LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

LABOR AND EMPLOYMENT LAWNOTES

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QUOTING THE "WISDOM OF THE WISE"

Stuart M. Israel

"The wisdom of the wise, and the experience of ages, may be preserved by quotations," Benjamin Disraeli wrote. Winston Churchill wrote that *"Bartlett's Familiar Quotations* is an admirable work" and that he "studied it intently."

Quotations are essential to the art of persuasion as practiced by lawyers. We precisely quote the statute or contract to support our position that its "plain meaning" is A, to deftly counter our opponent's argument that its "plain meaning" is B. We quote court opinions to show the "clearly established" governing legal principles, to refute the other side's quoted court opinions showing that the "clearly established" governing legal principles are something else.

The fine distinctions at the heart of legal disagreements are illuminated by Thomas Sowell's broader observation: "All things are the same except for the differences, and different except for the similarities."

Mark Twain wrote: "It were not best that we should all think alike; it is difference of opinion that makes horse-races." Difference of opinion makes lawsuits, too.

Judge Richard A. Posner, who sat on the Seventh Circuit Court of Appeals, is a source of many quotations, opinions, and differences of opinion. He wrote (in dissent) in *Chaulk v. Volkswagen of America, Inc.,* 808 F.2d 639, 644 (7th Cir. 1986): "There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called experts."

You can quote Judge Posner to your judicial "gatekeeper" when you move to keep out the opinion of the other side's "so-called expert." Or you can just find a "so-called expert" of your own.

You also may support your points by quoting phrases and maxims which, in the majesty of Latin, succinctly capture the wisdom of the wise and the experience of ages. The phrase *ipse dixit,* for example, is a memorable way to describe a self-important "so-called expert" opinion based on "bare assertions," *not* grounded, as the rule *requires,* on applied "scientific, technical, or other specialized knowledge." See *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 157 (1999) (citation omitted) ("nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert").

As for the "so-called experts" on legal-writing who want to do away with legal Latin, their advice is better "honored in the breach than in the observance," to quote Hamlet's phrase.

Speaking of Hamlet, you may quote Shakespeare, and others populating the non-legal universe, to strengthen your points, or to refute the other side's points. "There are more things in heaven and earth" than are "dreamt of" in law books.

One quotation is often apt in legal argument—to deflate the other side's undue self-certainty, or to appeal the imperious trial judge's egregious legal error, to highlight the absence of humility. It is this: "It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so."

That quotation, and variations of it, have been attributed to Mark Twain, Josh Billings, Artemus Ward, Will Rogers, Friedrich Nietzsche, and others. Quotation-users should check their sources. Ambrose Bierce, in *The Devil's Dictionary,* defined quotation as the "act of repeating erroneously the words of another."

Bierce also had something to say about humility. He defined *scriptures* as the "sacred books of our holy religion, as distinguished from the false and profane writings on which all other faiths are based."

Quotations may help put the other side's humility-deficit into proper perspective. Twain wrote: "In the first place, God made idiots. That was for practice. Then he made school boards." That quotation can be used as is—or applied to legislatures, homeowners' associations, and others as appropriate.

Quotation-users should be aware that a perfect quotation may be countered by an equally-perfect but opposite quotation. Is agreement, for example, a case of "great minds run in the same channel" or "fools think alike"? *Caveat emptor.*

"The bane of lawyers is prolixity and duplication," Judge Posner wrote in *Ryan v. CFTC,* 125 F.3d 1062, 1064 (7th Cir. 1997). You can make arguments more succinct and efficient, interestingly making your points by quoting the "wisdom of the wise."

Some (Of My Favorite) Law-Related Quotations

"I object, your honor! This trial is a travesty. It's a travesty of a mockery of a sham of a mockery of a travesty of two mockeries of a sham!" Woody Allen as Fielding Mellish in *Bananas* (1971).

"If the law supposes that, …the law is a ass—a idiot." Mr. Bumble in Charles Dickens, *Oliver Twist,* ch. 51 (1838).

"Bernie tells me what to do/Bernie lays it on the line/Bernie says we sue, we sue/Bernie says we sign, we sign." Dave Frishberg, "My Attorney Bernie" (1983).

"…the thing seemed simplicity itself when it was once explained." Doctor John Watson on Sherlock Holmes' reasoning in Sir Arthur Conan Doyle, "The Stock-Broker's Clerk" (1894).

"It depends on what the meaning of the word 'is' is." William Jefferson Clinton at the grand jury in 1998.

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STATEMENT OF EDITORIAL POLICY

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

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

QUOTING THE "WISDOM OF THE WISE"

(Continued from page 1)

"This is the Court of Chancery…which gives to monied might the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; there is not an honourable man among its practitioners who would not give—who does not often give—the warning, 'Suffer any wrong that can be done you, rather than come here!'" Charles Dickens, *Bleak House,* ch. 1 (1853).

Lewis Carroll, *Alice's Adventures in Wonderland,* ch. XII (1865), at the Knave's trial:

> The King of Hearts: "Begin at the beginning…and go on till you come to the end; then stop."
>
> The Queen of Hearts: "Sentence first—verdict afterwards."

Sam Spade [counting ten "thousand-dollar bills"]: "We were talking about more money than this." Casper Gutman: "Yes, sir, we were…but we were talking then. This is actual money, genuine coin of the realm, sir. With a dollar of this you can buy more than with ten dollars of talk." Dashiell Hammett on negotiation, in *The Maltese Falcon,* ch. XVIII (1930).

Ray Charles on impeachment, in "I've Got News For You" (1961):

> "You said before we met/
> That your life was awful tame/
> Well, I took you to a nightclub/
> And the whole band knew your name/
> Well, baby, baby, baby/
> I've got news for you/
> Oh, somehow your story don't ring true."

"I read all three of the morning papers over my eggs and bacon the next morning. Their accounts of the affair came as close to the truth as newspaper stories usually come—as close as Mars is to Saturn." Phillip Marlowe in Raymond Chandler, *The Big Sleep,* ch. 19 (1939).

From Ambrose Bierce, in *The Devil's Dictionary* (1911):

> "Lawful, *adj.* Compatible with the will of a judge having jurisdiction."
> "Lawyer, *n.* One skilled in circumvention of the law."
> "Litigation, *n.* A machine which you go into as a pig and come out of as a sausage."

"How empty is theory in the presence of fact!" Mark Twain, *A Connecticut Yankee in King Arthur's Court,* ch. XLIII (1889). ■

Send *Lawnotes* Your Favorite Law-Related Quotations!

See your name in print associated with wise authors *and* simultaneously edify the bench and bar, whose members—Lord knows—can use more wisdom. Publication is subject to the editor's discretion. He will be the final judge of what is wisdom and what ain't. Send your favorite quotation(s) to the editor at jgabrieladam@gmail.com.

THE QUOTABLE JUDGE RICHARD POSNER

A great source of wisdom is found in the more than 2,000 legal quotes collected in Robert F. Blomquist, *The Quotable Judge Posner: Selections from Twenty-Five Years of Judicial Opinions* (2010).

Richard Posner writes in the foreward:

> A quotation is not an opinion. But the quotations that Professor Blomquist has painstakingly culled from a corpus of more than 2,200 published opinions (without any help from me) will give the reader a good idea of my judicial philosophy and judicial style. I am honored by the patience and assiduity with which Professor Blomquist has searched for passages that could be detached from their original context yet convey a coherent sense of my conception of the judicial role.

Judge Posner explains why meritless cases can look closer than they are:

> I try in my opinions to bring to the surface the considerations that move judges in close cases. Not that all the cases in which I write an opinion are close. Far from it. But often a case looks close because there are vaguely stated legal rules or principles that enable both sides to make colorable arguments, though one side's arguments may be pretty obviously wrong, even absurd.

Some of my favorite Posner quotes:

> "[T]he cardinal sin of legal reasoning … is to take judicial language out of its original context and apply it uncritically in a materially different context." *In re Kaiser,* 791 F.2d 73, 76 (7th Cir. 1986).
>
> "It sounds like the legal equivalent of 0 + 0 = 1." *Colaizzi v. Walker,* 812 F.2d 304, 307 (7th Cir. 1987).
>
> "Analogies are everywhere; the trick is to pick the apt analogy." *Wilkins v. May,* 872 F.2d 190, 193 (7th Cir. 1989).
>
> "Legal proofs are not the only source of knowledge and decision. Categorical judgments based on experience and common sense play an important role in all areas of the law." *Wilbur v. Mahan,* 3 F.3d 214, 218 (7th Cir. 1993).

John G. Adam

SUPREME COURT CLARIFIES STANDARD FOR RELIGIOUS ACCOMMODATION UNDER TITLE VII.

Blake C. Padget
Butzel Long, PC

The Supreme Court issued its long-awaited decision in *Groff v. Dejoy,* 600 U.S. 447 (2023). *Groff* addressed a nearly 50-year-old precedent regarding the undue hardship standard for religious accommodations under Title VII. Now, it will be more difficult for employers to deny an employee's request for a religious accommodation.

In 1977, the Supreme Court ruled that an employer need not accommodate an employee's religious belief if it causes an undue hardship. *See Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). The Supreme Court went on to say that a religious accommodation imposes an undue hardship if it causes the employer to bear more than a "de minimis" cost.

Fast forward to 2012, Gerald Groff became a rural mail carrier for the United States Postal Service (USPS). In 2013, USPS signed a contract to deliver packages for Amazon including on Sundays. This was an issue for Groff, an Evangelical Christian who observes a Sunday Sabbath, believing that day is meant for worship and rest. USPS tried to accommodate Groff's request to not work on Sundays for a period of time, but eventually began disciplining Mr. Groff when he refused to work on Sundays. Mr. Groff resigned and sued USPS under Title VII when it became apparent that he would be terminated for refusing to work on the Sunday Sabbath.

In a unanimous decision, the Court determined that Title VII requires an employer to show more than just a minor or "de minimis" cost to deny a religious accommodation. Instead, an employer that denies a religious accommodation must show that granting the accommodation would result in "substantial increased costs in relation to the conduct of the particular business."

Under this new standard, courts will consider factors such as the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer. The Court also clarified what consideration an employer can give to the accommodation's impact on coworkers.

Under *Groff*, the impact on coworkers is only relevant to the undue hardship analysis if those impacts go on to affect the conduct of the business. However, a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice, cannot be considered in denying an accommodation. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

Often when I'm trying to get the parties to settle a case, I explain the difference between arbitration and mediation. Arbitration, I say, is about the past. Who did what? Who broke what rule? What did the parties intend when they negotiated this contract language? Mediation, in contrast, is about the future. We may never agree about exactly what happened. But whatever it was, what are we going to do about it going forward? The past is hard to change, I say. The future, on the other hand, offers lots of possibilities.

The other difference between arbitration and mediation, I explain, is that arbitration decisions are imposed, and mediated settlements are agreed to. Some cases need to go to arbitration. I don't deny that. But settlements arrived at by the parties themselves are always better than decisions imposed by someone else. Why should this be?

One reason is that no one actually cares about the past. What we care about is whether Jones is going to get fired or Smith is going to get paid. We talk about the past as a way of determining how we're going to behave in the future. If Jones broke the rule, he's going to get fired. If the parties who negotiated the CBA intended this provision to be applied in this way, Smith will get paid.

But there are problems with this approach. One is that the people who formulated the rule were likely not thinking about a case like Jones's. The people who negotiated the language of this provision were likely not thinking about a case like Smith's. Context is key. Conditions change. Judgement is required in the enforcement of rules and the application of contract language. The question for the parties in dispute is this: Whose judgement do you trust to do the best job of considering the context and the changing conditions, the actual people who are going to have to live with the result, or some guy you picked off a list?

Another problem with arbitration (or litigation) is that arguing about the meaning of Article XXIV, Section 6, Paragraph B(4)(c) is beside the point. In the same way that no one cares about the past, no one actually cares about the meaning of B(4)(c). What we care about is Smith. We argue about the meaning of B(4)(c) because it's a proxy. The legal culture is premised on the idea that a neutral decision maker can apply the rules objectively. Smith is messy. B(4)(c) is neat.

Sorry, but this is delusional. Professionals who are paid to do it can complicate B(4)(c) indefinitely. The arbitrator may have different biases, prejudices, predispositions and cognitive deficits than the parties themselves, but he or she is no more objective than they are. And, most importantly, arguing about the meaning of B(4)(c) violates the first rule of arguments: Fight about what you're fighting about.

There's an old story about a dairy farmer who hires a scientist to design a more efficient milking operation. The scientist works on the problem for a long time and comes up with the optimal solution. The only problem, he says, is it only works for spherical cows in a vacuum.

The idea that the law exists and the facts exist and the job of an arbitrator (or a judge) is to apply the law to the facts and produce an objective result is a fairytale. It has no more relevance to the real world than spherical cows in a vacuum have to a dairy farm.

Did Jones break the rule? Did the parties intend this meaning or that one when they agreed to this language? You can hire an arbitrator to answer those questions for you if you insist. We will do our best. But the most truthful response to both questions is: How the hell should I know? ■

Farwell FWIW

This will be my last *For What It's Worth* column for *Lawnotes*. I've been doing these for 21 years. It's been a lot of fun, but it's time to move on. My thanks to Stuart Israel, John Adam, and everyone else who helped make it happen.

I'm very proud to say I have been offered a rotating slot on my favorite website, 3 Quarks Daily, https://3quarksdaily.com. I hope to see you there.

Barry Goldman

MICHIGAN LEGAL GIANTS: PROFESSOR GRANO AND JUSTICE CORRIGAN

Marianne J. Grano
Kienbaum Hardy Viviano Pelton & Forrest, P.L.C.

Any discussion of the rise of textualist and originalist interpretation in Michigan would prominently feature Joseph Grano, Distinguished Professor of Criminal and Constitutional Law, Wayne State University, and his spouse Hon. Maura Corrigan, formerly Chief Judge of the Court of Appeals and Chief Justice of the Michigan Supreme Court, the only person to have served as Chief on both appellate courts.

The couple met in the early 1970s. Grano came from a working-class Italian neighborhood in South Philadelphia, and, through scholarships, had attended Temple University for law school and the University of Illinois for his LLM. Corrigan hailed from a large Irish Catholic family well-known in Cleveland; blazing a new trail for women in her family, she attended Marygrove College in Detroit and University of Detroit-Mercy Law School, where she was one of only a handful of women in her class, yet was elected Student Bar President by her peers. Corrigan tended toward a "living constitution" philosophy; Grano won her over to textualist principles—then won over her heart, and the two were married in 1976.

Grano joined the faculty of Wayne Law; his contributions included numerous articles and several books, including *Confessions, Truth, and the Law,* presenting a structural challenge to the *Miranda* rule, and the textbook *Problems in Criminal Procedure*. Grano, though firmly committed to originalism, demonstrated great respect for, and was deeply respected by, his liberal colleagues, with whom he held public debates. Michigan's chapter of the Federalist Society honors him each year with the presentation of the Grano Award. Grano's true passion, however, was teaching. He used the Socratic method and required a great deal of class participation, even sometimes inviting his young children, Megan and Daniel (who had been prepped, of course) to answer questions when the class could not.

For her part, Corrigan served in private practice and as a prosecutor at both the state and federal levels, rising to Chief Assistant U.S. Attorney (the first woman to serve in that role), before she was appointed to the Court of Appeals, then elected to the Supreme Court, where she served from 1998-2011 and as Chief from 2000-2005. A tireless jurist, she was nicknamed "Hurricane." Her opinions on the Court included *People v Goldston,* adopting the good-faith exception to the exclusionary rule in Michigan, and *Glass v Goeckel,* holding that under the public trust doctrine, citizens have the right to walk the beach.

Yet it was the Court's role related to foster care that captured her attention. During her term, Corrigan's office desk was nearly covered in files on every child that had died in foster care since she took office, demonstrating her commitment to those children. In 2011, she left the Court to lead the Department of Health and Human Services. As Director, she supervised and advocated for numerous reforms, and was instrumental in raising Michigan's maximum age for foster care from 18 to 21. She then continued her advocacy through the American Enterprise Institute before returning to private practice with Butzel Long, from which she recently retired. Currently, among many nonprofit and *pro bono* efforts, she is the President of the Wayne County Jail Outreach Ministry.

Corrigan worked on behalf of others while navigating personal tragedy. Joe Grano was diagnosed with Parkinson's disease in 1989, and died in 2001 at the age of 58. Although his disease robbed him completely of quality of life, Joe Grano's courage and compassion taught those around him to the end. Three of his colleagues, including John Dolan, his lifelong friend, and Robert Sedler of Wayne and Yale Kamisar of Michigan, both of whom he had frequently debated, eulogized him. Decades later, lawyers and judges constantly stop me to tell me "Joe Grano was my favorite professor."

Grano and Corrigan's contributions to the law continue to be recognized. Grano's works have been cited numerous times by the U.S. Supreme Court, most recently in the 2022 decision *Vega v Tekoh*. As for Corrigan, she had an eventful year; after her portrait unveiling at the Michigan Supreme Court in June, in August, she was awarded the 2023 Neal Shine Award for Exemplary Regional Leadership.

Grano and Corrigan have two children, Megan Grano (Michael Canale), a professional comedian and public speaking coach, and Daniel Grano, my husband, an Assistant Attorney General in the financial crimes division. Their five grandchildren each spoke at their Nana's portrait unveiling in June, and together lifted the veil covering her portrait. ■

Corrigan and Grano, 1971

THE NLRB'S BUSY AUGUST

John G. Adam and Russell Linden

As the first term of Biden-appointed but now reconfirmed Board member Gwynne Wilcox was coming to an end August 27, 2023, the Board issued a flurry of seven rulings reversing or clarifying decisions and a new election rule. The Board press releases highlight these changes:

1. Restores Protections for Employees Who Advocate for Nonemployees
2. Returns to Totality of Circumstances Test for Determining Concerted Activity
3. Revises Standard on Employers' Duty to Bargain Before Unilateral Changes
4. Clarifies *Wright Line* Burden
5. Announces A New Framework for Union Election Proceedings
6. Issues a New Rule for Union Elections
7. Adopts New Standard for Assessing Lawfulness of Work Rule

Chairperson Lauren McFerran along with Members Wilcox and David Prouty were in the majority in all seven decisions. Trump appointee Member Marvin Kaplan dissented from six of the decisions and from the new election rules.

The Board says in its press releases that it "restores," "returns," "revises," "clarifies," "announces," and "adopts" new standards and rules in many areas. So make sure to read the seven decisions, totaling 342-pages, and the 27-page election rule.

The most significant ruling, *Cemex Construction Materials,* 372 NLRB No. 130, is 121-pages with the majority opinion having 193 footnotes. Coauthor Russell Linden, who has written extensively on the Biden Board, says *Cemex* is a radical departure from precedent, best illustrating the strong labor bent of the Biden Board.

While these decisions will likely be covered in greater detail in the next issue by Russell Linden, for now, we provide a checklist with some commentary provided by Linden.

1. Protected activity on behalf of nonemployees. *American Federation for Children, Inc.,* 372 NLRB No. 137, ruled that concerted advocacy, such as civil rights and social justice issues, by statutory employees (employees covered by the National Labor Relations Act) on behalf of nonemployees is protected when it can benefit the statutory employees.

Overrules Trump Board decision *Amnesty International,* 368 NLRB No. 112 (2019).

2. Concerted activity. *Miller Plastic Products, Inc,* 372 NLRB No. 134, reaffirmed the broad standard announced in 1986 in *Meyers Industries* that "the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence."

Overrules Trump Board decision *Alstate Maintenance,* 367 NLRB No. 68 (2019).

3. Employer unilateral changes. In two decisions, the Board reversed Trump Board law and curtailed an employer's ability to make unilateral changes in a unionized workplace.

Wendt Corp., 372 NLRB No. 135 and *Tecnocap,* 372 NLRB No. 136, "reaffirmed" the Board's "commitment to the bedrock principle" that a unilateral change made during negotiations 'must of necessity obstruct bargaining . . . [and] will rarely be justified by any reason of substance,' and thus, the narrow past-practice defense to such unilateral action applies only when the employer proves its action is consistent with a longstanding past practice and is not informed by a large measure of discretion."

Overrules *Raytheon Network Centric Systems,* 365 NLRB No. 161 (2017).

4. *Wright Line* Burden. *Intertape Polymer,* 372 NLRB No. 133, "reaffirmed that the General Counsel's burden under *Wright Line* remains the same as it has been throughout decades of Board jurisprudence."

Clarifies *Tschiggfrie Properties,* 368 NLRB No. 120 (2019). The Board explained that to the extent *Tschiggfrie* has been interpreted as modifying or heightening the General Counsel's *Wright Line* burden, "we reject that interpretation, and we reaffirm that the General Counsel's burden under *Wright Line* remains the same as it has been throughout decades of Board jurisprudence."

5. Elections not necessarily required. *Cemex Construction Materials,* 372 NLRB No. 130, creates a "framework for determining when employers are required to bargain with unions without a representation election." The Board (Op. 35) "may find a current bargaining obligation based on nonelection evidence where an employer's misconduct has rendered a recent or pending election a less reliable indicator of current employee sentiment."

The Board significantly altered the law for the consequences of employers responding to union demands for voluntary recognition and when it may issue a bargaining order.

As noted, Linden opines this decision dramatically revamps Board law and places a firm imprimatur on union recognition by means other than Board supervised elections.

Now in summary, employers faced with a union demand for recognition under the new *Cemex* standard, have three choices: **(1)** voluntarily recognize the union, **(2)** "promptly filing" (which normally means within two weeks of the recognition demand being made) a petition for election with the NLRB, or **(3)** "acting at their own peril" and ignore or refuse the recognition request. Under the new standard, commission of ULPs in the case of choices 2 or 3 would result in the NLRB issuing a bargaining order and the union becoming the representative without an election.

Overrules the Board's longstanding precedent *Linden Lumber,*

190 NLRB 718 (1971) and reinstates a version of the standard from *Joy Silk Mills,* 85 NLRB 1263 (1949).

Cemex at 22 explains that: "In *Joy Silk,* the Board held that an employer unlawfully refuses to recognize a union that presents authorization cards signed by a majority of employees in a prospective unit if it insists on an election motivated 'not by any bona fide doubt as to the union's majority, but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union.'"

6. Election Rule Changes. The press release states the Board adopted a rule that "largely reverses the amendments made" by the Trump Board 2019 Election Rule which the Biden Board states "introduced new delays in the election process."

The new rules are effective December 26, 2023. Linden says the new rules are essentially a return to the "quickie election rules" issued by the Obama Board to further streamline the election process.

7. Work Rules. *Stericycle, Inc.,* 372 NLRB No. 113, creates a new legal standard for evaluating employer work rules challenged as facially unlawful. "Today, after previously issuing a notice and invitation for briefing, we adopt a new legal standard to decide whether an employer's work rule that does not expressly restrict employees' protected concerted activity under Section 7… is facially unlawful."

Linden says this new legal standard for evaluating employer work rules challenged as facially unlawful will invite the filing of unfair labor practices charges challenging employee handbook provisions and predicts the NLRB General Counsel will issue memos providing further guidance concerning the lawfulness of various provisions such as civility policies that were found lawful by the Trump Board.

Overrules Trump Board decision *Boeing,* 365 NLRB No. 154 (2017) which had overruled *Lutheran Heritage Village,* 343 NLRB 646 (2004). *Stericycle* adopts a "modified version of the basic framework set forth in *Lutheran Heritage,* which recognized that overbroad workplace rules and polices may chill employees in the exercise of their Section 7 rights."

8. Employer-mandated campaign meetings next to be overruled? The "General Counsel in *Cemex* also requested overruling *Tri-Cast, Inc.,* 274 NLRB 377 (1985), which established the standard for what employers may legally say about how unions will impact the relationship of employees with their employer" and also "requests that we overrule *Babcock & Wilcox,* 77 NLRB 577 (1948), which addresses the lawfulness of employer mandated campaign meetings. But the General Counsel did not allege or litigate any issue relating to the lawfulness of mandatory meetings in this case, and the record does not establish, as a factual matter, that all or most employees here were required to attend the Respondent's consultant meetings on threat of discipline. We accordingly decline the General Counsel's request that we address that issue *in this case.*" Op. 3, n. 15 (italics added). The Board similarly declined to address *Tri-Cast.*

Linden predicts both decisions will be overruled. ■

HOW TO MAKE A WEB CITATION PERMANENT

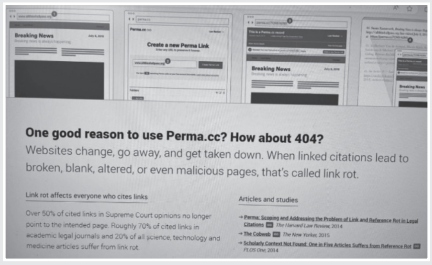
John G. Adam

Permanent is from Latin *permanere,* to endure, and *manere,* to remain. But many web articles do not seem to be permanent. In the past, I would cite and print the web page, and make it an exhibit.

But Perma.cc, created by Harvard Law School, lets you make most web sites permanent. I recently used Perma.cc for a Michigan Bar Journal article. I found Perma to be easy and cheap. Perma explains what it can do (perma.cc/about):

> Perma.cc is a service that helps anyone who needs to cite to the web create links to their references that will never break. Perma.cc prevents link rot.
>
> When a user creates a Perma.cc link, Perma.cc archives the referenced content and generates a link to an archived record of the page. Regardless of what may happen to the original source, the archived record will always be available through the Perma.cc link. To learn more about how Perma.cc works, please take a look at our user guide.
>
> Why use Perma.cc
>
> In a sample of several legal journals, approximately 70% of all links in citations published between 1999 and 2011 no longer point to the same material. Broken links in journal articles undermine the citation-based system of legal scholarship by obscuring the evidence underlying authors' ideas.
>
> As Internet usage becomes more widespread and web citations in scholarship become more common, the problem of link rot will become increasingly important.

Using Perma.cc, I made this page permanent, at perma.cc/2U2Y-HC5B. I also made a permanent link to the Summer issue of *Lawnotes* at perma.cc/Z282-D9A5.



Courts regularly use Perma.cc—more than 400 times by courts in the Sixth Circuit. See most recently, *Ingram v. Wayne County,* 2023 WL 5622914, at *4 (6th Cir.) (Citing "See Kara Berg, Lawsuit: Wayne County Prosecutors Retaliated Against Man After Civil Forfeiture Lawsuit, The Detroit News (Mar. 9, 2023, 3:59 p.m.), https://perma.cc/WCN4-25ZH."). ■

MICHIGAN LEGISLATURE AMENDS PERA TO RESTORE BARGAINING RIGHTS

Benjamin L. King
McKnight, Canzano, Smith, Radtke & Brault, P.C

On July 26, 2023, Governor Gretchen Whitmer enacted three major amendments to the Public Employment Relations Act, MCL 423.201, et seq ("PERA"). HB 4044 repealed PERA's requirement that an employer freezes its employees' wages and benefits after the expiration of a collective bargaining agreement at amounts that are no greater than those in effect at expiration. HB 4354 removed a number of prohibited subjects of bargaining, related to public school employees, from PERA, including prohibitions against bargaining over discipline, discharge, and teacher placement. HB 4233 repealed PERA's prohibition against a public-school employer's use of schools resources to collect union dues or service fees.

1.

In 2011, Governor Rick Snyder enacted an amendment to PERA that required public employers to "freeze" wage and benefit levels during contract negotiations. This prohibition, incorporated in Section 15b of PERA, outlawed step increases, and other benefit increases after the expiration of a contract. The amendment also banned wages and benefits under a new contract from being retroactive to the expiration date of the expired agreement. Section 15b also required public employees to bear any increased costs in insurance benefits necessary to maintain benefits at the levels in the expired contact.

Section 15b undermined fair bargaining and created an imbalance in bargaining power between public employees and their employers. Section 15b's prohibition against wage and benefit increases after the expiration of a contract undermined public sector unions' bargaining power because it required union members to bear the brunt of stalled contract negotiations. By imposing this burden on union members and their families Section 15b incentivized unions to settle contracts quickly in order to avoid financial consequences for members.

With the removal of Section 15b, practitioners might expect longer and more aggressive negotiations. With the passage and enactment of HB 4044, Union members and their families can expect better contracts without the risk of financial hardship from stagnant wages and increased healthcare costs.

2.

Section 15(3) of PERA prohibits public school employers and the unions that represent their employees from bargaining over a number of subjects. In 2011, the Michigan legislature and Governor Snyder enacted 2011 PA 103 and 2011 PA 260. Acts 103 and 260 amended Section 15(3) by adding subsections 15(3)(j)-(p), which made certain matters prohibited subjects of bargaining. These restricted subjects included teacher placement, layoff and recall decisions, the use and content of performance evaluation systems, polices regarding the discharge or discipline of a teacher, the format, timing, or number of classroom observations, decisions regarding performance-based compensation, and decisions about notifications to parents concerning a teacher's ineffective rating.

HB 4354 removes subsections 15(3)(j)-(p) from PERA. Additionally, HB 4354 removed PERA's prohibition against bargaining over intergovernmental agreements. These changes bring these subjects back to the bargaining table and give educators an opportunity to bargain over these issues.

3.

In 2012, Governor Synder, in an effort to undermine teachers' unions, signed into legislation 2012 PA 53. PA 53 amended PERA to prohibit public schools from using any resources to assist teachers' unions in the collection of dues and service fees.

A dues checkoff is a procedure through which the employer withholds union dues from employees' pay and remits the amount to the union. Its primary value to the union is administrative convenience: The procedure eliminates the time and effort that the union would otherwise spend making periodic individual collections. PA 53 prohibited public schools from assisting in the convenient and well-established practice of payroll deduction for union dues. Supporters of the 2012 law argued that unions should be responsible for collecting dues from their members and that by prohibiting dues deductions school districts could see some administrative cost savings.

PA 53 unnecessarily inconvenienced union members and undermined teachers' unions. Dues deductions are commonplace and there are no real costs associated with them. PA 53 was passed to make it more difficult for teachers' unions to collect dues and financial support from their members. Many public sector employers offer payroll deductions for insurance premiums, retirement contributions, education savings plans, and even charitable contributions. Any costs to an employer associated with dues deductions is nominal or nonexistent. On the other hand, payroll deductions provide a simple mechanism for union members to pay their dues. *Anheuser-Busch, Inc. v. Int'l Bhd. of Teamsters,* Loc. 822, 584 F.2d 41, 43 (4th Cir. 1978)(checkoff procedures are "simply an administrative convenience for the collection of dues").

By removing PERA's prohibition against dues deduction in public schools, teachers unions will no longer need to expend resources keeping track of delinquent members and dues payments. Resources used to collect dues can now be used to advance members rights and bargain stronger contracts.

These amendments to PERA will go into effect on or about March 30, 2024. For the last twelve years, public sector unions navigated the many restrictions and prohibitions imposed by lawmakers in 2011 and 2012. Going forward, public sector employers and unions can except to see many of these issues and topics at the bargaining table. ■

TWO IS ENOUGH

Mark H. Cousens

Between July 1, 2021 and June 29, 2023 the Michigan Employment Relations Commission issued some 62 decisions in which only two Commissioners participated. That raised concerns among some MERC practitioners. Were decisions issued with only two Commissioners participating binding?

The question has been answered. In *Van Buren Education Association v Van Buren Public Schools,* (Court of Appeals number 362076; 8/24/23) the Michigan Court of Appeals rejected an employer's challenge to a decision issued by two Commissioners. The employer had argued that failure to fill a Commission vacancy effectively rendered nugatory the requirement, contained in MCL 423.3, that the Commission consist of three Commissioners. The decision confirmed the ability of the Commission to function with two persons since the Labor Mediation Act expressly states that "A vacancy in the board shall not impair the right of the remaining commissioners to exercise all the powers of the commission." MCL 423.4. However, the Employer's argument was taken seriously. While the Court reached the correct decision, it was disquieting that a party would even raise the question.

The Employer did not raise any objection to the Commission proceeding while the matter was pending before the Commission; it presented the argument for the first time in its appeal to the Court of Appeals. The Court decided to consider the issue although the question had not been preserved.

The basis of the Employer's argument was that permitting the vacancy to continue indefinitely negated the requirement that there be three Commissioners. The Employer asserted, in essence, that there must be some limit read into the statute and permitting a vacancy to continue for an extended time had the effect of negating a mandatory provision.

The issue raised concerns similar to those which followed the decision by the Supreme Court in *New Process Steel, L.P. v. N.L.R.B.,* 130 S.Ct. 2635 (2010) which invalidated a spate of rulings by the National Labor Relations Board which were issued by two Board members. NLRA Section 3(b) of permits delegation to a "...group of three or more members." As a result, the Court concluded that three members must participate and that decisions by two members, although constituting a quorum of the Board, was not permissible given the language of the Act. While the delegation provision of the NLRA is not the same as the relevant provision of the Labor Mediation Act, it is safe to assume that the Employer viewed *New Process Steel* as a basis for its argument to the Court of Appeals.

The Employer's argument was dangerous. And it was directly contrary to the text of the Labor Mediation Act.

First, if the Employer had prevailed, the Commission might have had to reconsider some 62 decisions issued by it, many of which were routine. And it might have upset other rulings that were uncontested and did not result in any published decision such as election certifications. It was striking that a party would raise this question without acknowledging the adverse consequences of its argument.

Second, the Employer's argument was plainly wrong. The Commission was originally created as the Labor Mediation Board in the original iteration of the Labor Mediation Act adopted in 1939. The LMA was amended at the same time that the Legislature adopted the Public Employment Relations Act in 1965. The amended provision states that "A vacancy in the board shall not impair the right of the remaining commissioners to exercise all the powers of the commission. Two commissioners shall at all times constitute a quorum; but official orders shall require concurrence of a majority of the commission." This language clearly permits the Commission to function with two commissioners and issue decisions so long as the Commissioners agreed on the outcome.

The Court of Appeals agreed. It found that "...(A)n indefinitely long vacancy does not ignore any part of MCL 423.3. Appellant's argument reads into the statutes conditions and limits that are not supported by the statutory language. By inferring an "expiration period" for MERC's authority after a vacancy, appellant violates the principle of statutory interpretation that "nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself."

The decision eliminates a concern among many advocates who regularly practice before the Commission. Most were confident that the Commission could, indeed, function with two Commissioners. But the *Van Buren* decision puts to rest even an abstract concern. While all practitioners would encourage the prompt filling of Commission vacancies (the third Commissioner was appointed effective June, 2023), it is clear that "two is enough." ■

WINTER READING

Martin Gilbert, *Israel: A History* (RosettaBooks, 1998)

George Gilder, *The Israel Test* (Richard Vigilante Books, 2009)

Walter Isaacson, *Elon Musk* (Simon & Schuster, 2023).

David Garrow, *Rising Star: The Making of Barack Obama* (HarperCollins, 2017).

Amul Thapar, *The People's Justice: Clarence Thomas and the Constitutional Stories that Define Him* (Regnery, 2023).

MANAGEMENT TIME VERSUS NONEXEMPT TIME NOT DETERMINATIVE OF FLSA OVERTIME-EXEMPTION

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On August 17, 2023, the Sixth Circuit found that the travel plaza operator HMS Host Tollroads, Inc. properly classified an employee as overtime-exempt under the Fair Labor and Standards Act ("FLSA") despite spending 80% to 90% of his schedule performing nonexempt work. *Manteuffel v. HMS Host Tollroads,* 2023 WL 5287722 (6th Cir.) (Moore, McKeague and Mathis, J.).

Under the FLSA, employees generally must be paid an overtime premium of 1.5 times their regular rate of pay for all hours worked beyond 40 in a workweek—unless they fall under a statutory exemption. 29 U.S.C. § 207(a)(1). Under 29 § U.S.C. 213 (a)(1), any employee employed in a bona fide executive, administrative, or professional capacity is exempt from overtime requirements. Department of Labor regulations explain that an "employee employed in a bona fide executive capacity" is an employee (1) who is paid on a salary basis of at least $684 per week or $35,568 per year,[1] (2) whose primary duty must be management of the enterprise in which the employee is employed; (3) who customarily and regularly directs the work of two or more other employees; and (4) who has the authority to hire or fire other employees or whose recommendations for hiring or firing, including advancement and promotion, are given particular weight. 29 C.F.R. 541.100(a). The regulations also explain that an employee's "primary duty" is the "principal, main, major or most important duty that the employee performs." 29 C.F.R. 541.700(a).

In *Manteuffel,* the plaintiff was employed by HMS Host as a district director of operations and made $75,000 annually (satisfying the salary basis test). HMS Host classified Manteuffel as both an executive and administrative employee, but Manteuffel claimed that he did not satisfy the FLSA's definition of an executive under the job duties test. A district court granted summary judgment to HMS Host, and the Manteuffel appealed.

The 6th Circuit upheld the lower court based on its analysis that management was the employee's primary duty. The Court explained that the "determination [of employee's primary duty] is holistic, considering all the facts in a particular case." *Id.* at *3. Such factors may include the importance of exempt duties compared to nonexempt duties and the amount time spent performing exempt work as well as the employee's relative freedom from direct supervision and a comparison of employee's salary and the wages paid to other employees for the same kind of nonexempt work. The court stressed while the amount of time spent on nonexempt duties may be considered when determining if management is the employee's primary duty, the time spent alone is not determinative. *Id.*

Even accepting that 80% to 90% of Manteuffel's time was spent performing nonexempt work such as running the register, preparing food, and restocking inventory, the court ruled that Manteuffel was subject to the executive exemption of the FLSA as a matter of law. Namely, the 6th Circuit said that the record showed:

- The employee's management duties—hiring, directing, and supervising employees—were fundamental to the success of the company and were of greater importance to the overall success of the company than any nonexempt work he performed.

- The employee operated "'free from direct over-the-shoulder oversight on a day-to-day-basis,'" and was relatively free from supervision.

- The employee earned an annual salary of $75,000, whereas nonexempt front-line employees earned $10 per hour.

Furthermore, the court held that the employee's job satisfied other criteria for the executive exemption because he customarily and regularly directed others and had the authority to hire or fire them. "Each of these factors weigh[ed] in favor of determining that [the employee's] primary duty was management." *Id.* at *8. ■

—END NOTES—

[1] On August 30, 2023, the U.S. Department of Labor announced a notice of proposed rulemaking (NPRM) that would increase the FLSA's salary threshold for exemptions to overtime requirements from $684 a week, or $35,568 a year, to $1,059 per week, or about $55,068 per year.

THE DISAPPEARING PUBLIC POLICY CLAIM

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The employment landscape has altered drastically over the last ten years. As many as sixteen percent of Americans have worked as gig workers. As of 2019, the number of contract workers in the United States increased by 22% since 2001. See Lim *et al,* Independent Contractors in the U.S.: New Trends from 15 years of Administrative Tax Data (IRS, 2019). In Michigan, the number of contract workers increased by approximately 24% between 2001 and 2016, while the number of employees decreased by almost 10%. (*Id.,* Figure 5). Over the next ten years, experts anticipate the number of independent contractors to skyrocket, which will result in contractors comprising approximately half of the nation's workforce.

Yet, this burgeoning population of the workforce lacks significant legal protections. Federal law, for example, continues to protect "employees" exclusively, even in newly passed legislation like the Pregnancy Workers' Fairness Act. Michigan law differs in that it grants legal protections to independent contractors under its civil rights laws, but not its Whistleblowers' Protection Act. And, as of 2021, the Michigan Court of Appeals issued a precedential opinion prohibiting independent contractors from bringing a claim of retaliatory discharge under public policy. *Smith v. Town & Country Properties II, Inc.,* 338 Mich. App. 462, (2021), *appeal denied,* 975 N.W.2d 928 (2022).

Over the nearly forty years that Michigan has recognized a common law claim for retaliatory discharge in violation of public policy, Michigan courts have not issued a published decision prohibiting independent contractors from bringing such claims. *See Steffy v. Bd. of Hosp. Managers of Hurley Med. Ctr.,* 2017 WL 5615824, at *5 (Mich. COA) (Beckering P.J., concurring opinion). The *Smith* decision, significantly, strips this common law right from thousands of Michigan workers.

Of course, a number of Michigan's job industries rely heavily on independent contractors and those workers will suffer disproportionately. Over 1.2 million scientific and tech professionals are contract workers. (Lim *et al.,* 2019, Figure 6). Just under 1 million service workers are independent contractors. More than 800,000 real estate workers, as well as health care workers, are contract workers.

For example, the plaintiff in *Smith* was an associate real estate broker. As an associate real estate broker, he was subject to statutes and regulations defining his role, responsibilities, and, as the Court of Appeals recognized, the nature of his employment relationship with his brokerage firm. Article 25 of the Occupational Code, MCL 339.2501 *et seq*. Because Smith, like the overwhelming majority of Michigan's real estate brokers, was paid primarily via commission, he was determined to be an independent contractor, pursuant to statute. *Smith, supra.* The effect of the *Smith* decision, then, is to bar virtually *all* of Michigan's real estate agents from bringing public policy claims, regardless of the merit of their claims, the harm they have suffered, or the potential harm to the public.

Such a result is inconsistent with the spirit of public policy jurisprudence. The country's first court opinion recognizing a civil cause of action under state public policy, *Petermann v. Teamsters Local 396,* issued in 1959, defined public policy to be the "established interests of society" and further defined a violation of public policy to be an action that contravened those interests. *Petermann v Teamsters Local 396,* 174 Cal. App. 2d 184, 188 (1959). Elaborating, the *Petermann* court stated: "By 'public policy' is intended that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.*

Indeed, it is difficult to imagine a workplace situation more "injurious to the public" than a worker – be they an employee or independent contractor – being compelled to violate the law. Again, the facts alleged in *Smith,* provide a particularly compelling example. The plaintiff, as an associate real estate broker, possessed specialized knowledge with regard to real estate sales, which are subject to stringent laws and regulations. Smith's clients, in turn, relied on his specialized knowledge, rendering them particularly vulnerable should Smith neglect to inform them of pertinent information, or otherwise provide them with misinformation. This is precisely what Smith alleged the owner of his brokerage firm was demanding. When Smith refused to comply with the company owner's demands, he was promptly separated from the company.

Common law public policy claims are intended to prevent and remediate exactly this type of situation, wherein a worker is terminated for refusing to violate the law. As the *Petermann* court expertly articulated:

> "It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, *whether the employment be for a designated or unspecified duration,* on the ground that the employee declined to commit perjury, an act specifically enjoined by statute. . . . in order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury. To hold otherwise would be without reason and contrary to the spirit of the law." (emphasis added).

In ruling contrary to the foundational purpose of public policy claims, the Court of Appeals in its *Smith* decision nonetheless acknowledged that providing independent contractors with a common law public policy claim "may be sound public policy," yet, declined to issue a decision consistent with this reasoning.

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THE DISAPPEARING PUBLIC POLICY CLAIM

(Continued from page 11)

This is not the only inconsistency effectuated by the Court of Appeals' *Smith* decision.

Smith effectively bars Michigan's independent contractors from remedial action under common law for retaliatory termination when protections exist under comparative state legislation. Michigan's Elliott-Larsen Civil Rights Act ("ELCRA") prohibits discrimination and retaliatory termination by an employer against "an *individual* with respect to employment." MCL 37.2202. Michigan's Persons with Disabilities Civil Rights ("PDCRA") has identical language prohibiting retaliatory termination or discrimination "against an *individual* . . ." MCL 37.1202. The Michigan Supreme Court has held that this statutory language, "does not state that an employer is only forbidden from engaging in such acts against its own employees. Indeed, the CRA appears to envision claims by non-employees . . ." including independent contractors. *McClements v. Ford Motor Company,* 473 Mich. 373, 386 (2005); see also *Jamoua v. Michigan Farm Bureau,* No. 20-CV-10206, 2021 WL 5177472, at *12 (E.D. Mich.), *motion to certify appeal denied,* No. 20-10206, 2022 WL 1459563 (E.D. Mich.) (clarifying that *McClements* overturns prior decisions holding that ELCRA only applies to employees).

In light of these comparative statutes, the disparity resulting from the *Smith* decision's exclusion of independent contractors is glaringly inconsistent and nonsensical. With the *Smith* decision, independent contractors have legal recourse when they oppose *certain* violations of law. Returning to the facts in *Smith,* if Mr. Smith had, for example, refused to be complicit in a scheme intended to discriminate against individuals based on race or age, etc., - acts violating ELCRA – and subsequently suffered a retaliatory termination, he would have an actionable cause of action under the ELCRA. Similarly, if he had refused his employer's directive to engage in practices discriminatory towards individuals with disabilities, which would violate the PDCRA, and suffered retaliatory termination as a result, he would have an actionable cause of action under the PDCRA. Yet, because Mr. Smith alleged that he refused to violate a different law, he is deemed to be without legal recourse.

What justification can there be for this discrepancy in the common law's protections for Michigan's workers when the Court of Appeals has acknowledged it is not rooted in the furtherance of public policy?

There is no inherent principle of law that justifies the inconsistency. For example, Michigan public policy claims do not sound in contract, which could impact the standing of a plaintiff. Rather, the Michigan Supreme Court has clearly articulated that wrongful discharge claims, predicated on public policy, sound in tort. *Phillips v. Butterball Farms Co.,* 448 Mich. 239, 531 N.W.2d 144 (1995); See e.g., *Perry v. Huron Cty.,* No. 173241, 1996 WL 33324084, at *2 (Mich. COA) ("Like *Phillips,* we conclude that plaintiff's claim of retaliatory discharge [in violation of public policy] sounds in tort, not contract."); *Wiskotoni v. Michigan Nat. Bank-W.,* 716 F.2d 378, 388 (6th Cir. 1983) ("Because wrongful discharge in violation of public policy states an action in tort rather than contract, damages are not limited by contract principles."). As a claim rooted in tort, public policy claims are not constrained or voided due to a worker's classification on account of legal principle.

Several state supreme courts and Michigan Court of Appeals Judge Beckering have relied upon this reasoning to extend public policy claims to workers outside of the at-will employment context. In a concurring opinion, Judge Beckering, after noting "that there is no published opinion in Michigan that concludes that the public policy exception for wrongful discharge claims arises only in at-will employment relationships," reasoned "that the tort of discharge in violation of public policy should be available to all employees, regardless of their contractual status, as it differs in both scope and sanction from a breach of contract action for termination in violation of a just cause employment contract (or a collective bargaining agreement)." *Steffy v. Bd. of Hosp. Managers of Hurley Med. Ctr.,* No. 333945, 2017 WL 5615824, at *5 (Mich. Ct. App. Nov. 21, 2017) (Beckering P.J. concurring opinion). Reaching the same conclusion, in 2000 the Supreme Court of Washington reasoned:

> "the right to be free from wrongful termination in contravention of public policy may not be altered or waived by private agreement, and is therefore a nonnegotiable right . . . *the right is independent of any contractual agreement…"*

Smith v. Bates Tech. Coll., 139 Wash. 2d 793, 803 (2000) (original emphasis).

Similarly, in 1992, the Utah Supreme Court held "Both respect for precedent and sound public policy compel the conclusion that the tort of discharge in violation of public policy should be available to all employees, regardless of their contractual status." *Retherford v. AT & T,* 844 P.2d 949, 959–60 (Utah 1992), holding modified by *Graham v. Albertson's LLC,* 462 P.3d 367 (2020).

While it is true that, historically, independent contractors have been treated differently than employees under various laws and regulations, the rationale for doing so - the so-called increased control an independent contractor has over his/her work circumstances - has become antiquated and can no longer rationally provide a basis for denying independent contractors legal protections afforded to employees. In reality, independent contractors typically mirror their employee counterparts and enjoy fewer benefits and protections. Independent contractors pay *higher* taxes than employees as they are responsible for income tax as well as self-employment tax. By contrast, employees split social security and Medicare taxes with their employers, receive benefits, and have legal protections under federal and state law. Because employers are incentivized in this way, it is not uncommon for them to misclassify employees as independent contractors, despite extending independent contractors no more "freedom" than actual employees. Such misclassification of independent contractors is so widespread that it is a primary focus of the U.S. Department of Labor as well Michigan Attorney General Dana Nessel.

Moreover, given the developments in the workforce discussed above, including the lack of functional difference between independent contractors and employees, it seems only appropriate that Michigan's common law acknowledge these changes and provide independent contractors, as well as employees, with public policy protections. The Michigan Supreme Court has recognized the validity of this argument, stating:

> **"The common law does not consist of definite rules which are absolute, fixed, and immutable like the statute law,** but it is a flexible body of principles which are designed to meet, and are susceptible of adaption to, among other things, new institutions, public policies, conditions, usages and practices, and changes in mores, trade, commerce, inventions, and increasing knowledge, as the progress of society may require. **So, changing conditions may give rise to new rights under the law...."**

Price v. High Pointe Oil Co., 493 Mich. 238, 243 (2013) (citations omitted) (emphasis added). Roughly six-in-ten Americans likewise favor more legal protections for independent contractors, like gig workers.

In spite of all of the reasons to take up this issue, the Michigan Supreme Court declined to take up the *Smith* case, making the Court of Appeals' published decision binding precedent for the foreseeable future. It is difficult to understand why the Court declined to grant leave given the impact it will have on Michigan's workers and the implications for the public welfare. Are we to assume that the courts are so wary of potentially expanding the ambit of public policy claims, despite the Supreme Court's earlier dicta, that the common law does not consist of definite rules which are "absolute, fixed, and immutable?" In *Smith* the Court of Appeals signaled that extending public policy claims to include independent contractors (though no prior published decision actually excluded independent contractors from bringing such claims) should be a legislative decision. Are the courts relinquishing their authority over court-created common law causes of action in favor of legislative control?

Without any legislative action on this issue, and as more and more "employees" transition to independent contractors, public policy claims will become a rarity and the public and workers alike are likely to suffer for it.

—END NOTES—

[1] pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/ [https://perma.cc/VL3V-QTDJ].

[2] npr.org/2018/01/22/578825135/rise-of-the-contract-workers-work-is-different-now [https://perma.cc/HJ2F-UNGX].

[3] forbes.com/sites/robertwood/2013/11/21/do-you-want-a-1099-or-a-w-2/?sh=39adfe197463 [https://perma.cc/J8VP-ZUBM].

[4] natlawreview.com/article/michigan-employers-act-payroll-fraud-enforcement-unit-comes-knockingm[https://perma.cc/XX2B-PYK8]. ■

AN OVERVIEW OF MICHIGAN'S WAGE AND HOUR DIVISION

Jennifer Fields
Wage and Hour Division Manager

The Michigan Department of Labor and Economic Opportunity, Bureau of Employment Relations Wage and Hour Division administers and enforces 6 Michigan statues. Act 390 of 1978 the Payment of Wages and Fringe Benefits Act; Act 337 of 2028 the Improved Workforce Opportunity Wage Act; Act 338 of 2018, The Paid Medical Leave Act; Act 90 of 1978 The Youth Employment Standards Act 90 of 1978; Act 62 of 2016 The Human Trafficking Notification Act, and the Department of Management Technology and Budget (DTMB) Prevailing Wage projects.

The Division investigates complaints alleging non-payment of wages and fringe benefits, state minimum wage, overtime, equal pay, prevailing wage, and youth employment. The Wage and Hour Division also educates employers and employees in the areas covered by these Acts.

Wage complaints under Act 390 typically occur when workers do not receive their paycheck on the regular payday, have unauthorized deductions made, or are not paid fringe benefits pursuant to the employers' written policy or contract. Vacation, sick, holiday, bonuses, and authorized expenses are defined as fringe benefits pursuant to the employer's written policy.

Act 390 requires that wages be paid on the regular reoccurring payday. If an employee quits or is terminated, wages should be paid on the regular scheduled payday. Hand harvesters that are terminated should be paid within 1 day.

Wages may be paid by U.S. Currency, negotiable check, or payroll debit card. Wages cannot be paid in product or gift cards.

Electronic pay or wage statements are allowed, provided the employee can print out the statement at the time the wages are paid. The check stub should contain hours worked by the employee, the gross wages paid, identification of the pay period for which payment is being made, a separate itemization of deductions, and for each hand harvester paid on a piece work basis furnish a statement of the total number of units harvested by the employee.

Employees have 12 months from the date the wages or fringe benefits were due to file a wage claim with the Wage and Hour Division. The complaint form asks for basic information, such as the worker's name, address, phone number, county of residence, employer's name and address, an explanation of the wage issue and the period covered by the wage dispute.

Once the complaint is received, it is assigned to a Wage and Hour investigator for review. The investigator determines if all the necessary information is in the complaint and if it is something the division has the authority to investigate. Claims are handled on a first-in, first-out basis. The goal is to try to resolve claims within 90 days.

Under Act 390 either party can appeal the decision made. A Hearing will be scheduled before an Administrative Law Judge. If the parties disagree with that decision, they can appeal to Circuit Court.

If the wages or fringe benefits found due are unpaid, the orders become final and the cases are referred to the Michigan Attorney General for enforcement. Most cases are resolved informally but not every case is collectable. Employers can file for bankruptcy, have no assets, or leave the state making collection difficult.

The Wage and Hour Division can be contacted toll free at 1-855-464-9243 or at michigan.gov/wagehour. ■

HEARSAY VS. ADMISSIBILITY OF EXPERT WITNESS REPORTS AT TRIAL

Aubree A. Kugler

Is a report prepared by an expert witness inadmissible at trial? For many of us, this may be an issue that we have not had the opportunity to consider very often, if at all. Reports prepared by expert witnesses are generally and traditionally considered hearsay. They are prior, out-of-court statements which are usually offered for the purpose of proving the truth of the matter asserted therein.

Expert reports are admissible of course if they fall within a hearsay exception. For example, an expert report can often be classified as a business record, a record of events made at or near the time of the event at issue, a record of regularly conducted activity, or a statement made for the purpose of medical treatment or diagnosis. Where such an exception applies, there are obviously no issues. But what if the report does not neatly fall into one of the available exceptions?

As a preliminary matter, it can be tricky to have an expert report admitted as a business record. The traditional business records hearsay exception is justified on grounds of trustworthiness and that trustworthiness is itself an express threshold condition of admissibility. Michigan courts have however found that generally a record which is prepared for the purpose of litigation lacks the trustworthiness that is the hallmark of a document which can be properly admitted under MRE 803(6) as a business record. In many cases, an expert is enlisted and a report is prepared expressly for use during litigation, for example, to establish damages. Therefore, when seeking to have an expert report admitted into evidence, the business record exception may not be a viable option, and more creative arguments may be necessary.

Michigan does have a residual exception for hearsay, which is MRE 803(24). This rule may be useful in admitting expert reports. Despite most courts' history of excluding such reports on the basis that they constitute hearsay, some courts particularly in other jurisdictions are beginning to admit such reports as helpful to the trier of fact in understanding complex issues and for the purpose of making trials more efficient. This may be a sign of things to come across the nation, including in Michigan. Where a proponent of admitting an expert report is unable to get it admitted as one of the other enumerated hearsay exceptions under the rules of evidence, some courts may look to MRE 803(24).

"Residual hearsay exceptions" are designed to be used as safety valves in the hearsay rules; they allow evidence to be admitted that is not specifically covered by any of the categorical hearsay exceptions under circumstances dictated by the rules. Michigan courts have found that evidence offered under MRE 803(24) must satisfy four elements in order to be admissible: **(1)** it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, **(2)** it must tend to establish a material fact, **(3)** it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts, and **(4)** its admission must serve the interests of justice. Although this rule does provide an opportunity to admit otherwise inadmissible documents, it does present a high standard which proponents must meet, and is therefore not always practicable.

However, as noted, some courts across jurisdictions have started admitting expert reports on the basis that they are helpful to triers of fact in understanding complex issues and in making trials more efficient, despite the historical exclusion of these documents generally as hearsay. A recent opinion issued by the Delaware Chancery court exemplifies the analysis some courts are employing to admit expert reports into evidence, and which may be salient for Michigan attorneys.

In *In re Comtech/Gilat Merger Litigation,* No. 2020-0605-JRS, 2020 Del. Ch. LEXIS 306, the trial judge admitted expert reports over the opposing counsel's hearsay objection, concluding that expert reports show sufficient indicia of trustworthiness to be admitted as reliable hearsay. Noting that the expert reports had been disclosed well in advance of trial, that the authors had been deposed and would be subject to cross-examination at trial, that the parties were on notice that the reports would be admitted, and that the reports dealt with matters uniquely susceptible to expert proof, the court concluded that as factfinder, it was certain that the expert reports would be of use during deliberations.

While the case applied Delaware evidence law, the relevant provisions for expert reports and the definition of hearsay parallel the federal rules and most states' evidence codes, including Michigan's. The decision raises important questions about the role of expert reports in complex litigation, where the outcome often turns on the experts' testimony. This suggests that it is time for a fresh look at the admissibility of expert reports and practical benefits of allowing them to be reviewed by the trier of fact, whether that is accomplished pursuant to MRE 803(24) or otherwise.

Further, there is an interesting argument to be made that an expert report is not even hearsay at all, by definition. Expert reports often do not neatly fit within the definition of hearsay. In essence, they are a disclosure of the testimony which the expert witness will give at trial. In that sense, they can be conceptualized as, and in fact are, part of the testimony given, similar to pictures, graphs, or spreadsheets (which expert reports often contain) used to organize and summarize the expert's testimony. Given that an expert report must disclose all of the expert's substantive opinions, the oral testimony which is actually given before a jury or judge at trial is in large part just a recital of the contents of the report itself.

An expert report expresses opinions rather than facts. Therefore, it can be argued that an expert report is not offered to prove the truth of the conclusions reached by the expert at all. Rather, an expert report is simply offered to help the trier of fact understand the opinions and positions held by that expert concerning complex principles of specialized fields like the sciences, economics, engineering, and medicine. Triers of fact must be provided with the necessary assistance to comprehend these specialties so as to accurately make their determinations as to the facts.

In addition, the trier of fact may evaluate the opinions given by the expert supported by the expert report, and give those opinions their due weight as deemed appropriate based on the expert's testimony, considering issues like credibility of the expert and the reliability of methods used. The expert's opinions may be accepted or disregarded in whole or in part, unlike a fact, because an opinion is not characterized as either true or untrue.

An expert report can often be a crucial piece of evidence for use at trial, particularly when the trier of fact is a jury and the nature of the testimony from an expert witness is complex. Although reports have been considered inadmissible hearsay, there are arguments which can see them admitted. ■

GETTING THEIR NAMES RIGHT AND GAINING TRUST – AN INVESTIGATOR'S PERSPECTIVE

Linda G. Burwell
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To conduct a successful workplace investigation an investigator must complete several fundamental tasks: identifying, contacting, and interviewing key witnesses; locating, obtaining, and reviewing relevant documents; following leads, solving puzzles, analyzing information, making factual findings; and delivering an accurate and cogent report to the employer that enables the employer to appropriately respond. Yet, even if the investigator does all these things correctly, the investigation may fail in other critical respects if the investigator (or the employer) fails to earn and maintain the respect and trust of witnesses.

Even a thorough and impartial investigation that arrives at otherwise accurate factual findings can fail at the essential purpose of instilling confidence in its findings and providing closure if it falls short in these regards. Take a five-year investigation conducted in Australia into allegations that a church official failed to take appropriate action after learning of sexual abuse allegations made against priests under his supervision. In that case, the investigator upheld accusations of sexual abuse, which might have been expected to provide some measure of relief to the surviving victims who came forward. However, after the investigator reported his findings to the church, the church confused and misstated the names of the two surviving victims in its report. The report improperly identified one of the surviving victims as a "complainant" who initiated the investigation, and erroneously named another complainant, giving her the same last name as her abuser.

These missteps contributed to questions surrounding the reliability of the whole report and left the victims feeling disrespected. One surviving victim told *The Guardian* paper: "I have not received an explanation of how the tribunal seems to have not bothered to get the facts straight of my relationship to the case". "They can't get my name right, so what does that show you? They can't get anything right." As a result, an investigation and a finding that might have been expected to give a victim of misconduct some measure of solace, some satisfaction at finally being heard, had the opposite effect.

The importance of earning and maintaining the trust and respect of witnesses cannot be overstated. A claimant alleging harassment or discrimination wants to feel his or her voice was heard. A witness who came forward with information wants to feel that this action had value. A witness who understands the process and trusts the investigator is more likely to respond when contacted, and will be more forthcoming with information.

How does the investigator and the employer earn and keep this respect? An important part of earning respect is to manage a disciplined *process* of communications throughout the investigation, beginning before interviews are started and continuing until after findings are made. Regardless of whether the investigation is being conducted by an internal or external investigator, some issues to consider for each investigation, include:

Who at the company will initially communicate with witnesses? The individual who communicates the fact that there is an investigation may be different for the complainant and alleged wrongdoer, than for other witnesses. And the individual who initially communicates with witnesses may be different from the individual who makes introductions to witnesses and perhaps even the results of the investigation.

Who makes the introduction to each witness? Typically, identifying someone in the company, such as a senior HR executive, to be the point of initial witness contact, so that the claimant or other witness's first contact regarding the investigation comes from a familiar name or email address, is enough. You might look for someone in the organization who is not personally involved in the situation under investigation, a disciplined communicator who can stay on script, who can be relied upon to deliver the necessary information in a clear, dispassionate and disarming manner. It is not uncommon to enlist an executive from another department or a board member, when appropriate. The person who makes the introduction may be different with different witnesses or may change as the investigation progresses. For example, if the witness is a former employee, the investigator may suggest someone in the company who had a good relationship with the former employee to make the introduction. Or the investigator may learn things during an investigation to suggest to the investigator that the individual making the introductions may not be the right person.

What happens if witnesses ask the investigator for the status or details of the investigation? An investigator should be careful not to make promises or offer prospective timetables. For example, the timing of the investigation is often difficult to control due to availability of witnesses or documentary information. Even after investigative interviews have been completed the organization may have internal reasons for delaying the issuance of a statement or report. There may be governance issues, board meeting timing, or consideration of responsive actions that delay the issuance of a statement announcing the conclusion of the investigation. Thus, the investigator should be careful not to insert him or herself into the employer's communication process. The investigator can cause confusion by informing a witness that the investigation is finished if the entity has not yet completed its own internal activities. An investigator may let a witness know that information regarding status and specifics of an investigation can only be released by the employer, and the questions should be directed to a specific person previously identified.

Who communicates the outcome and when? This includes informing the decision-maker, the complainant, the accused, and other managers, or supervisors. Again, this may be assigned to different individuals within the entity. This typically would not be the investigator, and the investigator would not typically even be involved in deciding who should speak for the organization.

What happens if a witness contacts the investigator after the investigation is completed? An internal investigator may be more easily equipped to handle this type of inquiry. An external investigator, however, will want to be careful in their messaging. A typical way to handle this is to let the employer know that a witness has contacted the investigator and provide the information to the employer in a way that does not identify the witness if he

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or she wants to remain anonymous and to discuss with the employer who can acknowledge to the witness that his or her communication has been received, what an appropriate response might be and who should deliver it.

In addition to a disciplined communication *process*, the clarity of the *content* of the communications with investigation participants is also important. The clarity of the information provided to claimants and witnesses not only instills trust, but it may also shield the employer, investigator and even witnesses from potential liability. See *Egbujo v. Jackson Lewis, P.C.*, 2022 WL 4585688, *2 (D. Conn), appeal to the Second Circuit No. 12-3456, where a doctor accused of sexual harassment of coworkers sued the investigator for defamation based upon the investigator's substantiating the claims against the doctor. The court found the investigator law firm retained by the hospital was an agent of the hospital and therefore its communications with the hospital were not with a "third party." As a result, the necessary element of a defamation action (a communication of defamatory material to a third party) was not met.

See also, *Mezikhovych v. Kokosis*, 2022 ONSC 6480 (CanLii) Nov 2022, a Canadian case where an employee who was fired after an investigation of her harassment complaint filed an action against the lawyer who conducted the investigation, alleging the lawyer conducted a poor investigation, causing the termination of her employment. The court rejected her claim, reasoning that the lawyer was hired by the company and had no duty of care with respect to the worker. Although the employee claimed she did not understand that the lawyer was retained by the company, the court rejected this claim since the lawyer sent the employee a letter at the start of the investigation stating she had been retained by the company.

Carefully communicating the fact that the investigator has been retained by the employer and that the investigator does not in any way represent the witness will advance the likelihood of success on summary judgment if a claimant or witness brings a defamation case or other action premised upon some alleged legal duty owed by the investigator to the claimant or a witness.

Accordingly, once the introduction discussed above has been made, when the investigator does reach out to the claimant and all other witnesses, it is important for the investigator to clarify the purpose of the interview, the investigator's role and authority, the scope of the investigation and the fact that while the investigator will do his or her best to keep information confidential, confidentiality cannot be guaranteed. Finally, it is also helpful for the investigator and company to anticipate, be cognizant of, and deal with privacy issues that may arise to maintain the trust of witnesses and protect the integrity of the process.

Following some simple but often forgotten communication guidelines can also help build trust:

1. Ask each witness how they would like to be addressed and consistently address the witness as requested.
2. Watch the subject line in emails and calendar invites.
3. Don't communicate with multiple individuals in one email, even for scheduling.
4. Avoid email threads and be careful of forwarding messages.
5. Plan what you are going to say if you need to leave a voice mail message.
6. Don't be too informal in texts and other communication.
7. Treat all individuals the same regardless of their level within the company.
8. Promptly acknowledge witnesses when they contact you or when they send documents or other information.

Investigations can take on a life of their own and lead investigators into tangled and unexpected twists of fact and fancy, complex document analysis, contradictory witness accounts, puzzling timelines and many other difficult problems that are obstacles to success. It is therefore incumbent upon the investigator (and employer) to control the things that they can control, and among the most important of these is the process and content of communications. Timeliness, clarity and accuracy of these communications can go a long way to managing and meeting witness expectations, can result in more cooperative witnesses, more information and thus a more productive investigation, and can protect both the investigator and the employer from embarrassment or exposure to liability arising out of the investigation. ■

"Beware of opposition lawyers who field strip their own weapons," Sun Tzu said, or should have.

Pictured above is LEL Section member Ryan Fantuzzi, of the Michigan Army National Guard, who recently completed officer training at Fort Moore, nee Benning, in Georgia.

THE NEW "PRONOUNS" COURT RULE: INCLUSIVE OR INCOHERENT?

John G. Adam

The Michigan Supreme Court made "history" by taking a side in the gender-sex-personal-pronoun debate, administratively, by split vote. The majority's foray into the personal-pronoun wars generated dissent from two justices, media criticism, and talk-show ridicule.

1.

The pronouns-mandate—to be added to MCR 1.109(D)(1)(b) in January 2024—reads:

> Parties and attorneys may also include Ms., Mr., or Mx. as a preferred form of address and one of the following personal pronouns in the name section of the caption: he/him/his, she/her/hers, or they/them/theirs. Courts must use the individual's name, the designated salutation or personal pronouns, or other respectful means that is not inconsistent with the individual's designated salutation or personal pronouns when addressing, referring to, or identifying the party or attorney, either orally or in writing.

The staff comment, included in the Supreme Court's order, construes the new language, instructing that it "allows parties and attorneys to provide a preferred salutation or personal pronoun in document captions."

The amendment and the staff comment use the apparently-offensive term "preferred." The staff comment does not use the apparently-non-inclusive term "gender," but some of the Justices do. Need guidance? See the "tips about pronoun" usage provided by Michigan State University's Gender and Sexuality Campus Center (f/k/a LGBT Resource Center) [perma.cc/7EAP-KTXS]:

> Do not refer to a person's pronouns as their "preferred" pronouns or "gender" pronouns.
>
> Using "preferred" implies that a person's pronoun selection is merely a preference and, therefore, something that is not required.
>
> Using "gender" ignores people who are agender.

2.

Is this an idea whose time has come? There is no consensus. Some justices think so; some do not. Four justices opine in four opinions. Two defend the rule; two criticize it.

Justice Elizabeth Welch writes that the new rule "is a positive step forward that will bolster public confidence in the judiciary and help to promote a sense of fairness among members of the public who interact with the courts."

Justice Kyra Bolden joins in Justice Welch's opinion and believes it is time to "expressly" provide "comprehensive protection for personal pronouns" in the court rules. Justice Bolden adds her expectation that the new mandate will help "break down some of the fear, intimidation, and anxiety parties may have when stepping into courtrooms" and "may" make "the LGBTQ+ community…feel more secure within a courtroom."

The new rule, Justice Bolden writes, makes Michigan "the first state court" to institutionally take a side on pronoun questions and, she adds, "history is made by being the first." But the new rule is really no big deal, Justice Bolden assures, because it "merely reinforces what is already required under the judicial canons."

Is the new rule a big deal? Will the pronoun-mandate "bolster public confidence" in judges and "break down" courtroom anxiety? Does traditional pronoun usage—and differentiation of the singular from the plural—undermine faith in the court system? Should the Supreme Court *administratively* address cultural and grammar controversies by *split decision*?

Justices Brian Zahra and David Viviano think the rule is a big deal and not a good thing. They opine, variously, that the pronoun-mandate, among other things: **(1)** will "cause confusion within our courts," **(2)** is "entirely unnecessary," **(3)** is "political," **(4)** "will create problems" and imprecision, **(5)** is an "open invitation to abuse" by litigants seeking "control over their fight," **(6)** will not bolster public confidence or cure fear of litigation, **(7)** is "a solution in search of a problem," and **(8)** is a "directive that will undoubtedly inflame conflict and exacerbate the social division."

The Court's September 27, 2023 order includes the new language, the staff comment, and the four opinions. It's only 15 pages, so you should read it for the details.

3.

Notably, the pronoun-mandate does *not* directly govern parties, attorneys, or witnesses. This means—*presumably*—that a defendant, say, and his/her/their attorney(s), do/does not have to use the pronoun(s) and honorific(s) "designated" in a caption by, say, the plaintiff and their/her/his attorneys if, say, doing so would infringe on the defendant's or the defense attorney's/attorneys' religious, political, or grammatical principles.

Justice Zahra, in dissent, notes that "to avoid violating the free-speech rights of private citizens" the new "rule applies only to judges" and "does not compel the use of any preferred personal pronouns by the parties themselves, attorneys, witnesses, or others." But, of course, free speech rights, like pronouns, are evolving things. It may be that the boundaries of pronoun rights and transgressions will have to addressed in the common law manner, subject to future lower court and Supreme Court refinements. Or maybe in the attorney and judicial discipline processes. Or maybe in response to constitutional challenges.

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THE NEW "PRONOUNS" COURT RULE: INCLUSIVE OR INCOHERENT?

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And there is the evolving "cancel culture" phenomenon. Attorneys, parties, experts and witnesses, and other "private citizens" may be "chilled" into conforming to the strongly-proclaimed pronoun views of a majority of the Michigan Supreme Court justices who may decide their legal fates. It is not like aggrieved "private citizens" have meaningful pronoun-recourse at the ballot box. Legions of Michigan voters ignore judicial elections. Many "non-partisan" judges are appointed by the governor, and *never* seek election—only *reelection*. Many voters just defer to party endorsements. And when each incumbent Justice seeks reelection, they/he/she is/are identified by the noun "Justice." Good luck to Mx. Smith if they/she/he run/runs for a Supreme Court seat without an incumbency designation.

4.

The dissenting views have found resonance in the national media. The *National Review* called Justice Welch's defense of the new rule "incoherent." A national late-night talk-show ridiculed the rule as another example of out-of-touch virtue-signaling public official-elites fiddling while Rome burns. Such negative reactions—fair or unfair—show that the majority has taken a side in a highly-divisive public debate in the absence of a "case or controversy." This—and charges of judicial incoherence—would not seem to "bolster" confidence in the Michigan Supreme Court.

The *National Review* asks—with pointed irony—why the new rule microaggressively excludes other pronouns and honorifics, like "ze/zie/ne/ve/ey/xe (and so on)." What is to be done about the omissions?

The University of Michigan offers a two-hour "Pronouns 101 workshop" (for $600) to teach participants to **(1)** "identify the correct pronouns in various sentence structures"; **(2)** practice "different methods of addressing harm using a tool called scripting"; and **(3)** use an "action planning resource to develop one tangible, actionable goal related to their increased inclusivity around pronouns." [perma.cc/5758-TPV2].

Maybe all Michigan judges should have to read the MSU pronoun "tips" and complete the U-M workshop. Every judge must be aware that there is more to "correct" pronoun usage than may meet their/his/her/ze eye.

In conclusion, I recommend studying MCR 1.105. It instructs that the court rules "are to be construed, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties." Just, speedy, economical, and substantial rights. *That* is a Michigan court rule to bolster public confidence. ■

DECONSTRUCTING THE SIXTH CIRCUIT'S NEW STANDARD FOR FLSA COLLECTIVE ACTIONS

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The Sixth Circuit has stepped into the middle of a Circuit split regarding supervising notice to collective members in Fair Labor Standards Actions. The case was closely watched because it presented a challenge to the "conditional-certification" procedure utilized for decades by district courts across the country including the Sixth Circuit – although the Sixth Circuit had never explicitly blessed it. On the other hand, the Fifth Circuit in 2021 announced a new standard in *Swales*, which the Defendant Appellants urged should be adopted by our Circuit. But the result was less expected. Rather than adopting one or the other of the approaches previously blessed by sister Circuits, Judges Kethledge, Bush and White announced a "new" standard for FLSA collective actions and generated one lead opinion by Judge Kethledge and two concurring opinions. *Clark v. A.L. Homecare, 68* F.4th 1003 (6th Cir. 2023).

It has long been widely accepted that FLSA wage cases are treated differently and not governed by the class action procedures under Fed. R. Civ. P Rule 23. After all, the FLSA has its own proscribed process allowing lead plaintiffs to bring minimum wage and overtime claims on behalf of "similarly situated" persons. Since *Clark* was decided, the internet has been filled with a crowded cacophony of blogs proclaiming the demise of *Lusardi*, and declaring a new stricter standard.

So, what about it is new? A review of the *Clark* opinion(s), and a handful of district court cases applying the new standard so far, suggest - not that much.

Clark necessarily follows the Supreme Court and affirms the districts court's implied judicial power "in appropriate cases" to "facilitate notice … to potential plaintiffs." *Hoffman-LaRoche v. Sperling,* 493 U.S. 165, 169 (1989). Under *Hoffman-LaRoche*, the opt-in process for similarly situated employees is clearly a matter of the district courts' case management discretion. In the decades that followed, district courts adopted a case-management process known as "conditional certification," widely called the *Lusardi* standard, after *Lusardi v. Xerox Corp*., 118 F.R.D. 351 (D.N.J. 1987).

Most Circuits stayed out of the development of this case management process, until recently. See **(1)** *Scott v. Chipotle Mexican Grill*, 954 F.3d 502, 520 (2d Cir. 2020) ("it is error for courts to equate the requirements of § 216(b) with those of Rule 23 in assessing whether named plaintiffs are "similarly situated" to opt-in plaintiffs under the FLSA."); **(2)** *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1119 (9th Cir. 2018) ("The collective action cannot be decertified unless the factual dispute is resolved against the plaintiffs' assertions by the appropriate factfinder."); and **(3)** *Morgan v. Family Dollar Stores*, 551 F.3d 1233 (11th Cir. 2008) (We have "sanctioned a two-stage procedure for district courts to effectively manage FLSA collective actions in the pretrial phase.").

A. The "*Lusardi* two-step" approach

Under *Lusardi*, district courts applied a two-step process for managing court supervised notice to potentially similarly situated employees. The first step is a notice phase, when Plaintiffs would be required to come forward with a "colorable basis" or a "modest

factual showing" sufficient to demonstrate that they and potential plaintiffs together were victims of a common policy or plan that violated the law. But that showing was never a rubber stamp. Courts requiring a factual showing under the first step considered factors "such as whether potential plaintiffs were identified; whether affidavits of potential plaintiffs were submitted; . . . whether evidence of a widespread discriminatory plan was submitted" *Olivo v. GMAC Mortg.*. 374 F. Supp. 2d 545, 548 (E.D. Mich. 2004) (Zatkoff, J.) (citing cases, denying conditional certification). Although the first stage of the conditional certification process was described as "lenient" from its inception, district courts have always exercised a gatekeeping function - and obtaining courts supervised notice was less than a sure bet. The author is unaware of any case where the Court granted notice based solely on a mere possibility that other similarly situated people exist.

Moreover, the modest showing for the notice phase was augmented over years of district court case management orders. Many courts adopted a "modest plus" standard after the parties have had an opportunity to conduct limited discovery. Once FLSA Plaintiffs have been provided opportunity for discovery on the scope of alleged violations and the impacted employees, a request for notice would now require "more than a mere possibility" but still less than a preponderance of evidence that similarly situated employees have been impacted by the same violations. See *Byers v. Care Transp., Inc*., 2016 U.S. Dist. LEXIS 124419, *9-10 (Rosen, J.)

The second "decertification" phase has always been more stringent. After notice, the Defendant would be permitted to challenge the joinder of opt-in members and it was plaintiffs' burden to show that opt-in plaintiffs were in fact similarly situated, at least to the extent that collective litigation would yield "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Clark* at 1012 (quoting *Hoffmann,* 493 U.S. at 170; see *Monroe v. FTS,* 860 F.3d 389, 398 (6th Cir. 2017) (collective representative trial is appropriate if plaintiffs "'suffer from a single, FLSA-violating policy,' or if their 'claims [are] unified by common theories of defendants' statutory violations").

B. Enter the Fifth Circuit

The Fifth Circuit introduced a radically different approach in *Swales v. KLLM Transp. Servs.,* 985 F.3d 430 (5th Cir. 2021). *Swales* rejected the *Lusardi* two-step approach and held that district court is required to identify, at the outset of the case, "what facts and legal considerations would be material to determining whether a group of employees is similarly situated and then authorize preliminary discovery accordingly." Under *Swales*, courts in the Fifth Circuit may only authorize notice upon a showing by a preponderance of the evidence that there are similarly situated employees, and after allowing discovery if necessary. Since *Swales,* the district courts in the Fifth Circuit have adapted to the new case management burdens. Early "similarly situated" discovery motions and tolling motions have become part of the new routine. But it is less clear whether the process is more efficient for the courts or the parties, or if employers really scored the big win they were expecting.

C. What did the Sixth Circuit do?

Confronting a choice between the time-honored two-step *Lusardi* approach used by district courts for two decades in the Sixth Circuit, and the relatively new *Swales* standard, most court watchers expected the *status quo*. It was surprising when the *Clark* court rejected both *Lusardi* and *Swales* approaches, and announced a "new" standard.

Clark is similar to *Swales* in rejecting the concept of condition certification. But differs from *Swales* in almost all other respects. *Clark* flatly rejected the Fifth Circuit's requirement of proof of similarly situated-ness by a preponderance of the evidence. It was not supported by *Hoffman-LaRoche*: "notice to absent class members need not await a conclusive finding of 'similar situations.'" *Clark* at 1010 *(*quoting *Sperling v Hoffman-LaRoche)*. So, under the *Clark* how much has really changed?

D. What has changed under *Clark?*

The *Clark* rulings are clear, there is no longer any certification process under the FLSA. There is no "conditional certification." There is no "decertification." As practitioners we need to remove those terms from our vocabulary. Still, a two-step process persists. Under *Clark*, a proposed FLSA collective has a notice phase and a post-discovery phase when the courts will examine whether a preponderance of the evidence demonstrates the collective members are "in fact" similarly situated.

The notice phase now requires a Court to find more than a "mere possibility" but requires less than a preponderance of the evidence. *Clark v. A&L Homecare*, 2023 U.S. App. LEXIS 12365, at *12 (6th Cir.) ("[The] standard requires a showing greater than the one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance.").

Court-supervised notice phase still does not involve evaluation of success on the merits of the underlying FLSA claims, nor does it allow the Court to conclusively determine whether absent class members are in-fact similarly situated. *Clark* at *11-12. The district court only evaluates whether the proposed collective members are likely similarly situated *more than a mere possibility, less than a preponderance.*

Equitable tolling should be considered on a group basis from the beginning of the case. Although the lead opinion in *Clark* is silent as to equitable tolling, concurring opinions from Judge Bush and Judge White are in accord and persuasively argue that courts should consider *American Pipe* style tolling in FLSA cases. Under *American Pipe*, rule 23 class actions have long been accepted to toll the statute of limitation back to the date of filing for the entire putative class. District courts in the Circuit seem to be accepting this directive without much need for discussion. *See Teran v. Lawn Enf't, Inc.*, No. 2:22-2338 (W.D. Tenn. Aug. 1, 2023) (revisiting notice under the *Clark* standard and granting tolling without discussion).

Arbitration based defenses, like all defenses, are to be considered but do not necessarily defeat notice. "The parties can present whatever evidence they like as to such a contention; the district court should consider that evidence along with the rest in determining whether the plaintiffs have made the requisite showing of similarity." *Clark* at 1012.

E. What has not changed under *Clark?*

It's still a two-step process under a new name. Conditional certification is now court supervised notice.

The second step of the process (f/k/a decertification) is essentially unchanged, although it will have to get a new name. The ramifications of the second step remain the same. Opt-ins should be dismissed and left to file individual actions if a court finds that collective litigation would not yield "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity,"*Clark* at 1012 (quoting *Hoffmann-La Roche*. *Accord McElwee v. Bryan Cowdery*, Inc., 2:21-cv-1265 (S.D. Oh., 2023) ("If collective litigation would be efficient for liability but not damages, similarly situated plaintiffs should be permitted to proceed to trial collectively on liability, with damages addressed separately.") (citing *Monroe*).

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DECONSTRUCTING THE SIXTH CIRCUIT'S NEW STANDARD FOR FLSA COLLECTIVE ACTIONS

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F. What it has always been about: Whether the proposed collective is similarly situated

Most importantly, the guidance for who is considered similarly situated remains unchanged and continues to be the touchstone for district court management of FLSA Collectives. The *Clark* court plainly affirmed long-standing Sixth Circuit precedent that collective treatment is appropriate if plaintiffs "'suffer from a single, FLSA-violating policy,' or if their 'claims [are] unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct.'" *Monroe v. FTS,* 860 F.3d 389, 398 (6th Cir. 2017). "[T]ypically, similarly situated plaintiffs 'performed the same tasks and were subject to the same policies—as to both timekeeping and compensation…'" *Clark v. A&L Homecare & Training Ctr.,* 2023 U.S. App. LEXIS 12365, at *10-11 (6th Cir.). *Clark* relied on prior precedent in *Monroe* and *Pierce* to illustrate how "similar situated-ness continues to be analyzed.

Pierce v. Wyndham Resorts, 922 F.3d 741, 746 (6th Cir. 2019) found that employees were part of same collective even though they held different job titles at different job locations. The court reasoned that there were "no meaningful differences between the in-house and front-line salespeople or for that matter between the jobs they performed at the four Tennessee locations." Similarly, in a recent Ohio district court case, 15 opt-ins had worked at six facilities with virtually identical handbooks and performed the same tasks. The Court had no problem finding the *Clark* standard satisfied. *Gifford v. Northwood Healthcare Grp.*, 2:22-cv-4389 (S.D. Oh. 2023).

In *Monroe v. FTS*, cable technicians sued for failure to pay overtime, even though they worked in different locations. 860 F.3d 389, 402 (6th Cir. 2017). "The Monroe court treated the cable technicians as similarly situated because they did the same job and alleged a single time-shaving policy, even though they worked different amounts of overtime." Id. at 404. The *McElwee* case in the southern district of Ohio, recently undertook a second-step inquiry. Consistent with *Clark*'s embrace of Monroe, the district court noted the flexibility of the similarly situated analysis. It is not all-or nothing, rather if "collective litigation would be efficient for liability but not damages, similarly situated plaintiffs should be permitted to proceed to trial collectively on liability, with damages addressed separately." *McElwee v. Bryan Cowdery*, 2:21-cv-1265 (S.D. Oh. 2023) (citing *Monroe*).

Some cases applying *Clark* have fallen short of the "more than a mere possibility but less than a preponderance". However, on review it is doubtful that they would have fared any better under *Lusardi*. *Shoemo-Flint v. Cedar Fair,* 2023 U.S. Dist. LEXIS 111873, *7-8 (These allegations do not provide a "colorable basis" for, much less a "strong likelihood" of, the necessary conclusion that plaintiff is similarly situated to the other defined members of the collective.).

It is still a two-step process, and the analysis still boils down to the plausibility of a uniform policy such that efficiency favors collective treatment. In the end, the quality of the proffer must remain flexible. Single Plaintiff cases supported by nothing more than a Plaintiff affidavit have always faced an uphill climb. But, a single plaintiff alleging a clear policy that can be demonstrated on pay records (like straight time for overtime) may often satisfy the *Clark* standard with little more than a few documents. The likely impact of *Clark*, if any, will be felt only in the most borderline cases. ■

MICHIGAN JUDICIAL REVIEW OF ARBITRATION ISSUES

Lee Hornberger
Arbitrator and Mediator

I review Michigan cases from September 2022 concerning arbitration issues.

Supreme Court reverses COA concerning shortened limitations period.

McMillon v City of Kalamazoo, 983 NW2d 79 (2023). Plaintiff applied for job with City of Kalamazoo in 2004. She completed the application and underwent testing and background check. She did not get job. In 2005, City contacted her about a job as Public Safety Officer, and she was hired. She did not fill out another application in 2005. In 2019, Plaintiff sued alleging discrimination, retaliation, and harassment in violation of Elliott-Larsen CRA and Persons with Disabilities CRA. The City moved for summary disposition, relying, in part, on provision in application Plaintiff had signed in 2004 that had nine-month limitations period. Circuit Court granted City's motion for summary disposition. COA affirmed in unpublished opinion. The Supreme Court ordered oral argument on application to address whether: (1) *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234 (2001), correctly held limitations clauses in employment applications are part of binding employment contract; (2) the employee is bound by terms of document that states "this … is not a contract of employment," *Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405 (1996); (3) contractual limitations clauses that restrict civil rights claims violate public policy, *Rodriguez v Raymours Furniture Co, Inc*, 225 NJ 343 (2016); and (4) these issues are preserved. *Mich Gun Owners, Inc v Ann Arbor Pub Schs*, 502 Mich 695, 708-709 (2018).

After hearing oral argument on application, in lieu of granting leave to appeal, Supreme Court reversed that part of COA judgment affirming summary disposition for defendant based on shortened nine-month limitations, vacated remainder of COA judgment, and remanded case to Circuit Court for further proceedings. Circuit Court and COA held lawsuit barred by nine-month limitation period. Supreme Court held there is genuine issue of material fact whether plaintiff had notice of use of prior application materials' future employment-related terms and whether she agreed to be bound by those materials. City had not sufficiently demonstrated that parties had mutuality of agreement to be entitled to summary disposition**.** Justice Welch, concurring, would have ruled on whether *Timko* correctly held limitations clauses in employment applications are part of binding employment contract.

Supreme Court orders argument on vacatur of labor arbitration award.

AFSCME Council 25 v Wayne Co, 356320 and 356322 (2022), **app lv pdg, oral argument to be scheduled**. In split decision, COA affirmed Circuit Court vacatur of labor arbitration award. On verge of discharge, employee took cash-in retirement. Employee applied for retirement while awaiting outcome of disciplinary action initiated by employer. His retirement application required him to agree to "separation waiver." "Waiver" stated he was terminating employment and not seeking reemployment. Defendant terminated his employment the following day. Employee allowed his retirement application to

proceed, but he also filed grievance pursuant to CBA with employer, seeking reinstatement of employment. County Retirement System approved employee's retirement. Employee transferred his defined contribution retirement account funds to an IRA. The arbitrator reinstated employee in spite of background retirement issues. Circuit Court and COA vacated reinstatement award in light of retirement issues.

The Supreme Court ordered argument on: (1) whether standard in *Detroit Auto Inter-Ins Exch v Gavin*, 416 Mich 407 (1982), applies to labor arbitration cases and (2) whether Circuit Court erred in vacating arbitrator's awards.

Supreme Court orders argument on whether discrimination claims are subject to arbitration.

Saidizand v GoJet Airlines, LLC, 355063 (Sep 23, 2021), **app lv pdg, oral argument to be scheduled.** Plaintiff brought claims against employer and a supervisor under Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*, alleging he was harassed and discriminated against because of his ethnic background and religion. Defendants requested summary disposition, citing an arbitration agreement signed by plaintiff when he completed application for his position. Agreement stated that he and GoJet agreed to resolve all claims arising out of application, employment, or termination exclusively by arbitration. Circuit Court denied defendants' motion for summary disposition as to plaintiff's ELCRA claims. Court of Appeals reversed holding Circuit Court erred by determining whether ELCRA claims were subject to arbitration because under the terms of the agreement plaintiff and GoJet agreed that arbitrator had authority to determine whether plaintiff's claims were subject to arbitration.

On June 23, 2023, Supreme Court ordered oral argument on application to address whether discrimination claims under ELCRA may be subjected to mandatory arbitration as condition of employment under Michigan law.

COURT OF APPEALS PUBLISHED DECISIONS

COA reverses Circuit Court order not to arbitrate with Board members.

Steward v Sch Dist of the City of Flint, ___ Mich App ___, 361112 and 361120 (2023). Plaintiff was hired by defendants to be Superintendent of schools for City of Flint. She worked under written employment agreement that had broad arbitration clause for resolution of disputes. Signatories to contract were Plaintiff and "Board of Education of the School District of the City of Flint." Plaintiff clashed with members of Board, including defendant Board members). Plaintiff complained Board members created hostile work environment. Dispute resulted in plaintiff's removal. After plaintiff filed suit against Board members, they moved for summary disposition based on arbitration provision. Circuit Court granted relief to entity defendants, but not Board members because they were not parties to agreement that contained arbitration provision. COA reversed denial of summary disposition because **obligation to arbitrate disputes extended to Board members as well as School District**. *Altobelli v Hartmann*, 499 Mich 284 (2016). Gilbride and Cobane, "Extending Arbitration Agreements to Bind Non-signatories," *Michigan Bar Journal* (February 2019).

Circuit Court should stay case instead of dismissal when orders arbitration.

Legacy Custom Builders, Inc v Rogers, ___ Mich App ___, 359213 (2023). Plaintiff appealed Circuit Court order compelling arbitration. COA held Circuit Court correctly enforced agreement to arbitrate, but **should have stayed proceedings pending arbitration instead of dismissing case**. MCL 691.1687; MCR 3.602(C).

COA reverses Circuit Court order asking question of arbitrator in prior case.

Mahir D Elder, MD, PC v Deborah Gordon, PLC, ___ Mich App ___, 359225 (2022). Plaintiff sued former employer for wrongful termination and received monetary award from arbitration proceeding. Award stated plaintiff should receive compensation as calculated by Chart B, but award then listed lower monetary amount in Chart A. Plaintiff's attorney confirmed award. Prior case was then dismissed. When plaintiff sued his attorney for legal malpractice, Circuit Court decided to send question to arbitrator to determine whether arbitrator meant to award plaintiff monetary amount stated in award. Plaintiff appealed. COA reversed. "After you have reviewed the materials, please confirm whether you intended to award Dr. Elder $5,516,907 in back pay, front pay and exemplary damages, or some other amount." According to COA, MCL 691.1694(4) precludes "any statement, conduct, decision, or ruling occurring during the arbitration proceeding." This prohibits compelling arbitrators from giving factual evidence as a witness regarding statements, conduct, decisions, or rulings that it may have made during arbitration proceedings.

MICHIGAN COURT OF APPEALS UNPUBLISHED DECISIONS

COA affirms Circuit Court order denying arbitration in dentist non-compete case.

Paine v Godzina, 363530 (July 27, 2023). **What does "and" mean?** Appellants argued Circuit Court erred because plain language of agreement required arbitration of parties' dispute regarding non-compete clause. Based on word "and" in arbitration agreement, COA affirmed Circuit Court's denial of motion to compel arbitration. COA agreed with Circuit Court that language, "[a]ny dispute, controversy or claim between the Associate and the Employer concerning questions of fact arising under this Agreement and concerning issues related to wrongful termination … shall be submitted … to the American Arbitration Association," means arbitration is required only for cases that involve both questions of fact arising under Agreement **and** issues related to wrongful termination.

COA affirms Circuit Court confirmation of labor arbitration award.

AFSCME Council 25 Local 1690 v Wayne County Airport Authority, 360818 (2023). Union requested vacatur of award. Award denied wage increase relief where one provision of CBA provided for a wage increase and the arbitrator authority provision of CBA specifically said arbitrator could not grant any wage increase. Circuit Court denied vacatur. COA affirmed:

> The plain and unambiguous language of Article 10.04, Step 4(E) prohibits the arbitrator from granting a wage increase, without exception, and grants him the authority to interpret and apply the terms of the CBA, which he did. Because the arbitrator's award was a valid exercise of his authority and "drew its essence" from the contract, it cannot be disturbed. … .

(Continued on page 22

MICHIGAN JUDICIAL REVIEW OF ARBITRATION ISSUES

(Continued from page 21)

COA dismisses because of arbitration clause.

Zora v AM & LN, 360224 (June 29, 2023). COA affirmed Circuit Court ruling that lawsuit barred by arbitration agreement. Zora argued that *Lichon v Morse*, 507 Mich 424 (2021), resulted in material change in law of arbitration that affected Circuit Court's ruling. Zora asserted *Lichon* held that expansive interpretation of an arbitration agreement, which is how Circuit Court construed arbitration clause, only applies in context of collective bargaining agreements. COA held *Lichon* does not undermine or conflict with Circuit Court ruling. *Lichon* ruled that while parties are bound to arbitration if disputed issue is "arguably" within an arbitration clause in the context of collective bargaining agreements, the principle does not apply outside that context, in which case arbitration agreements are to simply be read like any other contract. COA ruling is not predicated parties' dispute merely being "arguably" within arbitration clause.

COA affirms divorce judgment based on DRAA arbitration.

Weaver v Weaver, 361752 (June 15, 2023). Defendant wife argued Circuit Court erred by entering a judgment of divorce (JOD)which reflected arbitration award that failed to value and divide marital portion of plaintiff's 401(k) plan without first holding hearing to ensure 401(k) was divided appropriately because arbitrator exceeded its powers in failing to value and divide it. Defendant further argued Circuit Court erred in entering JOD based on award that was incomplete and failed to equitably divide marital property, awarded plaintiff non-marital property (that should have been considered marital), and made defendant responsible for her entire student loan debt. Defendant contended remand necessary for evidentiary hearing to ensure that all marital assets are appropriately divided. COA affirmed Circuit Court. COA reviews de novo Circuit Court decision to confirm an award. A reviewing court may not review arbitrator's findings of fact, and any error of law must be discernable on the face of the award itself. In order to vacate award, error of law must be so substantial that, but for the error, award would have been substantially different.

COA affirms Circuit Court confirmation of award.

Leczel v Intrust Bldg, Inc, 362855 (2023) affirmed confirmation of award in case arising from home construction and apportionment of liquidated damages issue.

COA reverses Circuit Court vacatur of award.

Certainty Construction, LLC v Davis, 361276 (2023). Circuit Court vacated award of attorney fees and determination that construction lien was valid. Because there was nothing on face of award that evinced error of law, COA held Circuit Court erred by vacating attorney fees award.

COA affirms Circuit Court ordering arbitration.

UAW v 55th Circuit Court, 361366 (2023). Employer argued Union did not properly or timely request arbitration under CBA, and matter was therefore withdrawn and no longer arbitrable. Employer argued that CBA provides threshold issue of whether Union's request for arbitration was timely submitted for Circuit Court, rather than arbitrator, to decide. Circuit Court and COA held that threshold issues of whether Union timely invoked arbitration under CBA to be decided by arbitrator.

COA affirms Circuit Court confirmation of remanded clarified award.

Soulliere v Berger, 359671 (2023), **app lv pdg**. COA affirmed Circuit Court denying defendants' motion to vacate award and instead confirming arbitrator's award as clarified by arbitrator pursuant to COA's previous remand.

COA reverses Circuit Court order not to arbitrate.

Payne-Charley v Team Wellness Ctr, Inc, 361380 (2023). Employer appealed Circuit Court holding employment agreement did not require parties to arbitrate dispute. According to Employer, parties required to resolve dispute in arbitration under plain terms of employment agreement. COA agreed and reversed.

COA affirms Circuit Court on arbitration waiver issue.

Renu Right, Inc v Shango, 359976 (2023). Shango argued he did not have knowledge of his right to arbitration and Circuit Court erred in concluding he waived his right to arbitration. COA disagreed and affirmed Circuit Court not ordering arbitration. Shango claimed he did not read agreement and could not have waived his right to arbitration because he allegedly had no knowledge of arbitration clause.

COA affirms confirmation of employment arbitration award.

Waller v Blue Cross Blue Shield of Mich, 360392 (2023). Michigan Uniform Arbitration Act, not court rule, applies because MCL 691.1683(1) states MUAA governs all agreements to arbitrate made after July 1, 2013, and MCR 3.602(A) confines court rules to all other forms of arbitration that are not governed by MUAA. MUAA does not contemplate arbitration must be closed before party may move to vacate or modify award from that arbitration. MCL 691.1703(1) provides Circuit Court may vacate "an award" from arbitration proceeding without requiring award be final and definite award. Plaintiff's contention party may only challenge final and definite award to Circuit Court is without support. Award regarding attorney fees and costs did not modify economic and noneconomic damages that were already awarded.

COA affirms order to arbitrate.

Barada v American Premium Lubricants, LLC, 359625 (March 23, 2023). Plaintiffs moved to strike defendants' "affirmative defense" of arbitration, arguing defendants waived their right to arbitration because they were participating in the litigation. Defendants filed witness lists, participated in depositions, and stipulated to add parties as codefendants after having asserted their "affirmative defense" to arbitration. Circuit Court held arbitration clause plainly stated arbitration was exclusive remedy to disputes under contract and that there was no carve out for injunctive relief. Plaintiffs appealed. COA affirmed.

COA partially affirms Circuit Court concerning ordering arbitration.

Vascular Management Services of Novi v EMG Partners 360368 (2023). Plaintiffs appealed order compelling plaintiffs and defendants to participate in binding arbitration. COA affirmed but remanded to Circuit Court for further proceedings regarding arbitrability.

COA affirms Circuit Court confirming award.

Yaffa v Williams, 360732 (2023). Williamses purchased

home from Yaffa. In disclosure statement, Yaffa represented septic tank and drain field in working order. Later inspection report noted home had public sewer system, but it also indicated bathroom drainage system was not adequately functioning. Inspector suggested further investigation needed. No further inspection occurred. After Williamses took possession of home, they discovered septic system not operational. Matter submitted to arbitration. Arbitrator found Yaffa fraudulently misrepresented septic system was in working order when he sold home. Arbitrator awarded Williamses exemplary damages and costs. Circuit Court confirmed award. COA affirmed confirmation.

COA confirms award.

Clancy v Entertainment Managers, LLC, 357990 (2023), **app lv pdg**. AAA administered arbitration under expedited proceedings pursuant to its Commercial Arbitration Rules. According to COA, defendant did not explain how it was prejudiced by use of expedited procedures such that award would have been "substantially otherwise" had arbitration been conducted differently. Contrary to defendant's assertion, arbitrator did not disallow recording of arbitration hearing or prevent defendant from arranging stenographic recording of proceeding. Concerning attorney fees, plaintiffs' contention that arbitration provision allowed award of reasonable attorney fees for "[a]ll claims and disputes arising under or relating to [the] Agreement" within plain language of provision. COA affirmed Circuit Court confirmation of award.

Domestic Uniform Rental v Bronson's, 359297 (Jan 19, 2023). Defendants appealed order confirming award. COA affirmed. According to Circuit Court and COA, arbitrator did not make errors of law by enforcing contract terms. COA agreed with appellant that award reflected error of law concerning attorney fee award, but **Circuit Court did not err by confirming award because appellants cannot demonstrate that substantially different award would have been rendered but for the error**. As long as arbitrator even arguably construing or applying contract and acting within scope of authority, court may not overturn award even if convinced arbitrator committed serious error.

COA holds court case stayed rather than dismissed when case sent to arbitration.

SP v Lakelands Golf and Country Club, 359710 (2023). COA affirmed Circuit Court determination hostile work environment allegations of complaint subject to arbitration. COA affirmed Circuit Court decision to stay proceedings pending arbitration. To extent Circuit Court may have dismissed, rather than stayed, any of plaintiff's claims that were sent to arbitration, it erred by doing so, and those claims are reinstated and stayed. COA held individual defendant entitled to enforce arbitration agreement despite not being signatory to agreement and question of arbitrability of plaintiff's claims question for court.

COA affirms Circuit Court denying motion to compel arbitration

Schmidt v Bowden, 360454 (2023). After parties closed on sale of property, plaintiff commenced arbitration proceedings regarding sales commission with Board of Realtors. Defendant argued plaintiff not entitled to commission and commission dispute not subject to arbitration. Circuit Court denied motion to compel arbitration. COA affirmed. Plaintiffs conceded parties did not contract to arbitrate commission issue. Plaintiffs presented no written agreement regarding commission, with or without an arbitration clause. There was no arbitration clause for court to review. Plaintiffs argued that even though parties did not agree to arbitrate, they are compelled to arbitrate because plaintiff and defendant, as real estate professionals, voluntarily belonged to real estate organizations that required arbitration of disputes. Plaintiffs asserted defendant belonged to North Oakland County Board of Realtors and plaintiff belonged to Ann Arbor Board of Realtors, both of which have rules containing mandatory arbitration provisions. Plaintiffs asserted that Michigan Code of Ethics and Arbitration Manual applicable to real estate professionals, as well as MLS where defendant listed her home, also compel arbitration. Plaintiffs theorized that because parties are members of real estate associations, rules of those associations impute to parties agreement to arbitrate a disputed commission. Plaintiffs did not support this theory with Michigan authority.

COA says courts decide validity of arbitration agreement

Domestic Uniform Rental v Custom Ecology of Ohio, Inc, 358591 (2022). Reversing Circuit Court, COA held court, not arbitrator, must decide validity of arbitration agreement. The existence of arbitration agreement and enforceability of its terms are questions for the court, not the arbitrator. MCL 691.1686(2).

COA affirms confirmation of award.

Clark v Suburban Mobility, 359204 (2022). In matters involving arbitration, it is purview of arbitrator to decide substantive issues between parties. Whether dispute is subject to arbitration is for court to determine. MCL 691.1686(2). Award for PIP benefits not basis for reversal of Circuit Court's order.

COA dismisses action to vacate award.

Wolf Creek Production, Inc v Gruber, 358559 (Sep 29, 2022), lv den ___ Mich ___ (2023). COA affirmed Circuit Court *sua sponte* dismissal of complaint to vacate award because plaintiff failed to file timely motion to vacate. MCR 3.602.

Distinction between money judgment and judgment lien.

Asmar Constr Co v AFR Enters, Inc, 357147 (2022), lv den ___ Mich ___ (2023). This dispute turned upon a distinction between money judgment and judgment lien. In 2011, Circuit Court entered judgment confirming arbitration award. Award, which was incorporated in judgment, reduced to $550,000 plaintiffs' construction lien. Award authorized plaintiffs to obtain from defendant personal guaranty in amount of lien only as it relates to sale of property. Almost a decade later, Circuit Court granted plaintiffs' ex parte motion to renew judgment. Defendants objected by moving to set aside judgment lien renewal. Circuit Court granted motion, characterizing 2011 "judgment" as a lien. COA concluded 2011 "judgment" was more a lien than a "noncontractual money obligation." COA affirmed. The issue was whether Circuit Court's "Judgment Confirming Arbitrator's Award" should be treated as judgment renewable within ten years pursuant to MCL 600.5809(3) or as judgment lien that must be renewed within five years under MCL 600.2801 and MCL 600.2809.

COA confirms award.

Wikol v Select Commercial Assets, 355393 (2022). Plaintiff appealed Circuit Court order denying his motion to vacate or modify arbitrator's decision to dismiss plaintiff's arbitration claims against defendants on basis of collateral estoppel and *res judicata*. COA affirmed. ■

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INSIDE *LAWNOTES*

Working on Fall issue

- Is the new "pronouns" MCR inclusive and salutary or divisive, harmful, and incoherent? John Adam reports; each reader can decide for their own self.
- Stuart Israel presents wisdom with quotable quotes.
- Ben King explains PERA amendments.
- Kimberly Coschino and David Blanchard each address Sixth Circuit FLSA rulings.
- Barry Goldman retires his great *FWIW* column.
- Read how the Michigan Court of Appeals upheld MERC rulings issued by two commissioners, as explained by Mark Cousens.
- Spelling names correctly and other details are important to a workplace investigation, explains Linda Burwell.
- Learn about two Michigan legal giants, Professor Joseph Grano and retired Michigan Chief Justice Maura Corrigan.
- Russell Linden and John Adam review seven blockbuster NLRB rulings.
- Learn how to make web articles permanent using Perma.cc.

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