U.S. 795 (1999), the Court affirmed summary disposition in favor of defendant on plaintiff's handicap and age discrimination claims, relying, as it had prior to remand, on the doctrine of judicial estoppel. The Court previously held that plaintiff's successful representation to the Social Security Administration that he was "totally and permanently disabled" barred him from maintaining a handicap claim under state law and claiming that he was "qualified" to do his job.

The Court in *Tranker II* concluded that a plaintiff could be "disabled" for purposes of the SSA and still be qualified to perform the duties of his job with reasonable accommodation under the Handicappers Civil Rights Act. The Court emphasized, however, that although the two *claims* are not necessarily inconsistent, prior *statements* made by the successful claimant in support of a disability claim may defeat a subsequent handicap claim. Similarly, the Supreme Court in *Cleveland*, while holding that there was not *automatic* preclusion or even a presumption against success on a subsequent ADA claim, concluded that to survive summary judgment, "[a]n ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation." The Supreme Court distinguished between a "context-related legal conclusion," namely, "I am disabled for purposes of the [disability act]," and subsequent factual assertions. In some cases, remand would be the appropriate remedy to afford plaintiff the opportunity to explain her apparently inconsistent statutory statements.

The Court in *Kerns* recognized that remand is *not* always necessary. Relying on two recent federal cases- *Motley v. New Jersey State Police*, 196 F.3d 160 (CA 3, 1999); *Mitchell v. Washingtonville Central School District*, 190 F.3d 1 (CA 2, 1999)- the Court examined all the statements plaintifff had made concerning the scope of his disability, and concluded that they did not create a factual dispute sufficient to warrant remand or to withstand summary disposition. The Court stated that "[t]his case, unlike *Cleveland*, does not merely involve divergent context- related legal conclusions, but rather sets forth irreconcilable factual inconsistencies . . . ." The Court also reiterated that the employer's duty of "reasonable accommodation" does *not* require that it grant plaintiff medical leave until he can perform the requirements of his job, (See *Lamoria v. Health Care & Retirement Corp*., 233 Mich. App. 560, 562 (1999)) or that it recreate the position, adjusting or modifying job duties otherwise required by the job description, or that it place plaintiff

(Continued on page 22)

MICHIGAN COURT OF APPEALS DECIDES THREE SIGNIFICANT HANDICAP DECISIONS

(Continued from page 21)

in another position. See *Carr v. General Motors* , 425 Mich. 313 (1986), amended in part on rehearing, 426 Mich. 1231 91986). Finding that plaintiff's prior statements in seeking Social Security benefits prevented him from making a prima facie case of either handicap or age discrimination, the Court affirmed summary disposition.

Kerns is required reading when dealing with a plaintiff who has made apparently inconsistent statements regarding his disability.

Petzold v. Borman's, Inc., Docket No. 211567 (July 18, 2000)

Plaintiff was employed as a bagger for Defendant Farmer Jack. Tourettte Syndrome, a rare neurological disorder, caused plaintiff to involuntarily utter profanities and racial epithets. After customers complained about these outbursts, Farmer Jack fired plaintiff. After his union refused to take his grievance to arbitration, plaintiff brought a claim alleging that his termination violated the Michigan Handicappers' Civil Rights Act, now known as the Persons With Disabilities Civil Rights Act, MCL 37.1101 *et seq*. He also alleged that Farmer Jack failed to accommodate his handicap.

Farmer Jack sought an interlocutory appeal after the trial court denied its motion for summary disposition. The Court of Appeals reversed, and agreed that plaintiff did not qualify as handicapped under the Act, because his Tourette Syndrome was *not* unrelated to his ability to perform his job. The Court stated that "it would be ridiculous to expect a business such as defendant Farmer Jack to tolerate this type of language in the presence of its customers, even though we understand that because of plaintiff's condition, his utterance of obscenities and racial epithets is involuntary." The Court found that plaintiff's uncontrollable outbursts constituted misconduct prohibited by Farmer Jack's uniform work rules, for the violation of which plaintiff was terminated. Moreover, relying on the express statutory requirement that an employee "notify [the employer] in writing of the need for accommodation within 182 days after the date the [person] knew or reasonably should have known that an accommodation was needed," the Court agreed that the trial court should have dismissed plaintiff's failure to accommodate claim as well, because it was undisputed that he failed to make a *written* request for accommodation.

Mitan v. Neiman Marcus, Docket No. 212002 (April 28, 2000)

In contrast to the strict requirement for a written request for accommodation to support an accommodation claim under the Persons With Disabilities Civil Rights Act, the notice requirements to support a retaliatory discharge claim under the Act are far less stringent. In a per curiam opinion, *Mitan v. Neiman Marcus*, Docket No. 212002 (Decided April 28, 2000), the Court reiterated that "[r]egardless of the vagueness of the charge or the lack of formal invocation of the protection of the [Civil Rights Act], if an employer's decision to terminate or otherwise adversely effect [sic] an employee is a result of that employee raising the spectre of a discrimination complaint, retaliation prohibited by the act occurs." (citing *McLemore v. Detroit Receiving Hospital & University Medical Center*, 196 Mich. App. 391, 396 (1992)). Notwithstanding this loose standard for a retaliation claim, the Court upheld the trial court's grant of summary disposition in favor of defendants, finding that in none of the verbal or written complaints of "job discrimination" that plaintiff made did she ever "state, imply, or raise the spectre" that the complained of treatment was related to her disability. The Court also rejected plaintiff's attempt to create a fact issue by disavowing prior damaging deposition testimony by way of contradictory affidavit.

The Court decided three other labor cases. In *Michigan State Building & Construction Trades Council AFL-CIO v. Perry*, Docket No. 206704 (June 9, 2000), the Court construed the Prevailing Wage Act, MCL 408.551 *et seq*., and held that the Department of Labor lacked discretion to define wages, including overtime, or fringe benefits, independently of the collective bargaining agreements in the locality.

In *Cline v. The Auto Body Shop, Inc.*, 2000 Mich. App. LEXIS 118 (May 16, 2000), the Court construed the prohibition against discrimination "because of religion" contained in the Elliott Larsen Civil Rights Act, MCL 37.2101 *et seq*., and concluded that the fact that plaintiff, according to the trial court, did not have "a bona fide religious belief" (plaintiff was agnostic) did not mean that his employer's adverse employment actions were beyond the reach of the Act. The trial court erred by concluding that an employee who does not allege a religious belief has failed to state a prima facie case of religious discrimination, and summary disposition was improper.

Finally, in *Thomas v. United Parcel Service, Inc*., 2000 Mich. App. LEXIS 123 (May 16, 2000), the Court held in two consolidated cases that neither a claim of common law defamation nor of gender and race discrimination under Elliott Larsen is preempted by the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. 41713, commonly known as the Airline Deregulation Act. Finding *Gilman v. Northwest Airlines, Inc.*, 230 Mich. App. 293 (1998) dispositive, the Court concluded that summary disposition of plaintiffs' race and gender claims and common law defamation claim, on the basis of preemption, was improper in both cases. ■

LOOKING FOR

Lawnotes Contributors!

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

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

For information, contact *Lawnotes* editor Stuart M. Israel or associate editor John G. Adam at Martens, Ice, 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.

THE JOY OF LABOR LAW

Effective Cross-Examination. "That's B__S___!" This presidential-like statement, by an employer in response to the grievant's not-so-convincing explanation during the investigatory meeting that led to his discharge, does not violate the CBA, so ruled the arbitrator in *Louisville Water Co.*, 114 LA 583 (2000). The union argued that such language is a "major league" contract violation, a secondary point in the discharge arbitration. Perhaps the union was sending a "subliminable" message that the management guy was a bad person. The arbitrator, however, noted that it is generally the union guy who is disciplined for, shall we say, colorful language, and that the comments here "would never serve as the basis of discipline" of a union person, so lighten up union! In other words, a little B.S. never violates the CBA.

To the Best of My Memory. Speaking of B.S., did you ever get a feeling that a witness (or counsel) is not being "frank" or has an credibility problem, when he prefaces his answers with "to the best of my memory," "to be frank," "to be honest with you," or "to tell you the truth." While such expressions may be used for emphasis, or may reflect a bad speech habit, like too many "you knows," they may reveal dissembling. Take President Clinton's deposition, for example, excerpted in the judge's opinion finding the President "violated this Court's discovery orders." *Jones v. Clinton*, 36 F. Supp.2d 1118, 1127 (E.D.Ark.1999). Prefacing answers to questions about "that woman," the President used these phrases: "to the best of my memory and belief," "I don't have a specific recollection," "My recollection," "that's my recollection," "I have no specific recollection." I especially liked the answer that started: "Let me begin with the correct answer. I don't know for sure.... if you want me to give an educated guess.... But I can't be held to a specific time." I would have replied, "No, Mr. President, please begin with the incorrect answer."

Similarly, an ALJ found a witness' protestations too much. "She iterated and reiterated during her testimony statements like: I am telling you the truth; I said I told you the truth which I did; As my oath of God; I will take the oath on the Bible; I could have said it because it was the truth; it is the truth; it is the truth, maybe I did say it; it is true. Her frequent protestations of the truth of her statements sounded hollow and were reminiscent of Shakespeare's quote from Hamlet: 'The lady doth protest too much methinks.'" *Ludwig Motor Corp.*, 222 NLRB 635, 644 (1976).

Being quite frank, the witness was sending a "**S**ubliminable" message of a credibility problem. To tell you the truth, such answers make me smell a RAT!

FBI Profiling! In a discharge case in Marshall, Michigan, involving an alleged threat to go postal made by the employee at home to his girlfriend while cleaning his guns (she reported the statement to the doctor who reported it to the employer), the company relied, in part, on FBI profiling. The arbitrator rejected company witness Dr. Kenneth Wolf's use of FBI guidelines for the predictability of violent behavior, noting that they "smack of judgment by profiling." *Eaton Corp*., 114 LA 1007 (2000). In other words lose the "subliminable" psychobabble. Indeed, according to a September 7 article in the *Washington Post*, the FBI itself rejects profiling as to student-killers: "In a 45-page study released as students across the country returned to the classroom, the FBI rejected the controversial practice of profiling, saying it is virtually impossible to predict who will commit the next violent act." Go to www.fbi.gov to get the report called "School Shooter: A Threat Assessment Perspective." Maybe the arbitrator got an early draft of the report! In another threat case, out of Ovid, Michigan, an employee was fired because he told his barber, after seeing a TV report of a Seattle workplace shooting, that he is close to doing that. *Michigan Milk Producers*, 114 LA 1024 (2000). Perhaps the unions should have argued that these threats were only "subliminable." It does not appear that the unions in either case invoked the little-used barber-customer or girl-boyfriend privileges. As for the FBI's methods, remember Wen Ho Lee.

Confucius and Labor Law. Looking to the East for supporting authority, several NLRB ALJs from the 1970s and 1980s quoted Confucius."When there is tension between supervisor and subordinate, the words of Confucius come to mind: 'The relation between superiors and inferiors is like that between the wind and the grass. The grass must bend when the wind blows across it.'" *Arlington Hotel Company, Inc.*, 278 NLRB 26, 33 (1986) Another ALJ invoked these same words to rule against an employee. "Rather than cross swords with her on so delicate a subject, I will let a philosopher decide. 'The relation between superiors and inferiors is like that between the wind and the grass. The grass must bend when the wind blows across it.' (The Confucian Analects, book XII, 19.)... Perhaps the weaknesses of mankind—womankind?—simply showed up in what both Strong and Coleman did that day. These are but the vicissitudes of life." *Masterson's Food And Drink*, 267 NLRB 248, 252, (1983); See also *National Medical Care, Inc.*, 268 NLRB 790, 793, (1984)("The union activity had long gone and been forgotten by the time Harris was discharged. To close the gap, the General Counsel quotes the Sun King, Louie XIV. If he can do that, I can quote a more respected philosopher. 'The relation between superiors and inferiors is like that between the wind and the grass. The grass must bend when the wind blows across it.' The Confucian Analects, Book XII, 19."); and *New York Chinatown Senior Citizens Coalition Center Inc.*, 239 NLRB 614, 618 (1978)("Understandably offended by the charge of having acted illegally, Lee reacted by calling it misconduct. I am sure he realizes now the employees did not mean to offend him personally. And again, if I may quote the old philosopher: 'Things that are done, it is needless to speak about ... Things that are past, it is needless to blame.' The Confucian Analects, book III, 21, ii.")

These ALJs have quoted Master Kung out of context and in an outmoded translation. Confucius was referring not to management and labor but to capital punishment. The ALJs left out the prior sentences. The metaphor related to a ruler asking Confucius to authorize capital punishment: "Suppose I were to kill the bad to help the good; how about that?" Confucius replied: "You are supposed to govern, not to kill. If you desire what is good, the people will be good. The moral power of the gentleman is the wind; the moral power of the common people is the grass. The grass will always bend in the direction of the wind." T.R. Reid, *Confucius Lives Next Door: What Living in the East Teaches Us About Living in the West*, 108 (2000). Perhaps the ALJs were sending a "subliminable" message about industrial capital punishment!

As Justice Frankfurter once said: "Quoting out of context is the most frequent and powerful modes of misquotation." *Palermo v. United States*, 360 U.S. 343, 352 (1959). So to avoid mixing metapoors, know the contours and evoid Bartlett's book of quotatings. It's a terrorist thing to waste a mind!

John G. Adam

INSIDE *LAWNOTES*

- Dave Calzone analyzes common mistakes made by employers in administering FMLA leaves.
- Facilitative mediator Marty Reisig looks at the new Michigan court rules on alternative dispute resolution.
- Stuart Israel addresses coaching witnesses and the oath according to Louie DePalma.
- Russell Linden advises non-union employers on NLRA obligations.
- John Adam writes about the Western District website, the Psycho Chihuahua, and NLRB bedtime reading.
- Information on upcoming events and LELS business: the 2001 LELS Mid-Winter Dinner and CLE Program on January 28 and 29 in Ypsilanti; the 26th LELS-ICLE-FMCS Labor and Employment Law Seminar on April 25-26, 2001 in Troy; 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, David B. Calzone, Gary S. Fealk, Stuart M. Israel, Russell S. Linden, Danielle N. Mammel, Alexandra S. Matish, Andrew M. Mudryk, Martin I. Reisig, William C. Schaub, Jr., Rosemary G. Schikora, Michael M. Shoudy, Jeffrey A. Steele; and more.

Labor and Employment Law Section
State Bar of Michigan
The Michael Franck Building
306 Townsend Street
Lansing, Michigan 48933

BULK RATE
U.S. Postage
PAID
Permit No. 2217
Detroit, MI

Printed on Recycled Paper