LABOR AND EMPLOYMENT LAW SECTION – STATE BAR OF MICHIGAN

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WPA: SUSPECTED VIOLATIONS OF LAW

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For years, my colleagues and I have vetted whistleblower claims: testing prospective clients' articulation of the actual or suspected violations of law; ascertaining their bases for believing unlawful activity had occurred to assess whether their belief (and report) was made in good faith; and assessing the evidence supporting a causal connection between their report and the adverse employment action taken against them. As the overwhelming majority of our clients are non-attorneys, they are often unable to point to the specific statute, rule, or regulation they believe was violated, nor do we require them to. Rather, we have operated under the common assumption that the law does not require them to pinpoint, with absolute certainty, the specific law that they believe has been violated.

The Whistleblowers' Protection Act ("WPA"), MCL 15.362, provides that "an employer shall not discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, *a violation or a suspected violation* of a law or regulation...to a public body, unless the employee knows that the report is false . . ." (emphasis added).

To establish a prima facie case under the WPA, the Plaintiff must demonstrate that (1) she was engaged in a protected activity as defined by the Act; (2) she was discharged, threatened or discriminated against; and (3) a causal connection exists between the protected activity and the discharge. *Whitman v. City of Burton,* 493 Mich. 303 (2013); *see also Debano-Griffin v. Lake County Bd of Comm'rs,* 493 Mich. 167 (2013).

The WPA defines "protected activity" as reporting or being about to report a violation or suspected violation of a law, regulation or rule promulgated by Michigan or a political subdivision of the state or the United States to a public body, unless the employee *knows* the report to be false. MCL 15.362; *see also Debano-Griffin v. Lake County,* 486 Mich. 938 (2010).

The Eastern District has interpreted the inclusion of the term "suspected violations" to protect employees with the "subjective good faith belief that he was reporting a violation of the law." *Melchi v. Burns Int'l Security Services, Inc.,* 597 F.Supp. 575, 583 (E.D.Mich.1984); see also *Smith v. Gentiva Health Servs.*, 296 F. Supp. 2d 758, 762 (E.D. Mich. 2003).

> The Act's protections are extended beyond the reporting of actual violations by the clause "suspected violations." This is clearly consistent with the purpose of the Act to permit and perhaps encourage employees to report violations of the law without retaliation, which would be thwarted if an employee could only report violations on peril of reprisal if it is ultimately shown that the employer did not violate any laws, rules or regulations. The Act goes on, however, to limit the Act's protection by excluding from its coverage reports that "the employee knows ... is false." Thus the legislature recognized that employees must not be permitted to use the statute in a purely offensive manner by reporting violations known to be false. By precluding protection to those acting in bad faith, the legislature clearly implied that only those acting in good faith are entitled to protection.

Melchi, 597 F. Supp. at 583. Michigan courts have likewise adopted the "subjective good faith belief" standard. See *e.g., Truel v. City of Dearborn,* 291 Mich. App. 125, 138 (2010).

Thus, when the Michigan Supreme Court issued *Janetsky v. County of Saginaw,* 982 N.W.2d 374 (2022), holding, in part, that "[w]hether there were actual violations of the law . . . is not dispositive, as the WPA also protects those who report *suspected* violations of the law," I considered this opinion to be consistent with the text of the WPA and existing jurisprudence. (original emphasis).

Yet, Chief Justice Elizabeth Clement's opinion, concurring in part and dissenting in part, opined that the Michigan Supreme Court "has never held this before" and, furthermore, that the majority's holding was "misguided." *Janetsky v. Cnty. of Saginaw,* 982 N.W.2d at 377. Elaborating, Chief Justice Clement's opinion distinguished between the factual underpinnings versus the legal bases supporting the alleged suspected violation of law. *Id.* (original emphasis):

> [W]hile the statute accepts uncertainty—a violation need only be *suspected* to be reportable and protected—this should be construed as *factual* uncertainty, not *legal* uncertainty. In other words, for a plaintiff to make a report that qualifies for WPA protection, the plaintiff need not know with certainty that the activity reported actually *occurred,* but the plaintiff *does* need to demonstrate that *if* those facts actually occurred, they would *definitely* be a violation of the law.

This is a dangerous opinion.

Should Chief Justice Clement's opinion become law, laypeople would be held to a much higher standard than reasonable. Do we really think it is reasonable to expect a layperson to identify *with certainty* the law they suspect was violated? Should employees who, in good faith, report a suspected violation of law to a public body be precluded from bringing a retaliation claim because they

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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*

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happened to be technically mistaken or lacked specialized legal knowledge to determine that the facts they allege conclusively establish a definite violation of law?

I do not believe so.

Adopting Chief Justice Clement's opinion would have a chilling effect on prospective whistleblowers, which is counter to the underlying purpose of the WPA – the protection of the public. *Dolan v. Continental Airlines/Continental Express,* 454 Mich. 373, 378 (1997). The WPA purposefully "meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law." *Id.* at 378-379. By contrast, implementing Chief Justice Clement's heightened standard of "suspected violation," imposes a barrier on whistleblowers to know, with certainty, that the law was violated, assuming the alleged conduct occurred. Whistleblowers would, understandably, be fearful of making reports of suspected violations of law and plaintiffs' attorneys, who must vet and file a claim under the WPA within 90 days, would likewise be chilled from bringing claims under the Act.

Janetsky is particularly instructive on this regard. The Justices' opinions wildly diverged as to whether the facts alleged by Janetsky qualified as a violation of law. Chief Justice Clement, for example, opined that the facts alleged supported a violation of MCL 780.756(3). *Janetsky,* 982 N.W.2d at 378. Conversely, Justices Zahra and Viviano did not. *Id.,* at 381-84. If Michigan's highest court cannot agree that a definite violation of law occurred, how can we expect a layperson to, or a single attorney operating under a ticking clock?

Chief Justice Clement reasoned that, by extending protections only to whistleblowers whose report is based on uncertain facts, but legal certainty, would prevent "reporting violations of imaginary laws . . . even if a reasonable person might believe such a law exists." *Id.* at 377 (Clement, C.J. concurring opinion). While this may be true, there's no evidence to suggest this is an existing, or even likely future, problem, particularly as the report would still be subject to a reasonable, good faith standard.

Moreover, similar retaliatory discharge claims, such as those brought under Title VII or Michigan's Elliott-Larsen Civil Rights Act, use the "reasonable and good faith belief" standard. *See e.g., Jackson v. Genesee County Road Commission,* 999 F.3d 333 (6th Cir. 2021) and *Booker v. Brown & Williamson Tobacco Co.,* 879 F.2d 1304, 1311-12 (6th Cir. 1989). What rationale could there be for applying one standard to suspected instances of unlawful race or gender discrimination and another standard to suspected violations of other laws?

Thankfully, the Michigan Supreme Court majority did not agree with Chief Justice Clement's reasoning and we are not in the uncomfortable position of grappling with these questions and an unnecessarily heightened standard. The Court confirmed that the legal standard we've been operating under is, in fact, the appropriate legal standard. For now, anyway. ■

PENDULUM CONTINUES SWINGING PRO-LABOR AT THE NLRB

Russell S. Linden

Halfway through President Biden's term is a good time to review some predictions I made in "The Pendulum Swings: Predicting the Biden NLRB" (*Lawnotes* Winter 2022). I predicted that the NLRB would follow President Biden's pro-labor agenda and reverse many Trump Board decisions and rules. This article addresses some of the more significant changes that have occurred or are in the process of changing—from micro bargaining units to proposed rules on joint employer status and those impacting the NLRB election process—but given the Biden Board's ambitious activist bent, I could use all 24-pages of *Lawnotes* to discuss other changes and proposed changes, but the editor thankfully declined to allow.

Joint Employer Rule. "The Pendulum Swings" predicted that the Biden NLRB would abandon the Trump Board direct control joint employer rule and revert to the expansive standard for determining joint employer status adopted in *Browning Ferris Industries,* 362 NLRB No. 186 (2015). Sure enough, on September 6, 2022, the NLRB issued a Notice of Proposed Rulemaking on Joint-Employer Standard that would replace the Trump Board rule and reject its focus on direct and immediate control over employees for determining joint employer status. Republican Board members Kaplan and Ring dissented to the proposed rule.

Under the proposed rule, two or more employers would be deemed joint employers if they "share or codetermine those matters governing employees' essential terms and conditions of employment." The proposed rule defines "share or codetermine" to mean that two or more business entities ``possess the authority to control (whether directly, indirectly or both) one or more of the essential terms and conditions of employment." The proposed rule provides an extensive laundry list of what are considered to be "essential terms and conditions'' including "but not limited to wages, benefits and other compensation; hours of work and scheduling; hiring and discharge; discipline; workplace health and safety; supervision; assignment; work rules and directions governing the manner, means or methods of production. Staffing agencies and their client businesses or franchisors and their franchisees would likely be deemed to joint employers under the proposed rule where their agreements contain reservations over such significant aspects of work as compensation, discipline and work hours. Like the *Browning Ferris* standard, the proposed rule would expansively consider both evidence of direct control and evidence of reserved and/or indirect control over the essential terms and conditions of employment and create increased risk for joint employer status under the Act. The comment period for the proposed rule expired in December 2022, so presumably it will be adopted sometime in early 2023.

Micro Bargaining Units Redux. "The Pendulum Swings" detailed the NLRB's flip-flop from the Obama to the Trump administrations concerning the standard for determining the appropriateness of micro bargaining units; smaller bargaining units within operations of larger groups of employees. That article also noted the advantages unions have in organizing smaller sized bargaining units as opposed to larger ones and the NLRB's historical preference for wall-to-wall units in a single facility. Consistent with my prediction and NLRB General Counsel ("GC") Jennifer Abruzzo's expressed desire, the NLRB in *American Steel Construction, Inc.,* 372 NLRB No. 23 (2022), a 3-2 decision with the two Republican members dissenting, overruled the Trump NLRB's decision in *PCC Structurals,* 365 NLRB No. 160 (2017) and returned to the Obama Board permissible micro bargaining unit standard in *Specialty Healthcare,* 357 NLRB 934 (2011).

American Steel revised the test applied in bargaining unit determinations where a union files an election petition which seeks to represent a unit that contains some but not all job classifications in the workplace. The union's election petition in that case sought to represent employees in only two job classifications and the company unsuccessfully argued that the smallest appropriate bargaining unit should also include employees in three other job classifications thereby creating a much larger unit. Increasing the unit size could have created issues for the union; i.e. making the necessary showing of interest more difficult (having authorization cards signed by at least 30% of the employees in the unit deemed appropriate) and winning the election in a larger unit than the one desired. Rejecting the employer's argument for a larger bargaining unit, the Board returned to the *Specialty Healthcare* standard and held that when an party argues for the inclusion of other job classifications to the proposed smaller bargaining unit which is readily identifiable as a group and that group of employees share a community of interest, the challenging party has the burden of showing that the excluded employees share an overwhelming community of interest with the smaller group to mandate their inclusion.

The upshot of *American Steel* is that unions will be allowed to more easily obtain elections involving smaller bargaining units. The Board's imprimatur on micro bargaining units should provide an edge to unions in two significant respects: (1) organizing smaller groups is easier to accomplish than larger ones and (2) their better track record in elections involving smaller employee groups.

Permitting Off-Duty Employee Access to Property. In accord with NLRB GC Abruzzo's expressed preference that the NLRB revisit the issue of off duty employees having access to third party's property which was discussed in "The Pendulum Swings", the Board recently did so in *Bexar County Performing Arts Center Foundation (Bexar II),* 372 NLRB No. 28 (2022); another 3-2 decision with the two Republican Board members dissenting. In that case, the Performing Arts Center had banned from its property San Antonio Symphony unionized musicians who were present for the sole purpose of protesting the Center's use of recorded music as opposed to contracting with those musicians to perform live.

On remand from the D.C. Court of Appeals, *Local 23, American Federation of Musicians,* 14 F.4th 778 (D.C. 2021), the NLRB in *Bexar II* overruled *Bexar I,* 368 NLRB No. 46 (2019), which held that a property owner could lawfully exclude a contractor's off duty employees from accessing its property to engage in Section 7 activities unless those employees worked both regularly and exclusively there and the property owner failed to show they have one or more non-trespassory means of communications. In *Bexar II,* the NLRB returned to the Obama era test in *New York Hotel & Casino,* 356 NLRB 907 (2011), enfd. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 568 U.S. 1244 (2013), which held that a property owner may lawfully exclude

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access to a contractor's off duty employees who regularly work on site that seek to engage in Section 7 activity only upon showing that the activity would significantly interfere with the owner's use of its property or where the exclusion is justified by another legitimate business reason such as the need to maintain production or discipline.

In *Bexar II,* the Board reasoned that unlike non-employee union organizers who can be lawfully banned from the property, employees of contractors who exercise their Section 7 rights are much more closely aligned to the rights of the property owner's employees. In the NLRB news release announcing *Bexar II,* NLRB Chairman Laura McFerran stated that "the decision ensures that contract employees' rights are protected and respected in a manner appropriate with the nature of their employment" and "avoids creating incentives for employers to avoid direct hiring."

Permitting Awards of Consequential Damages. *The Pendulum Swings* noted that the NLRB invited briefs in *Thryv, Inc.,* 371 NLRB No. 37 (2021), to address the issue of whether consequential damages could be awarded as part of a make-whole remedy in unfair labor practices ("ULP") cases. In *Thryv, Inc.,* 372 NLRB No. 22 (2022), another 3-2 decision with the two Republican members dissenting, the NLRB answered the question and expanded the scope of remedies available for violations of the Act to include damages for all direct or financial harm sustained by employees. In that case, after the NLRB found that the employer violated Sections 8(a)(1) and (5) of the Act when it laid off employees without providing notice to the union or an opportunity to bargain, the three Democratic Board members ruled that in all pending and future cases, employers must compensate affected employees for all direct or foreseeable pecuniary harm incurred as a result of the employer's unfair labor practices reasoning. As explained in *Thryv,* in addition to the remedy of lost wages and benefits, and consistent with a make-whole remedy for violations of the Act, employees will now be able to recover out-of-pocket medical expenses, credit card debt, or other costs that are a direct or foreseeable result of the violations. Perhaps as a possible preview of what could happen with a Republican majority NLRB, Republican Board members Kaplan and Ring dissented and rejected the majority's direct or foreseeable standard but agreed that affected employees should be compensated for all losses suffered as a direct result and those indirectly caused where the causal link between the loss and the violation is sufficiently clear. Thus, there appears to be a consensus under either a Democratic or Republican Board for allowing for more expansive monetary remedies beyond the customary lost wages and benefits awarded in ULP proceedings.

Procedural Protections for Interviewing Employees to Prepare for ULP Proceedings. In *Sunbelt Rentals, Inc.,* 372 NLRB No. 24 (2022), another 3-2 decision, the NLRB reaffirmed the 58-year old approach for determining when employers violate the Act where they interview employees incident to preparing for ULP hearings. Although it appeared that the standard might change when the then Republican majority Board invited briefs on the issue in *Sunbelt Rentals, Inc.,* 370 NLRB No. 94 (2021), the shift to a Democratic majority member Board resulted in reaffirming the test first adopted decades ago in *Johnnie's Poultry,* 146 NLRB 770 (1964). As a consequence, the standard remains that such interviews violate the NLRA unless the employer gives certain prescribed assurances before interviewing employees and refrain from certain conduct during the interview.

In particular, *Sunbelt Rentals, Inc.* reconfirmed the requirements first detailed in *Johnnie's Poultry* that for such employee interviews to be legal, an employer must (1) communicate to the employee the purpose of the questioning; (2) assure the employee that no reprisal will take place; (3) obtain the employee's participation on a voluntary basis; (4) the questioning must occur in a context free of employer hostility to union organizations and must not be itself coercive in nature; and (5) questioning must not exceed the necessities of the legitimate purpose by prying into union matters, eliciting information concerning an employee's subjective state of mind or otherwise interfere with statutory rights of employees. Failing to apply any of these safeguards will result in the interview being deemed in violation of the Act.

Dissenting Members Ring and Kaplan proposed adopting a rebuttable presumption standard under which an employer's failure to provide the required safeguards would be presumed coercive which could be rebutted by showing that the questioning was not coercive under the totality of the circumstances. The Democratic majority rejected that proposed standard because it "fails to ensure questioning is noncoercive, invites employers to provide post hoc rationalizations and opens the door for employers to probe into employees' union sympathies." In a news release announcing the decision, Chairman McFerran stated that the "decision maintains a well-understood 58 year standard that has proven successful in balancing employer needs and employee rights, while protecting the integrity of the Board's process." She further said the "familiar, bright line test is easy for employers to comply with and brings certainty to the administration of the Act."

Dress Code Policies and Prohibitions on Wearing Union Insignias and Apparel. In *Tesla, Inc,* 371 NLRB No. 131 (2022), the NLRB continuing a pattern of issuing 3-2 decisions with the Republican members dissenting, reaffirmed long-standing standard from *Republic Aviation Corp. v. NLRB,* 324 U.S. 793 (1945), where the Supreme Court ruled that employer policies that restrict employees from displaying union insignias and wearing union apparel are presumptively illegal absent special circumstances justifying the restrictions. The *Tesla* decision came in the aftermath of the then Republican majority Board teasing the possibility that the Board might be posed to adopt a standard favorable to employers when they invited briefs on the issue in *Tesla, Inc.,* 370 NLRB No. 88 (2021). However, that bubble burst when the Democratic majority reaffirmed the decades old precedent protecting the rights of employees to wear union insignias and apparel absent their employer establishing special circumstances for the prohibition.

Tesla overruled the Trump NLRB's *Wal-Mart Stores, Inc.,* 368 NLRB No. 146 (2019), which held that the *Republic Aviation* special circumstances standard applied only when there is a complete prohibition on wearing union insignias and that employers do not need to make such a showing for policies that limit the size and appearance of union buttons and other logos but not completely ban them. Instead, such restrictions could be deemed lawful based on less compelling employer interests. Under *Tesla, Inc.,* when an employer has a policy that prohibits employees from wearing union insignias and apparel in any manner, it will have the burden of establishing special circumstances making those restrictions necessary such as the need to maintain production and discipline. In effect, *Tesla, Inc.* essentially held that workplace dress codes and uniform policies

that prevent wearing pro-union apparel even if facially neutral are presumptively illegal.

Tesla's dress code policy at issue in the case required employees to wear either a Tesla provided t-shirt with the company logo imprinted on it or a plain all black t-shirt and effectively prohibited wearing union insignias at work, including metal buttons. After its Fremont plant workers began wearing union apparel, Tesla instructed them to stop wearing them as they were in violation of the dress code. The NLRB held that the facially neutral dress code policy violated Section 8(a)(1) of the Act unless Tesla could establish special circumstances for the ban. To illustrate what would constitute special circumstances justifying the restriction, the NLRB cited *Komatsu,* 342 NLRB 649 (2004), which identified employee safety, quality control, public image, and workplace decorum as possible lawful justifications. The Board stated establishing special circumstances is a heavy burden and that in any case "involving a restriction on the display of union insignia" it "will engage in a rigorous, fact specific inquiry to determine whether the employer actually established the existence of special circumstances in the context of its workplace." Applying that standard, the NLRB rejected Tesla's stated reason for banning metal union buttons which was to prevent scratches and damage to cars and found its policy violated the Act.

NLRB Chairman McFerran explained in the NLRB news release for *Tesla* that "wearing union insignias, whether a button or a t-shirt is a critical form of protected communications'' and the decision "reaffirms that any attempt to restrict the wearing of union clothing or insignia is presumptively unlawful and consistent with Supreme Court precedent *(Republic Aviation)* decision, an employer has a heightened burden to justify attempts to limit this important right." Employees wearing shirts supporting unions, union buttons and union hats frequently occur in union organizing drives. *Tesla* clearly warns employers, unionized and not unionized, that any restrictions on such fashion statements will face skeptical and rigorous scrutiny at the NLRB. The last word has yet to come on this important issue as Tesla filed a petition for review on September 6, 2022 with the U.S. Court of Appeals for the Fifth Circuit; a circuit with a reputation for favoring employers and being hostile to federal agencies. *Tesla, Inc. v. NLRB,* 5th Cir. Case No. 22-60493

Continuing Obligation to Deduct Dues After the CBA Expires. In *Valley Hospital Medical Center, Inc. (Valley Hospital II),* 371 NLRB No. 160 (2022), which was a case on remand from the Ninth Circuit, the NLRB in another 3 to 2 decision, held that an employer after a collective bargaining agreement ("CBA") expires must continue to honor any dues checkoff provision in that CBA and deduct dues from employees' paychecks until either a new CBA is reached or a valid overall bargaining impasse permits unilateral action by the employer. Under *Valley Hospital II,* ceasing deducting dues before either occurs would be unlawful unilateral action in violation of Sections 8(a)(1) and (5) of the NLRA.

Valley Hospital II reversed the Trump Board's *Valley Hospital Medical Center, Inc. (Valley Hospital I),* 368 NLRB No. 139 (2019), which held that employers could lawfully unilaterally stop deducting union dues after the CBA expired. CBAs frequently have union dues checkoff provisions which require employers to deduct monthly union dues from their employees' paychecks and remit the dues to the union. Such provisions are not lawful in states that have right to work laws, such as in Michigan.

Valley Hospital II is an excellent illustration of how political fortune has increasingly shaped the Board's interpretation of the NLRA. Originally, the NLRB ruled in *Bethlehem Steel,* 136 NLRB 1500 (1962) that employers could lawfully stop deducting dues from employees' paychecks after the CBA expired. The Obama Board overruled that decision in *Lincoln Lutheran of Racine,* 362 NLRB 1655 (2015) and held that stopping dues deduction after the CBA expired violated the Act. Four years later in 2019, the Trump Board reversed *Lincoln Lutheran* in *Valley Hospital I* and ruled that stopping deductions was lawful. Now the Biden Board's *Valley Hospital II* provides another course reversal making it three neck-turning changes in seven years. While the text of the NLRA did not change, what did change were presidential administrations and the political makeup of the Board.

Proposed Fair Choice and Employee Voice Rule. Continuing steps compatible with its announced pro-union agenda, on November 3, 2022, the NLRB issued a notice of proposed rulemaking for the "Fair Choice and Employee Voice" rule. That proposed rule would rescind the Trump Board "Election Protection" rule and address three significant issues that could impact union organizing efforts; (1) the Board's blocking charge policy which when applied, delays the holding of an election while NLRB investigates pending ULP alleging coercive conduct that may threaten employee free choice, (2) the ability to contest an employer's voluntary recognition of a union and the viability of the voluntary recognition bar to an election, and (3) the ability to contest certain construction industry CBAs. Republican Board members Kaplan and Ring dissented from the proposed rule. (Ring's term expired on December 16, 2022. As a result, the Board is currently composed of three Democratic members; McFerran, Prouty and Wilcox and one Republican member, Kaplan.) The currently in effect Trump Board "Election Protection" rule allows the following: (1) NLRB union elections to proceed despite pending ULP alleging coercive conduct that may interfere with the election and constitute grounds for requiring a re-run election; (2) election challenges to the representative status of a voluntarily recognized union based on a showing of majority interest before there has been a reasonable period for collective bargaining; and (3) election challenges to the representative status of a union representing construction industry employees despite the undisputed evidence of the union's majority support confirmed by detailed language in the CBA making it clear that the employer voluntarily recognized the union based on a showing of majority support of the employees. The proposed rule would rescind all three aspects of that rule.

First, the proposed rule would return to the NLRB's long established blocking charge policy that dates back to 1966 to provide that Regional Directors will have discretion to delay elections if they determine that a pending ULP alleges conduct threatening employee choice in the pending election. The stated rationale for this part of the proposed rule is promoting employee free choice and conserving NLRB resources through avoiding rerun elections.

Second, the proposed rule would eliminate the Trump rule requiring notice and election procedures triggered by voluntary recognition of a union and restore the voluntary recognition bar. Under this portion of the proposed rule, the voluntary recognition would act as an immediate bar to the filing of an election petition for no less than six months following the parties' first bargaining session and for no more than one year after that date. The NLRB

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news release for the proposed rule explained that change would encourage collective bargaining and preserve labor relations stability and were stated reasons for the proposed rule.

Finally, the proposed rule would return to the NLRB's prior approach to voluntary recognition in the construction industry. The current rule provides that construction industry bargaining relationships under Section 8(f) cannot bar NLRB petitions for elections. Instead an election bar could only be imposed in the construction industry under the Trump Board rule where there is proof of a Section 9(a) relationship with the union by positive evidence that it has majority support of the employees and language in the CBA is insufficient evidence of such. That proposed rule would rescind that rule and follow prior case precedent addressing Section 9(a) recognition in the construction industry including the six month limitations period for filing election petitions challenging a construction employer's voluntary recognition of a union under Section 9(a) (*Casale Industries,* 311 NLRB 951 (1993)) and adopt the principle from *Staunton Fuel & Material,* 335 NLRB 717 (2001) that sufficiently detailed language in a CBA can serve as a evidence that voluntary recognition was based on Section 9(a) of the Act.

In announcing the proposed rule, McFerran stated "The Board believes, subject to comments, that these proposed changes will better protect worker's ability to make a free choice regarding union representation, protect stability in labor relations, and more effectively encourage collective bargaining." The proposed rule's comment period was extended to March 1, 2023 and it may be just a matter of time before it is adopted.

Increased Scrutiny of Workplace Electronic Monitoring and Surveillance. GC Abruzzo targets employer use of workplace technology for rigorous scrutiny in her most recently issued memo, GC Memo 23-02 (2022) entitled "Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights." That technology is identified in that memo to include recording employee conversations, tracking employee movements through wearable devices, cameras, radio-frequency identification badges, GPS tracking devices, computer keyboard monitoring devices, webcams, and software that takes screenshots. GC Abruzzo expressed her concern "that employers could use these technologies to interfere with the exercise of Section 7 rights by significantly impairing or negating employees' ability to engage in protected activity–and to keep that activity confidential from their employer."

To address that concern, Abruzzo's memo calls for Regions to "rigorously apply extant Board law in cases involving new workplace technologies." She identified such existing NLRB law to include restrictions on employers engaging in (1) surveillance, (2) unlawfully creating the appearance of surveillance, (3) unlawfully taking pictures of employees engaged in protected activity such as health and safety protests or strikes, (4) reviewing employee social media posting, and (5) implementing technologies in response to Section 7 activities including union organizing. Abruzzo's memo also instructs Regions to submit all intrusive or abusive surveillance and algorithmic initiative cases to the Division of Advice to presumably provide opportunities to develop Board law consistent with her memo.

Most significantly, GC Abruzzo indicates that she will "urge the Board" to apply a "new framework" in cases involving workplace surveillance and monitoring technology and "find that an employer has presumptively violated Section 8(a)(1) where the employer's surveillance and management practices when taken as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activities protected by the Act." Under her proposed "new framework", if the employer establishes that the practices at issue are narrowly tailored to address a legitimate business need–*i.e.,* that its needs cannot be met through means less damaging to employee rights, GC Abruzzo "will urge the Board to balance the respective interests of the employer and employees to determine whether the Act permits the employer's practices." Even if it is determined that the balancing favors the employer, GC Abruzzo's proposed framework would impose certain disclosure obligations on the employer. If the employer's business need outweighs employees' Section 7 rights, unless the employer demonstrates that special circumstances require covert use of the technologies, Abruzzo will urge NLRB to require the employer to disclose to employees (1) the technologies it uses to manage and monitor them, (2) its reasons for using them, and (3) how it is using the information it obtains. GC Abruzzo states that "Only with that information can employees intelligently exercise their Section 7 rights and take appropriate measures to protect the confidentiality of their protected activity if they so choose." She justifies her "new framework" by stating that "It is the Board's responsibility 'to adapt the Act to changing patterns of industrial life,'" quoting *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 266 (1975). Reliance on that quote makes the Act a particularly malleable law for use in GC Abruzzo's agenda and makes swings in the pendulum inevitable.

In sum, the NLRB pendulum has now swung favorably to the union side, assisting President Biden with meeting his stated intention to "be the most pro-union president you have ever seen." Presumably for the remainder of his term, that swing will continue unabated as the Democrats will remain the majority on the Board. Further changes that would overrule Trump NLRB decisions, protect employees and aid unions are already in the pipeline. For example, briefing has been invited on employee arbitration agreements (*Ralph's Grocery Company,* 371 NLRB No. 50 (2021)) and work rules (*Stericycle, Inc.,* 371 NLRB No. 48 (2021)), and the Democratic Board majority recently found confidentiality and non-disparagement provisions contained in severance agreements violated the Act in *McLaren Macomb,* 372 NLRB No. 58 (2023)). In addition, the recent ALJ decision, *Amazon.com,* JD(NY)-01-23 (2023), finding that Amazon committed certain ULPs prior to losing the election at its Staten Island warehouse may provide the vehicle for revamping the Board's long standing captive audience meeting precedent in the restrictive manner called for by Abruzzo (NLRB GC Memo 22-04), which was discussed in "Starbucks, Amazon and Union Organizing" (*Lawnotes,* Summer 2022). Unionized as well as non-unionized employers will need to keep pace with the rapidly changing Board law that provides greater protections to their employees and favors unions.

The question remains whether unions can reverse their historical and ongoing decline even with the favorable pendulum swing. Legal developments can only help so much. While labor recently enjoyed high profile successes at Amazon and Starbucks, the Bureau of Labor Statistics recently reported that only 6% of the private sector workforce was union represented in 2022; the lowest level on record. That was a decline from the then all-time low of 6.1% in 2021. ■

MAKING REMEMBERED POINTS AT ORAL ARGUMENT

Stuart M. Israel

Legal realist Karl N. Llewellyn advised advocates that oral argument is (1) a chance "to answer any questions you can stir" the court "into being bothered about and into bothering with" and (2) the "one chance to sew up each such question into a remembered point."

1.

Judges often welcome advocates to the oral argument podium with an admonition. "Rest assured, counsel," a judge might say, "this Court has read the papers, and you should not repeat the law and facts covered in the briefs."

Respecting judicial impatience, I always leave out of the briefs a few controlling appellate decisions and a smoking-gun fact or two—so I will have something fresh to reveal at oral argument.

Only kidding! The important stuff *must* be in the briefs—the law, the facts, and an explanation of how they compel the result sought by your side. Ruth Bader Ginsburg reportedly observed: "The written argument endures. The oral argument is fleeting."

But has the judge read the written argument?

2.

Some judges read the papers before oral argument. At the hearing they are familiar with the law and the facts and the questions to be resolved.

Some judges only skim the papers, or look only at issue-statements, introductions, or conclusions.

Some judges read only the law clerk's summary. That may help. After all, the law clerk graduated from a good school, got good grades, maybe was on law review, and has wisdom gained from *months* of post-graduation experience.

But sometimes the judge hearing oral argument is pretty much a *tabula rasa.* This often is the case in busy state trial-level courts, where law clerks are few and mountains of motions are filed.

Whatever the level of the judge's pre-hearing preparation, it may not be too late to win the judge's heart and mind at oral argument. Many judges tell you how to best get their attention. They do this in bar journal articles, at CLE seminars, and at bar association rubber-chicken dinners.

Be succinct, judges advise. Address the important stuff. Do not waste time on unimportant stuff.

Later, in the decision, your judge will tell you which stuff is important and which is not.

3.

The practical reality is that oral argument may be too late to influence outcome.

My informal survey of judges reveals that oral arguments are not often outcome-determinative. Some judges view oral argument as an outmoded remnant of a slower-paced era. Some view oral argument as a time-consuming imposition. Some judges cite the lack of acumen displayed by some oral-arguers.

Often oral arguments are exercises in judicial confirmation bias, during which—to borrow from Paul Simon—the judge hears what the judge wants to hear and disregards the rest.

But all is not pre-ordained by the papers. Oral argument can change a judge's mind. It happens.

Hope springs eternal in the zealous advocate. As Llewellyn advised, oral argument may be your last and best chance to "stir" the judge "into being bothered about and into bothering with"—and remembering—the points in your favor.

4.

What should you do at oral argument to try to "stir" the judge?

In Johnny Mercer's phrase, ac-cent-tchu-ate the positive. Present your strengths. Pound the favorable law or the compelling facts or both (but not the table), to try to persuade the judge that you are right and the opposition is wrong. Tell your client's human story, appeal to justice and fairness, apply the Laws of Primacy and Recency, and try to ensure that each point pertinent to your desired outcome becomes, for the judge, a "remembered point."

Here is an orderly oral argument template, which begins with your expression of deference and humility. You can tailor the template to fit your case, your black-robed audience, and your personality.

> I know the Court is familiar with the law and the facts.
>
> I will use my time to emphasize three points which I believe are outcome-determinative.
>
> First, *blah, blah, blah.*
>
> Second, *blah, blah, blah.*
>
> Third and last, *blah, blah, blah.*
>
> In sum, we ask the Court to *blah* and *blah.*
>
> I'd be happy to answer any questions.

5.

In most endeavors, the "best-laid schemes o' mice and men gang aft agley." So, you might prepare for the possibility that at the hearing the judge will say: "Good morning, counsel. I read your briefs. You each will have two minutes to tell me what more you think I need to know to fairly decide this matter."

You can instantly edit your template into a two-minute presentation, memorably making your salient points, endeavoring to make it easy for the judge to rule your way: "First, *blah.* Second, *blah.* And third, *blah.* We ask the Court to *blah* and *blah.* I'd be happy to answer any questions."

Brevity, simplicity, clarity, and confidence help make "remembered points." ■

STICKERS, BUTTONS, AND SPECIAL CIRCUMSTANCES: WHEN IS UNION INSIGNIA PROTECTED?

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

For eighty years, courts and the NLRB have recognized that the use of clothing and other accessories, commonly called union insignia, in the workplace to convey messages of solidarity is protected concerted activity under the NLRA.

Republic Aviation Corp. v. NLRB, 324 U.S. 793, 801-803 (1945), in an opinion by Justice Stanley Reed, held that employees have the NLRA Section 7 right to wear union insignia on an employer's premises, which may not be infringed, absent a showing of "special circumstances." The NLRB in a 3 to 2 decision, reaffirmed these core principles in *Tesla, Inc.,* 371 NLRB No. 131 (2022).

So, as a millennial organizer might ask, when is union "swag" protected?

1.

An employer that restricts the use of union paraphernalia and accessories bears the burden to prove the existence of special circumstances that would justify a restriction. *W San Diego,* 348 NLRB 372 (2006). Under the special circumstances test, an employer may create and enforce rules that prohibit employees from wearing union insignias in instances where it could "jeopardize employee safety, damage machinery or products, exacerbate employee dissension, or unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Komatsu America Corp.,* 342 NLRB 649, 650 (2004).

Komatsu found that special circumstances existed to prohibit union t-shirts comparing a Japan-based employer's outsourcing to the 1941 attack on Pearl Harbor. The union's message was provocative, offensive, and appealed to ethnic prejudices.

Hanes Hosiery, 219 NLRB 338, 346-47 (1975) ruled that an employer demonstrated special circumstances where union buttons could cause "picks" in its hosiery because the buttons had a pin that protruded a quarter-inch beyond the circular button.

In contrast, the NLRB rejects employer claims that union stickers on hardhats can damage the hardhat or create safety issues. See *In Re E & L Transp. Co.,* 331 NLRB 640 n.15 (2000) ("Clearly there are no safety or product damage control issues involved in the wearing of stickers on bump hats.").

NLRB precedent requires actual, not imagined special circumstances, to restrict a worker's right to wear union paraphernalia or insignia.

2.

Stabilus, Inc., 355 NLRB 836 (2010) specified that the *Republic Aviation* test applies when an employer maintains and consistently enforces a uniform policy that necessarily precludes wearing union attire, even when the policy allows employees to wear union insignia on items like buttons, pins, and stickers. *Stabilus* found that an "employer cannot avoid the 'special circumstances' test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia." 355 NLRB at 838.

Wal-Mart Stores, Inc., 368 NLRB No. 146 (2019) reversed *Stabilus,* ruling that where an employer "maintains a facially neutral rule that limits the size and/or appearance of union buttons and insignia that employees can wear but does not prohibit them, a different analysis is required." *Wal-Mart* presumes the "infringement on Section 7 rights is less severe" where an employer has merely maintained a "facially neutral" policy, and accordingly "the employer's legitimate justifications for maintaining the restriction do not need to be as compelling for its policy to pass legal muster."

Under *Wal-Mart,* rules that limited but did not prohibit insignia were not presumptively invalid, but rather permissible if they passed the much looser balancing test in *Boeing Co.,* 365 NLRB No. 154 (2017), which weighs the "nature and extent of the potential impact on NLRA rights" against the "legitimate justifications associated with the rule."

3.

Tesla found that the employer's rule that required workers to wear black T-shirts that were either plain or featured the company logo—therefore preventing workers from wearing black pro-union t-shirts—violated Section 8(a)(1). In reaching this conclusion, the NLRB overruled *Wal-Mart* and reaffirmed "that under *Republic Aviation* and its progeny, when an employer interferes in any way with its employees' right to display union insignia, the employer must prove special circumstances that justify its interference."

The NLRB explained that Tesla's "team-wear policy allows production associates to wear only black teamwear shirts with the Respondent's logo—or on occasion, with their supervisor's permission, all-black shirts—and thus prohibits them from wearing union shirts in place of the required team wear or other approved shirts. As a result, the team-wear policy interferes with production associates' Section 7 right to display union insignia. Accordingly, under *Republic Aviation* and its progeny, the team-wear policy is presumptively invalid, and the Respondent has the burden to establish special circumstances that justify its interference with production associates' protected right to display union insignia."

Tesla represents a proper reaffirmation of the *Republic Aviation* principles and creates a single standard for any employer uniform policy that has the effect of banning any kind of union insignia.

Even the dissenters agree that "displaying union insignia in the workplace is an important way employees exercise their rights under Section 7" and employees who display union insignia communicate their own support for the union and implicitly encourage other employees to join them. Effective protection of this right is therefore vital to our national labor policy." Slip. Op. 20. ■

SUPREME COURT TO ADDRESS EMPLOYER'S DUTY TO ACCOMMODATE AN EMPLOYEE'S RELIGIOUS BELIEFS

Julie A. Gafkay

The standards for Title VII religious accommodation in the workplace may be changed in favor of religious employees asserting accommodations.

At present, an employer does not have to accommodate the religious employee if doing so would require the employer to bear more than a *de minimis* cost.

The Supreme Court granted *cert* and will hear argument on April 18, 2023 in *Groff v DeJoy* (2023 WL 178403; Docket 22-174). The Court is likely to address religious accommodations in the workplace under Title VII of the Civil Rights Act. The issues include: (1) whether the Court should overrule the more than *de minimis* cost test for refusing religious accommodations under Title VII stated in *TWA v. Hardison,* 432 U.S. 63 (1977); and (2) whether an employer may demonstrate "undue hardship on the conduct of the employer's business" under Title VII merely by showing that the requested accommodation burdens the employee's coworkers rather than the business itself.

Like many religious accommodation cases, *Groff* and *Hardison* involved employees who requested not to work on Saturdays *(Hardison)* or Sundays *(Groff)* because of religious beliefs prohibiting working on their Sabbath. *Hardison* involved a union member who was employed by TWA; TWA was willing to work with the union to change the employee's work assignment to accommodate Saturday off, but the union was unwilling to violate the seniority system to accommodate the employee's religious belief, which may burden secular employees. *Hardison* held the employer made reasonable efforts to accommodate the employee's religious needs and the suggested alternatives to accommodate the employee's religious beliefs would have been an undue hardship within the meaning of Title VII, as construed by EEOC guidelines.

Under Title VII, the term religion "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §2000e(j). The statute does not provide guidance on the degree of accommodation. *Hardison* held an employer is not required to bear more than a *de minimis* cost to accommodate an employee's religious belief because it would be an undue hardship. The EEOC has found this to mean an employer is required to accommodate an employee's religious beliefs "unless doing so would cause more than a minimal burden on the operations of the employer's business." Since 1977, an employer has had a low obligation to make changes or adjustments for employees to accommodate their religious practices and beliefs.

The Third Circuit in *Groff v. DeJoy,* 35 F.4th 162 (3rd Cir. 2022) applied *Hardison,* holding it would be an undue hardship for the postal service to accommodate a union employee by allowing him to skip Sunday shifts, which would potentially violate the union's agreement with the post office.

The Sixth Circuit has held under certain circumstances an employee's request for a day off (Sunday, for instance) to observe the employee's religious belief should be accommodated. See *e.g., Smith v. Pyro Mining Co.,* 827 F.2d 1081 (6th Cir. 1987). *Smith* found the employer did not meet its Title VII obligations to accommodate the employee's religious beliefs because the employer's original accommodation proposed was unreasonable; the employer proposed the employee try to arrange a shift swap on his own with another qualified employee and, if he was unable to do so, then the employee was required to go through the employer's Open Door Policy to try to resolve. In *Smith,* the employer made no further attempts at accommodating the employee. The Sixth Circuit concluded it would not have posed an undue hardship for the employer to provide the employee with assistance in finding another employee to swap shifts with him to accommodate the employee's request for Sunday off, such as personnel posting a notice.

In contrast, *Cooper v. Oak Rubber Co.,* 15 F.3d 1375 (6th Cir. 1994), relying on *Hardison,* held the employer did not have to accommodate an employee's request for Saturdays off to observe her religious beliefs as a Seventh Day Adventist. In order to accommodate the employee's religious beliefs, the employer would have been required to hire another person to work the entire week, which the Court held was more than a *de minimis* cost to accommodate.

Groff is an important case to watch because the grant of *certiorari* suggests the Court may overrule the de minimis cost standard in *Hardison* and require employers to meet a higher burden to refuse accommodation, like the ADA standard. ■

FOR WHAT IT'S WORTH

Barry Goldman
Arbitrator and Mediator

OUR ADVERSARY SYSTEM AND JUSTICE: *CUI BONO?*

Psychologists say we are susceptible to the "just world fallacy." We think the arc of history bends toward justice. We think people get what they deserve. That kind of thing. There is something oddly touching about this. It's like discovering an adult has retained a vestigial confidence in the Tooth Fairy.

Historically, the belief in the just world hypothesis led to the practice of trial by combat. God, you see, favors the just. Since that is so, we merely need arrange a fight between the competing sides in a dispute, and God will reveal which side is right by seeing to it that the right side prevails. Trial by ordeal works on the same principle. Suppose two disputants appear before the decision-maker with equally likely explanations for some state of affairs. Both cannot be true. To resolve the question, the disputing parties can be, for example, required to carry a glowing hot iron bar over a certain distance. After a proscribed number of days, their wounds can be examined and compared. The person whose burns appear less festering and septic will be the one who is favored by God and ipso facto the one whose account of the situation is true.

We don't do it quite that way anymore. But the essence of the trial by ordeal is still with us. When we have disputes that we can't resolve ourselves, we hire champions to go forth and do combat on our behalf. They do it in dark wool suits rather than suits of armor, but the principle is the same. Our faith in this arrangement is similar to our faith in capitalism. Just as the invisible hand of the market is believed to promote Prosperity, the adversarial system is believed to promote Justice. The mechanisms are equally marvelous.

The problem is what lawyers mean by "justice" is *not* what the rest of the world means.

When a client walks into a lawyer's office and tells a story, the story will be about human beings, right and wrong. The lawyer's job is to translate that story into something cognizable and justiciable in the legal system. This requires carefully squeezing out both the human beings and the right and wrong in favor of this other mysterious thing only lawyers understand. To paraphrase Tina Turner, "What's Justice got to do with it?"

Don't believe me? Try this experiment. Pick up the legal document that is on your desk right now. Read it. Was there anything in it about right and wrong? Was there any mention of justice? Right, but let's keep going. Now carefully redact the particular facts and the information that would identify the parties and extract just the legal argument from your document. You'll get something like this:

Paragraph 16(a)(14) says "remedy" and Paragraph 19(g)6 says "relief." If the drafters were referring to the same thing in the two provisions, they would have used the same term. Since they did not use the same term….

Do this for a handful of cases. Then show the arguments to your client and see whether he can identify the one that represents his case.

Lawyers believe, because we were taught to believe and because it is in our personal interest to believe, that somehow our careful drafting of these documents and our meticulous and thorough citation of similar documents crafted by others entitles us to claim membership in an honorable profession. But *cui bono?* Who benefits from a system of dispute resolution where the dispute that is resolved by the professionals is unrecognizable by the actual human parties? How different is our system from the one that judged the merits of a case by the outcome of a knife fight?

And yet we believe, on the whole, more or less, generally speaking, the system works. Why is that? What evidence do we have that the system works?

Yes, in most neighborhoods there is little open warfare. Yes, there are a lot of cases where the specific outcome doesn't really matter. What the parties need in those cases is a ruling - preferably a timely one - so they can put the matter behind them. And yes, the adversarial system keeps a lot of lawyers busy, and that prevents them from committing even more pernicious mischief than they do. But in matters of consequence, what grounds do we have for supposing that the participation of lawyers adds value?

I am not advocating unilateral disarmament. I'm aware that in the system as it currently exists going lawyerless is legal suicide. My question is different. If you were designing a justice system from scratch, and your goal was Justice, would your system include lawyers? ■

CHIEF JUSTICE REHNQUIST ON ORAL ARGUMENT

Stuart Israel writes in this issue about making "remembered points" at oral argument. Oral argument can solidify the judge's post-brief-reading view or it can change the judge's mind. The key is to use oral argument to persuade the judge to rule *your* way.

I think Chief Justice William Rehnquist (1924-2005) would agree. Rehnquist devoted a chapter to oral argument in his book, *The Supreme Court* (2001). Below I pick some of key points from chapter 13, at 243-248 (paragraph breaks added, no ellipsis):

> Lawyers often ask me whether oral argument "really makes a difference." Often the question is asked with an undertone of skepticism, if not cynicism, intimating that the judges have really made up their minds before they ever come on the bench and oral argument is pretty much of a formality. Speaking for myself, I think it does make a difference: In a significant minority of the cases in which I have heard oral argument, I have left the bench feeling differently about a case than I did when I came on the bench. The change is seldom a full one-hundred-and-eighty-degree swing, and I find that it is most likely to occur in cases involving areas of law with which I am least familiar.
>
> It forces the judges who are going to decide the case and the lawyers who represent the clients whose fates will be affected by the outcome of the decision to look at one another for an hour, and talk back and forth about how the case should be decided.
>
> One can do his level best to digest from the briefs and other reading what he believes necessary to decide the case, and still find himself falling short in one aspect or another of either the law or the facts. Oral argument can cure these shortcomings.
>
> An oral advocate should welcome questions from the bench, because a question shows that at least one judge is inviting him to say what he thinks about a particular aspect of the case. A question also has the valuable psychological effect of bringing a second voice into the performance, so that the minds of judges, which may have momentarily strayed.
>
> If we were to combine the best in all of them, we would of course have the all-American oral advocate. If the essential element of the case turns on how the statute is worded, she will pause and slowly read the crucial sentence or paragraph. She will realize that there is an element of drama in an oral argument, a drama in which for half an hour she is the protagonist. But she also realizes that her spoken lines must have substantive legal meaning and does not waste her relatively short time with observations that do not advance the interest of her client.
>
> She has a theme and a plan for her argument but is quite willing to pause and listen carefully to questions. The questions may reveal that the judge is ignorant, stupid, or both, but even such questions should have the best possible answer. She avoids table-pounding and other hortatory mannerisms, but she realizes equally well that an oral argument on behalf of one's client requires controlled enthusiasm and not an impression of barely suppressed boredom.

John G. Adam

A HEALTHY ATTORNEY IS A HYDRATED ATTORNEY

Dr. Joel K. Kahn

Can attorneys perform at their peak and enjoy optimal health, if they do not pay attention to proper hydration during a busy work week?

More than 20 years ago, I read a research article that compared healthy adults in Loma Linda, California who drank five or more glasses of water a day compared with those that drank less than twice a day. The risk of heart attack was cut in half in the "high" water intake group over a 6-year follow-up. No other fluid provided this degree of protection against the number 1 killer of male and female attorneys (and of all people).

Recently, data has been published confirming the study I read back in 2002. This new study evaluated estimated fluid intake in 11,000 healthy adults in the USA. They used a blood test called a serum sodium level in which higher levels indicated poor hydration and lower levels indicated more adequate hydration with water. They measured 15 health markers like blood pressure, blood sugar, and blood cholesterol to estimated healthy or unhealthy aging. Those with adequate hydration compared with those that measured as dehydrated had more favorable biological age. They also had fewer strokes, heart failure, diabetes, dementia, and diabetes mellitus. Measurements consistent with adequate hydration were powerful predictors of health. According to a research press release, "The results suggest that proper hydration may slow down aging and prolong a disease-free life".

Another health project is called the Blue Zones. The 5 Blue Zones in the world, including Loma Linda, California, have 10X more centenarians than an average American city. People in the Blue Zones make drinking water a part of their daily routines. The Seventh Day Adventists, for instance, drink 7 glasses of water a day. When asked what the longest-lived people in the world drink, Blue Zones project founder Dan Buettner said, "Easy: Clean water is the best longevity beverage on earth."

Many busy attorneys do not focus on proper hydration for optimal performance and health. The implications can be quite serious. Therefore, this year, make a commitment to carrying a glass or stainless-steel water bottle full of fresh water in your car, to the office, to court, and to depositions and mediations. Finish several bottles a day. If at all possible, avoid plastic bottles as they are both an environmental and health risk with microparticulate plastic pieces and chemical exposure. Optimally, a desktop or whole house water filter system, like a reverse osmosis system, is ideal. Adding a few drops of concentrated minerals back to filtered water restores the water to full health potency.

A few more "Blue Zones" tips include:

1. Infuse water with fruits or herbs to add flavor and texture.
2. Brew and drink decaffeinated, herbal teas.
3. Drink water when you first wake up.
4. Eat more hydrating foods like celery, cucumber, apples, and melons.

Health favors a prepared mind and includes whole food nutrition, activity, sleep, and stress management. Hydration is often ignored but the data to support a focus on adequate intake of pure and clean water is strong. Make 2023 the year of a well hydrated attorney and perform at your peak. ■

JUSTICE FRANKFURTER, THE NLRA, CHIEF JUSTICE HUGHES, COURT-PACKING, AFFIDAVITS, COMMUNISTS, AND THE STEEL SEIZURE CASE

John G. Adam

Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment (2022) by Georgetown law professor Brad Snyder is a great way to learn law and history.

Felix Frankfurter (1882-1965) lived a remarkable life. Born in Austria, he came to the United States in 1894. Frankfurter graduated first in his class at Harvard Law in 1906, then worked in the administrations of William Taft and Woodrow Wilson. Frankfurter was a Harvard law professor, argued major cases in the Supreme Court, helped Louis Brandeis get confirmed to the Supreme Court, was friends with Oliver Wendell Holmes and other leading intellectuals, helped found *The New Republic,* and was a Zionist. Frankfurter mentored dozens of Harvard lawyers and for decades helped place students in key positions in the federal government.

Frankfurter served on the Supreme Court from 1939 to 1962. As a justice he advocated judicial restraint and was instrumental in getting a unanimous ruling in *Brown v Board of Education* (1954). Frankfurter was more conservative than other Franklin D. Roosevelt appointees, like Hugo Black and William Douglas.

Ahead I discuss FDR's court-packing plan and important labor cases discussed in *Felix Frankfurter.*

1.

Chief Justice Charles Evan Hughes' April 1937 opinion upholding the constitutionality of the National Labor Relations Act in *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), changed history and may have saved the Court from FDR's court-packing effort. See *Felix Frankfurter* at 265:

> The Court signaled its willingness to stop obstructing the New Deal on April 12 by upholding the National Labor Relations Act. In *NLRB v. Jones & Laughlin Steel,* another 5–4 decision, Hughes upheld the law granting unions the right to organize and to collectively bargain with management and the NLRB the power to investigate and adjudicate unfair labor practices.

A month later, in another 5–4 landmark decision, *Steward Machine Company v. Davis,* 301 U.S. 548 (1937), the Court, in an opinion by Justice Cardozo, upheld the Social Security Act.

In both cases, it is believed that Justice Owen J. Roberts (1875-1955) decided to join with Chief Justice Hughes to uphold these New Deal laws. Owen's decision was labeled "the switch in time that saved nine."

Before these 1937 rulings, the Supreme Court had been a barrier to FDR's New Deal laws. The Court, for example, in three unanimous opinions invalidated three New Deal laws in a single day, May 27, 1935, dubbed "Black Monday."

See **(1)** *Schechter Poultry Corp. v. U.S,* 295 U.S. 495 (1935) (struck down the National Industrial Recovery Act's live poultry code was an improper as a delegation of congressional power by failing to provide proper guidance to the executive branch); **(2)** *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1935) (struck down the Frazier-Lemke Farm Bankruptcy Act, a law designed to help debt-ridden farmers by scaling down their mortgages); and **(3)** *Humphrey's Executor v. U.S.,* 295 U.S. 602 (1935) (ruling that FDR's firing of the FTC commissioner violated the separation of powers).

See also the May 6, 1935 ruling, a 5-4 decision, with the Chief Justice in dissent, in *Railroad Retirement Board v. Alton RR Co.,* 295 U.S. 330 (1935), where the Court struck down the Railroad Retirement Act's pension system because it deprived the railroads of their property without due process and the January 6, 1936 ruling, a 6–3 decision, in *U.S. v. Butler,* 297 U.S. 1 (1936) that struck down the Agricultural Adjustment Act.

2.

"Black Monday" and other rulings striking down New Deal laws caused FDR—following his 1936 landslide re-election victory—to try to "pack the court," by adding up to six new justices.

FDR announced his plan, called the Judicial Reform Act of 1937, on February 5, 1937—just before the February 9, 1937 oral argument in *Jones & Laughlin.* FDR gave a March 9, 1937 Fireside Chat, drafted with Frankfurter's help, attacking the Supreme Court. FDR "asked Frankfurter for public silence and private assistance—an 'oath of silence and public neutrality.' Out of loyalty to Roosevelt and disgust with the Court's decisions, Frankfurter agreed. He declined all public comment and worked behind the scenes to help the president." *Felix Frankfurter* at 257, 289.

While FDR (president from March 1933 to April 1945) did appoint eight justices and elevated Justice Harold Stone to Chief Justice in 1941, FDR's first appointment to the Supreme Court was not until August 1937. FDR then appointed Alabama Senator Hugo Black (1886-1971) to succeed Willis Van Devanter (1859-1949). In 1937, Van Devanter was then the longest serving among the justices called the "Four Horsemen" (New Testament Book of Revelations, whose four horsemen were Death, Famine, Pestilence, and War), that is, anti-New Deal justices.

Another Horseman, Justice Sutherland, retired January 1938. These retirements may have been financially-induced, at least in part: "A 1932 law halved the salaries of retired justices as an austerity measure during the Great Depression; the full salaries of retired justices were not restored until March 1937. The diminished

retirement salaries may have discouraged Van Devanter and other aging justices from retiring." *Felix Frankfurter* at 266.

FDR's court-packing plan was rejected by the Senate. Even Vice President John Garner opposed court-packing, which put Garner "on the outs."

Many factors may have caused the plan to fail, including Justice Robert's change of position, the favorable New Deal Rulings, the death of Senate leader and court-packing champion Joseph Robinson, and Van Devanter's retirement.

3.

The book discusses the career of Chief Justice Hughes (1862-1948). Hughes ran for president, came very close to defeating then-incumbent President Wilson during the 1916 election (277 electoral votes for Wilson to 254 votes for Hughes). Frankfurter was divided between Wilson and Hughes. Hughes had been Governor of New York (1907-1910), Associate Supreme Court Justice (1910-1916), Secretary of State (1921-1925), and Chief Justice (1930-1941).

While a Republican, Hughes had a decent relationship with FDR, notwithstanding FDR's attempted court-packing plan. See J. Simon, *FDR and Chief Justice Hughes: The President, the Supreme Court, and the Epic Battle Over the New Deal* (2012).

An interesting footnote, Hughes' daughter Elizabeth Hughes Gossett (1907-1981) married Detroit attorney William T. Gosset. Elizabeth was also one of the first Americans to be treated with insulin for type 1 diabetes. See T. Cooper and A. Ainsberg, *Breakthrough: Elizabeth Hughes, the Discovery of Insulin, and the Making of a Medical Miracle* (2010).

4.

The Supreme Court ruled on affidavits in a 1957 case that is of interest to labor lawyers. The NLRB, like other federal agencies, is now governed by the 1957 Jencks Act, a law enacted to narrow a Supreme Court ruling.

The book discusses the Supreme Court 1957 opinion by then-new Justice William Brennan—*Jencks v. U.S.,* 353 U.S. 657 (1957). The Supreme Court required the government to turn over to the criminal defendant any witness statement in the government's possession even if that witness did not testify.

Clinton Jencks was a union official who in 1950 "had complied now with the Taft-Hartley Act by filing an affidavit with the National Labor Relations Board swearing that he was not a member of the Communist Party. On the basis of the testimony of two former Communist Party members, Jencks was tried and convicted of two counts of perjury. On appeal, he [successfully] argued that the trial judge should have ordered the FBI to disclose its reports about the two former Communist Party members." *Felix Frankfurter* at 610.

The FBI and members of Congress were outraged by the *Jencks* ruling. In a few months following that decision, Congress passed the Jencks Act, 18 U.S.C. §3500 (1957), which narrowed the ruling.

As explained in the book, the "compromise legislation permitted the defense to request a government witness's signed written statement, a stenographer's transcript of an oral statement, or a statement to a grand jury—but only after the witness had testified and only for impeachment purposes."

This is how the NLRB does it with affidavits obtained during its investigation. See, *e.g.* ALJ 2022 *Bench Book* at 94, § 8–445 ("A Jencks 'statement' or affidavit given by a potential witness to the General Counsel is not subject to production by subpoena in advance of the hearing. The Board's longstanding rule is that such statements or affidavits are producible only after the witness has testified and for use on cross-examination of the witness").

5.

The Steel Seizure case—*Youngstown Sheet & Tube Company v. Sawyer,* 343 U.S. 579 (1952)—arose from President Harry Truman's 1952 decision to seize the steel mills during the Korean War (1950-1953).

Justice Hugo Black, writing for the six justice majority, ruled that President Truman did not have the power to seize the steel mills absent congressional authorization. Justice Frankfurter concurred with the result but wrote a separate, narrower opinion. In all there were seven opinions. See *Felix Frankfurter* at 532-549.

William Rehnquist (1924-2005), later Associate and Chief Justice, in 1952 was a law clerk to Justice Robert Jackson. Rehnquist devoted two chapters to the Steel Seizure case in his book, *The Supreme Court* (2001):

> Shortly after I started work as a law clerk for Justice Jackson—a little more than a year before Chief Justice Vinson's death—the Steel Seizure Case came to the Supreme Court. The case was remarkable in more ways than one. It was a classic confrontation between the White House and a major industry, with the courts as referee. But it also had an immediacy about it that ordinary lawsuits, however important, do not have. Within a span of barely two months, President Truman seized the steel mills, the steel companies challenged the seizure in court, the case went all the way through the federal court system, and was heard and decided by the Supreme Court. A process that takes years for most cases was put on fast forward, all in the bright glare of continuous media coverage.

A week after the Supreme Court ruled against Truman, Justice Black "entertained the president and all the justices at his Alexandria home." "Truman was 'a bit testy' until he drank Black's bourbon and dined on steak." *Felix Frankfurter* at 538. ■

THE 2023 STATE BAR OF MICHIGAN LABOR AND EMPLOYMENT LAW SECTION

DISTINGUISHED SERVICE AWARD

presented to

DAVID E. KHOREY
JAMES M. MOORE

The State Bar of Michigan Labor and Employment Law Section Distinguished Service Award is presented to persons who, for a period of 20 years or more

- have made major contributions to the practice of labor and employment law;
- reflect the highest ethical principles, including principles of civility and professionalism;
- have advanced the development of labor and employment law;
- have a long-established commitment to excellence; and
- are recognized and respected by all constituents in the labor and employment community.

Past Recipients

1997	Theodore Sachs	2011	Thomas J. Barnes
1998	William M. Saxton	2012	George N. Wirth
1999	George T. Roumell, Jr.	2013	Joseph A. Golden
2000	Theodore J. St. Antoine	2014	Janet C. Cooper
2001	Erwin B. Ellman	2015	Richard Mittenthal
2002	James E. Tobin	2016	Kathleen L. Bogas
2003	John E. Brady		John R. Runyan, Jr.
	Joseph C. Marshall III	2017	Michael Pitt
2004	Gordon A. Gregory		David Calzone
2005	Carl E. Ver Beek	2018	Stuart M. Israel
2006	Robert J. Battista		Timothy H. Howlett
2007	H. Rhett Pinsky	2019	Megan P. Norris
2008	Leonard R. Page	2020	Barry Goldman
2009	Sheldon J. Stark	2021	Daniel Swanson
2010	Leonard D. Givens	2022	Nancy Schiffer

AWARD PRESENTATION TO JAMES M. MOORE

Scott Brooks
Gregory, Moore, Brooks & Clark, P.C.

I am thrilled to present this year's Distinguished Service Award to my friend and law partner Jim Moore. Shortly after he received the phone call telling him of his selection, Jim approached me with a deer in the headlights look in his eyes, seemingly totally bewildered that he was selected. I think he truly did not understand the high regard with which his colleagues on both sides of the labor fence, as well as those who sit squarely on top of that fence, view him. But that tells the story of Jim, who despite being remarkably modest for an attorney, provides excellent legal services to our clients, gets along well with opposing counsel, and is held in the highest esteem by labor arbitrators, judges, and other labor professionals.

Some of Jim's qualifications for the Award are easy to list: He was a council member and then chairperson of the Labor and Employment Law Section, he has written for numerous publications including the State Bar Journal and *Lawnotes,* he is a regular ICLE and Labor and Employment Law Section presenter, he is recognized in Best Lawyers in America and is a Michigan Superlawyer. And he is, in fact, a great attorney.

One of Jim's first jobs, however, was working for his hometown of Highland Park, Michigan, serving as a Rat Control Inspector. Apparently deciding that was not a long-term career for him, he moved on to graduate from the University of Michigan, both undergraduate and law school. Most important, he met his wife Carolyn there. They raised two boys in Rosedale Park in Detroit, and appropriately Jim dotes on his four grandchildren.

Jim's first legal job was as a law clerk for U.S. District Court Judge John Feikens. He then joined our law firm and has remained here for nearly 50 years.

Flat out, Jim is one of the smartest lawyers I know. He is widely recognized for his legal expertise and analysis. He is very efficient in his work habits and irritates me to no end by completing his post-hearing briefs a week or more in advance. But when you read those briefs, you begin to understand what a gifted attorney he is. Consistently they are thoughtful, succinct, persuasive, and especially well written.

Jim has represented our clients in hundreds of labor negotiations, arbitrations, hearings before the NLRB and MERC, and in all levels of Michigan and federal courts. One of my favorite cases is when he argued before the D.C. Court of Appeals where a three-member panel issued its decision with four separate opinions. Jim won of course.

Jim was and continues to be a valued teacher and mentor to me and all of our firm's attorneys. A former colleague recalled that when as a young lawyer he worked for our firm, Jim served to guide him both with legal and especially ethical matters, always coming down on the side of "do the right thing."

The respect our clients have for Jim further reflects on both his qualifications as an attorney as well as the manner in which he treats those with whom he transacts. Jim has represented many of these union clients for decades, notwithstanding sometimes hotly-contested elections resulting in leadership changes. Whether police, fire, teamsters, school and government employees, nurses, production workers or others, our clients readily accept his legal guidance but even more so simply relate to Jim as a person.

While I nominated Jim for the Distinguished Service Award, I was not alone. Many Section members also nominated Jim, including current and former firm members, union attorneys with other firms, and attorneys representing employers.

When I informed a union attorney colleague of Jim's selection along with Dave Khorey, he quickly dubbed them the Civility Ticket and I almost fully agree. A slight disagreement: We moved offices recently and I now share an office wall with Jim. I must admit that I have learned of a new side to Jim's prowess – let's just say that he does not always express himself in an entirely civil manner when addressing inanimate objects, like when his computer fails to do what he would like it to do. It turns out this happens fairly frequently. Rarely have I heard such creative use of advanced vocabulary as in these instances, and I note I have a wife who was born and grew up in New York. But for animate objects generally (excepting perhaps rats), and in these times of sharpened disputes and communications, Jim stands out for his continued insistence in any given matter on treating all in a civil and respectful manner, regardless of whose side they are on. For those of us who practice traditional labor law, we must remain cognizant that the parties continue to have a relationship after the instant dispute is resolved. Jim epitomizes that approach.

I know you didn't come here to hear me speak what you really came here for was the cocktail hour so let me give you a few conversation starters when you see and congratulate Jim there.

Feel free to ask him about:

- His worldwide tour singing with U of M's Men's Glee Club;
- His experiences on rat patrol;
- How often he is confused for being former Detroit Tiger Jack Morris;
- The Civil War;
- How often he is confused for being former NSA Advisor John Bolton;
- U of M hockey; and
- How to get Microsoft Word to stop underlining that, ah, stupid paragraph.

And be sure to tell him how truly deserving he is of the award. It is with great pleasure that I present Jim Moore with the 2023 Distinguished Service Award. ■

REMARKS OF JAMES M. MOORE

I am honored and humbled to join a list of such distinguished attorneys—from Dave Khorey to all the others who have received this award over the years.

I have been privileged to practice law with, against, and in front of many of the past recipients and indeed with, versus, and before many of our Section members and beyond. Those experiences have contributed immeasurably to whatever modest success I've enjoyed. Those to whom I owe a debt of gratitude are too numerous to recount. But there are a few I must recognize.

First and foremost, my wife Carolyn. Her love and support got me through law school and has sustained me ever since. We have been married longer than I've been a lawyer.

Next, my Dad, George Moore, who was a lawyer as was his father, my grandpa, Guy Moore. Being in his company as I grew up gave me a true-life exposure to being a lawyer—compared to the TV lawyers like Perry Mason. This was especially so in the years he was in private practice before he became the City Attorney in my hometown, Highland Park.

And I owe much to the only firm I've been a part of – it was Gregory, VanLopik & Higle when I joined it after clerking for Judge Feikens. The principal partners, Nancy Jean and Gordon, were demanding, generous and set examples that I have strived to measure up to ever since. Gordon, who received this Distinguished Service Award nearly 20 years ago, sadly passed away last month at age 92.

My growth as a lawyer and a person has continued with my coworkers in the firm over the years, now with Scott Brooks, Matt Clark, Rachel Helton, and Emily Emerson. They are all fine lawyers and trusted colleagues and I continue to benefit from their knowledge in the law and otherwise. And I must acknowledge their assistance and patience as I have wrestled with the technology that is the hallmark of the practice of law in the 21st Century. I am a bit of a Luddite. So when I wander into what's left of the library and stare in vain at the empty shelves looking for the case book, I am gently guided back to the computer.

I'm a union-side lawyer and have been fortunate to have had the opportunity to practice law in an area that has been and continues to be interesting, challenging and rewarding, at least most of the time. I have done what I could for our clients - the variety of unions we represent and, especially, their members.

I vividly recall – before I went to law school – getting a real-life introduction to the value of collective action and Union representation when I spent a summer working the assembly line at Ford's Highland Park plant up on Woodward Avenue where Ford built Model Ts. No, I did not help build Model Ts. I put two front seats and the rear-view mirror on 125 jeeps a day for the US Army. At one point the dreaded time-study man appeared, recognizable in his sharkskin suit with his clipboard and stopwatch, to announce I had enough time to perform another task – attaching a small dial to the dashboard. Supported by my fellow members of UAW Local 400 I refused; they all realized that if I caved, other dominos would begin to fall. So the jeeps began to roll of the line without installation of the small dial. The assembly line came to a halt; the company hates it when the line stops. But ultimately the company reversed course. We won that battle.

I will not presume to offer advice. But I do commend to you the words of Mark Twain: Always do right. This will gratify some people and astonish the rest. Thank you very much. ■

AWARD PRESENTATION TO DAVID E. KHOREY

Stephanie Setterington
Varnum LLP

I am honored to have the opportunity to introduce my long-time colleague, mentor, and friend, David Khorey, as recipient of the 2023 Distinguished Service Award. In sharing remarks about Dave, I speak on behalf of many who supported his nomination, including attorneys who have known Dave for even longer than the 25 years I have known him, and those who came to know him more recently. I also speak for colleagues who worked alongside Dave, as well as those who worked opposite him on legal matters. I will try to do us all justice as I briefly reflect on Dave and introduce him for presentation of the award.

Dave Khorey may or may not have been a David Letterman fan, but he has always had a knack for presenting legal issues as "top ten lists" with the same type of dry humor and entertainment as Letterman used to do.

I think Dave Khorey might melt into his chair if I presented a list of ten things about him today, so I will keep it to three, and will share the top three terms that aptly describe Dave and his contributions to the practice.

Top Three Terms to Describe Dave Khorey

1. "Mastermind" (or maybe, "Martial Arts Lawyer"). Dave's style of lawyering cannot go unmentioned. All of us who have worked with him agree this man is likely the most creative and strategic lawyer we have ever encountered. As associates in the law firm, it was terrifying. We would sit in Dave's office, where Dave would be strategizing with us about how to proceed with a case. Sometimes, as Dave was describing his thoughts, we might have absolutely no idea where he was going, and he would pause and ask a question like "and what do you think will happen next?" We, or at least I, had to finally muster up the courage and say, "I have absolutely no idea, Dave." Dave would then always pull on a single, metaphorical thread and pull it all together in a detailed and perfectly coherent synopsis. He has taught this to many a lawyer along the way. His skill is still pretty unmatched, but we are all smarter lawyers for having worked with Dave in this way.

Dave is a model for thinking out many steps ahead and considering all the various options. He also has an uncanny ability to turn what many would consider weaknesses in a client's position into strengths, and taking an opponent's apparent strengths and using them for his client's own advantage. This is why the term "martial arts lawyer" comes to mind. If Dave's lawyering were a particular martial art, it might be Judo, which is sometimes described as "the gentle way." Judo is an art in which one uses their opponent's strength, weight, and weapons against them, while preserving one's own strength and energy. This is Dave Khorey.

2. "Servant Leader." Over nearly 40 years of practice, Dave helped shape the direction of labor and employment law at the state and national level, and served the legal community in many ways. Dave is a past chair of the Labor and Employment Section of the State Bar of Michigan, of the Distinguished Service Award Committee, and of the Nominating Committee for the Labor Section. On the national level, Dave testified before the U.S. Senate Committee regarding a piece of proposed federal labor law legislation called the Team Act, in addition to helping shape the law through his tenacious and envelope-pushing advocacy in many NLRB and federal litigation matters. Dave served as a long-time Associate Editor and Contributing Editor for the American Bar Association's treatise "The Developing Labor Law," a staple resource for labor lawyers. Dave likewise served in leadership roles at the Varnum law firm by serving several terms as practice group chair of the labor and employment team, as well as serving as the firm's managing partner between 2016 and 2018.

3. Diplomat. Notwithstanding Dave's tremendous success as an advocate, it is striking that he enjoys the respect and friendship of many attorneys who have been his opponents in legal matters over the years. Several members of the plaintiffs' bar submitted letters of support of Dave's nomination of this award. Dave has treated the practice of law as an art, in which finding the best solution does not always equate to pummeling the other side. He has approached his practice and his fellow attorneys always as a gentleman and a professional.

Dave asked me not to go on too long about him today. This is true to his nature of not seeking the spotlight. However, sometimes you just can't escape situations in which people are going to go on about you, and Dave, this is one of those days. You are so deserving of this award, and I am so pleased and honored to introduce you to receive it. ■

LOOKING FOR *Lawnotes* Contributors!

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

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

For information and publication guidelines, contact *Lawnotes* editor John Adam at jgabrieladam@gmail.com.

REMARKS OF DAVID E. KHOREY

I would like to thank Stephanie Setterington and those from the firm who nominated me for this award—Beth Skaggs, Maureen Rouse-Ayoub, Luis Avila, and Ashleigh Draft. I knew you were all good lawyers, but the truth is, given what you had to work with as a case here, you deserve an award for advocacy under the circumstances. Seriously, working with you has been one of the professional and personal pleasures of my life, and I am proud to have been your law partner and associated with you, as I was proud to be the partner of Carl Ver Beek, Tom Barnes, Paul Kara, Larry Murphy, Dick Hooker, and the late, great Kent Vana.

As I look at the list of the past recipients of this award, including Carl and Tom, I feel compelled to thank those listed for setting such a good example for all of us. It is also important to me though to thank those whose names may not be on that short list of recipients, including but not limited to Kent, Paul, Larry and Dick, who nonetheless day in and day out set fine examples of professionalism. That longer list includes all of you here today, who, by your presence and participation in the Section and its efforts, serve the public and our clients with distinction. Not every lawyer is here, but those who are here are good lawyers.

For that reason I want to also thank Heidi, Keith, and all the Labor and Employment Section Council, its leadership and officers, and its committees for their committed and faithful service. Their work makes a difference for all of us, and in so doing they help us make a difference for the public and the clients we serve. I am humbled by the trust they have shown in me serving as an example. I hope I live up to that trust.

Of course for my own good example I look first to my wife and life partner, Jenny, who I always want to thank every minute for everything. Her patience endures, and any award I receive rightly belongs to her.

And it rightly belongs to those who over the years we practiced with, or against, or in front of, who themselves practiced law with respect, and intelligence, and good humor, and good faith, who knew that what mattered was not just what they did, but how they did it. You all know them, you all encounter them, you will find them here, as I found them, in this Section, in this room, more than anywhere.

Thank you for being here today and for allowing me to hopefully encourage all of our continued participation toward a more distinguished profession, one we can always serve better and more fully, as our best mentors and teachers have done, and as future lawyers look for us to do, so that it can rightly be said of all of us some day, that we have served with distinction.

Thank you again to the Section and Council and Committee, and to all of you. ■

MERC NEWS

Sidney McBride, Bureau Director
Bureau of Employment Relations

Proposed Legislation Impacting PERA and LMA.

Proposed changes to key statutes administered by this agency have been introduced by one or both legislative bodies. At this writing, a glance of the proposals include:

1. **HB 4004/SB0005:** Repeal Freedom to Work Provisions in PERA Sections 9 and 10
2. **HB 4005/SB0034:** Repeal Freedom to Work Provisions in LMA Sections 1, 8, 17 and 22.
3. **HB 4044:** Repeal Section 15 (b) of PERA previously added by 2011 PA 54 and 152.
4. **HB 4065:** Repeal the Emergency Manager Act including PERA Section 15 (7-9) established under 2012 PA 436--Local Financial Stability and Choice Act.

Agency staff will monitor the status of these and other related proposals.

SBM LELS 2023 Mid-Winter Conference.

For the second time, the agency participated in the 2023 Mid-Winter and Annual Meeting of the Labor & Employment Law Section of the State Bar of Michigan. The first "in-person" mid-winter event since 2020, Commission Chair Tinamarie Pappas and yours truly served as dual presenters during the segment—***MERC Case Highlights and Agency Updates.*** Chair Pappas covered 14 recent MERC cases issued over the past 13 months that dealt with various "hot issues" such as—Definition of "teacher" under PERA Section 15; Election bar following union disclaimer; Validity of an unsigned ballot return envelope and aspects of the "covered by doctrine" as to a party's bargaining obligation.

I discussed recent case processing enhancements, the agency's collaborative discussions to address unnecessary delays stemming from pre-hearing case adjournments, the anticipated postings to fill staff vacancies existing pre-pandemic, and a new "fast -track" grievance mediation pilot geared to allow interested parties to participate in a virtual mediation session within 3 business days from the agency initiating the case.

Overall, attendees seemed to enjoy the segments offered by each of the presenters. Special thanks to the LELS Council and Program Committee for inviting this agency to participate on the program.

The PowerPoint presentation used by this agency during the conference is available under *What's New* tab at www.michigan.gov/merc ■

SIXTH CIRCUIT CLARIFIES FMLA NOTICE REQUIREMENTS

Kimberly M. Coschino and Schuyler Ferguson
Miller, Canfield, Paddock and Stone, P.L.C.

The Sixth Circuit Court of Appeals issued two opinions that clarified the notice requirements under the Family Medical Leave Act ("FMLA"). The cases are **(1)** *Render v. FCA US, LLC,* 53 F.4th 905 (6th Cir. 2022) (Suhrheinrich, Moore, and Clay, J.) clarified the notice requirements for an employee to take intermittent FMLA leave and **(2)** *Milman v. Fieger & Fieger, P.C.,* 2023 WL 387293 (6th Cir.) (Kethledge, Stranch, and Nalbandian, J.) ruled that an employee's initial FMLA leave request gave sufficient notice to qualify as protected activity and to invoke the retaliation protections under the FMLA.

Both cases arose from the Eastern District of Michigan, and in both cases, the Sixth Circuit ruled for the employees and reversed the district court's rulings for the employers.

1.

In *Render,* the plaintiff requested up to 3-4 days of intermittent FMLA leave per month to manage his depression and anxiety disorder. He then was tardy three times and absent twice, saying he was having a "flare-up," did not "feel good at all," and/or had "been sick the last few days."

His employer, FCA, then terminated him for violating its attendance policy, and the plaintiff sued for FMLA interference. District Court Judge Robert Cleland granted FCA summary judgment, finding the plaintiff had not given sufficient notice to FCA before his absences. The Sixth Circuit reversed.

The impacts of the Court's decision include:

- "In intermittent leave cases, the qualifying reason is known in advance, even if it is unclear when the condition will flare up and require time off."
- The employee's "formal FMLA approval process satisfied the one-time notice requirement for intermittent leave," and his "subsequent calls on the days he wanted to use his leave did not need to specifically reference either the qualifying reason for the leave or the need for FMLA leave."
- As such, the employee "merely had to advise FCA of his schedule change on days that he wanted to use his intermittent leave."

2.

In *Milman,* the Sixth Circuit, in an opinion by Judge Stranch, reversed the dismissal of an FMLA claim brought by an attorney who was fired immediately after requesting unpaid leave to care for her two-year-old child (who had a history of respiratory illness and was exhibiting symptoms associated with Covid-19) during the early days of the Covid-19 pandemic. The Sixth Circuit ruled that the attorney's request for leave was protected under the FMLA, regardless of whether she was entitled to the leave.

To state a claim for retaliation for exercising (or attempting to exercise) FMLA rights, a plaintiff must establish that: (1) she was engaged in protected activity; (2) her employer knew she was engaged in the protected activity; (3) her employer took an adverse employment action against her; and (4) there was a causal connection between the protected activity and the adverse employment action. *Id.* at *5.

District Court Judge Stephen J. Murphy stated that "the FMLA protects leave that is taken only if it falls within the scope of entitlement; taking leave to which the employee was not entitled unambiguously falls outside the FMLA's protections." *Id.* at *5. Accordingly, Judge Murphy dismissed Milman's claim by reasoning that she was not entitled to the leave she sought.

The Sixth Circuit disagreed and remanded, pointing to the unique circumstances in Milman where the employee "never actually took leave; she only made a request for leave." *Id.* at *6. The Court held that the FMLA requires employees to put their employers on notice of their desire to use their unpaid leave by making a formal request to the employer, and that this is the first step in the process contemplated by the statute's procedural framework.

Thus, the Sixth Circuit held that the key question "is whether the FMLA protects the right of an employee to inquire about and request leave even if it turns out that she is not entitled to such leave." *Id.* The Court answered in the affirmative and provided the following rationale:

- The initial request for leave is protected under the Act to "protect the 'exercise or attempt to exercise' FMLA rights, . . .without regard to ultimate entitlement." *Id.* at *6.
- "There is no basis for imagining that Congress created a statutory scheme that puts the onus on employees to know preemptively whether their leave requests would fall within the scope of statutory entitlement." *Id.*
- "FMLA rights and the statute's purpose would be significantly diminished if employers could fire an employee who simply took the required initial steps to access FMLA leave." *Id.* ■

SCOTUS TO ADDRESS NLRA PREEMPTION

Blake C. Padget
Butzel Long, PC

On January 10, 2023 the Supreme Court heard oral argument in what is set to be a groundbreaking labor law decision, *Glacier Northwest, Inc. v. Teamsters,* Case No. 21-1449. *Glacier* involves issues of preemption of state lawsuits against unions when the employer makes common-law allegations of intentional destruction of property during a labor dispute.

In 2017, Glacier and Teamsters Local Union No. 174 were negotiating a new collective bargaining agreement. In an effort to apply pressure to Glacier, the employees went on strike. The union instructed drivers to return the running trucks to Glacier to minimize any potential damage, which the drivers did. Regardless of these efforts, all of the concrete in the trucks had to be discarded at Glacier's expense. Glacier later filed suit in state court claiming the union intentionally timed the strike to ruin the concrete and damage the trucks.

The case worked its way through the Washington state court system. The Washington Supreme Court found Glacier's claims were preempted under the Supreme Court's decision in *San Diego Building Trades Council v. Garmon. Garmon* held there cannot be a state cause of action over activities that are actually or arguably protected by or prohibited by the National Labor Relations Act. Glacier appealed to the Supreme Court.

At oral arguments, the Union argued that given its attempts to minimize damage, the strike could be considered "arguably protected" under federal labor law, which precluded Glacier's state court suit. Glacier on the other hand, argued the Union failed to take "reasonable precaution" to prevent damages, which should permit Glacier to sue in state court without going through the traditional NLRB complaint process. The Biden Administration also weighed in on the dispute. Assistant Solicitor General Vivek Suri said the justices should write an opinion that recognized "the mere spoilage of a perishable product after people walk off from the job is not something that the striking employees can be held responsible for," but that the truck drivers' actions were in a different category that should be actionable.

The Supreme Court, with its 6-3 conservative majority, has leaned toward curbing the power of labor unions in recent years. The court could use this case as an opportunity to limit or reverse *Garmon* preemption. Perhaps telegraphing the Court's stance, Chief Justice John Roberts said that there is a distinction between causing economic harm and intentional property destruction. As the Chief Justice put it, "[t]he difference between the milk spoiling and killing the cow."

Glacier will be one of the most highly anticipated decisions this term, particularly in the area of labor and employment law. Stay tuned for future issues of *Lawnotes* for updates about *Glacier* as well as other labor and employment issues addressed by the Court this term. ■

STOP FILING UNNECESSARY CERTIFICATES OF SERVICE IN FEDERAL COURT

John G. Adam

Stop filing useless certificates of service (COS).

The Federal Rules were amended in 2018, following the legal maxim that the law does not require you to do useless things. Now you don't have to file a COS when service is accomplished by using the ECF system. This covers all cases where the parties are represented by attorneys who "must" e-file.

Rule 5(d)(1)(B) states "No certificate of service is required when a paper is served by filing it with the court's electronic-filing system." See e.g. N.D. III. LR 5.5 (COS "is required only when service of a document filed on the Court's E-Filing system is made on a recipient who is not an E-Filer listed on the docket of the proceeding.").

The Committee Note to the 2018 Amendment explains (paragraph breaks added, sentences omitted):

> Under amended Rule 5(d)(1)(B), a certificate of service is not required when a paper is served by filing it with the court's electronic-filing system.
>
> When service is not made by filing with the court's electronic-filing system, a certificate of service must be filed with the paper or within a reasonable time after service, and should specify the date as well as the manner of service.
>
> Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. The time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney.

As with most rules, there are exceptions, such as dealing with non-parties or *pro se* parties. The committee note states that "Filings by a person proceeding without an attorney are treated separately."

I also use COS when I want proof that I served a paper that is not at the time filed with the court, like a prospective draft Rule 11 sanctions motion per Rule 11(c)(2) or an expert report. The committee note states that for "papers that are required to be served but must not be filed until they are used in the proceeding or the court orders filing, the certificate need not be filed until the paper is filed, unless filing is required by local rule or court order." For example:

> **Service of Defendants' [Prospective] Sanctions Motion**
> I certify that on May 6, 2022, I served the Defendants' [Prospective] Sanctions Motion (10-pages) with Exhibits on counsel for plaintiff ABC by email at ilackmerit@jailhouselaw.com.
>
> **Service of Plaintiffs' Expert Report**
> I certify that on May 6, 2022, I served the Expert Report of Dr. John Medicine on counsel for defendant XYZ by email at Iamlaw@bigdownlaw.com.

Get up-to-speed on the 2018 amended Federal Rule 5. Don't mindlessly tack a COS to every filing *unless* the amended rule requires it, or there is a good reason for doing so.

THE FTC WON'T LET ME BE: GAUGING REACTIONS TO FTC'S PROPOSED BAN OF NON-COMPETES

Will Forrest
Kienbaum Hardy Viviano Pelton & Forrest, PLC

The Federal Trade Commission announced in January 2023 a proposed rule that would prohibit the use of contractual non-competes and require employers to rescind existing non-competes. Responses to the proposed ban have been swift and polarizing. Let's take a quick look at the FTC's proposed rule and the positive feedback and negative backlash it has generated.

The Rule. The proposed rule would define non-compete provisions as "an unfair method of competition" under Section 5 of the Federal Trade Commission Act (FTCA). Employers would be prohibited from: (1) requiring employees to enter into non-competes; (2) attempting to enter into non-competes; and (3) representing to employees that they are subject to a non-compete. In addition, the rule would require employers to rescind existing non-competes and provide individual notice of that recission to affected current and former employees.

The rule states that a "functional test" will apply to determine whether a contractual provision is a prohibited non-compete clause. FTC supplemental materials clarify that a contractual provision that prohibits former employees from soliciting the employer's customers (non-solicits) or from disclosing the employer's confidential information (NDA's) would generally not be considered a non-compete clause. Rather, those types of restrictive covenants would only be prohibited under the rule where they were so "unusually broad in scope" that they function as a non-compete. As an example, the rule states that an NDA operates as a "de facto" non-compete clause where it is written so broadly that it effectively prevents an employee from working in the same field for another employer.

The proposed rule creates an exception that allows non-compete provisions in connection with the sale of a business, but only when the person restricted by the non-compete owns at least 25% of the business entity being sold.

If adopted this rule would supersede all contrary state laws.

The Proponents. Many labor organizations and consumer rights groups had called on the FTC to ban non-competes nationwide. Those groups argue that that non-competes operate to substantially reduce workers' wages, hinder innovation by preventing people from starting new businesses, and prevent workers from finding better jobs and working conditions. As an example, the proponents of the FTC's rule point to non-competes in the new-hire paperwork for low-wage workers. Jimmy John's, the freaky-fast sandwich chain, had an infamous non-compete that prohibited delivery drivers from working for two years or within two miles of a Jimmy John's store for a competitor that made more than 10 percent of its revenue from sandwiches. The chain dropped those non-competes as part of settlements with attorneys general in Illinois and New York back in 2016.

For its part, the FTC estimates that the proposed rule would increases workers' earnings by $250 billion to $296 billion each year. And the FTC points to research that its rule would "close racial and gender wage gaps by 3.6 to 9.1 percent." The FTC further notes that employers in the three states that currently prohibit non-competes – California, North Dakota, and Oklahoma – have found ways to protect their confidential information without non-competes.

The Opponents. Business advocacy groups have blasted the proposed rule as a massive and unlawful overreach that the FTC lacks the authority to promulgate. Those groups also argue that the rule would infringe on the restrictive covenants under state law that employers need to protect their investments in technology and training.

The U.S. Chamber of Commerce has already promised a lawsuit challenging the FTC's rule if it is adopted in its current form. That litigation would assert that Congress never delegated authority to the FTC under Section 5 of the FTCA to invalidate by rulemaking such a broad spectrum of private contracts. The case would likely involve the "major questions doctrine," which the U.S. Supreme Court recently invoked when holding that Congress must *clearly* authorize federal agencies to regulate issues of "vast economic and political significance."

Opponents of the proposed rule also note that the FTC should have used a scalpel, and not a sledgehammer, when defining what contractual provisions qualify as prohibited non-competes. For example, rather than a blanket prohibition, the FTC could have used a compensation threshold (or identified specific industries or job duties) for non-competes if it truly wanted to protect low-wage workers and not the highly-compensated techies and executives that often benefit from taking an employer's know-how to a competitor. The state of Illinois, for instance, prohibits non-competes for those earning $75,000 per year or less; it also generally prohibits non-competes for those in the construction industry with exceptions for those whose primary duties include management, engineering, architectural design, or sales. And the salary threshold increases to account for inflation through 2037. The FTC's proposed rule, its opponents say, improperly ignored this type of tailoring.

What Happens Next? The initial comment period for the proposed rule is open through March 20, 2023 (which could be reopened). The rule could then be finalized, abandoned, or a new rule proposed. Before the final rule is published, the Office of Information and Regulatory Affairs would likely analyze its cost and impact on the economy. Congress would have an opportunity to review the final rule before it took effect. And then comes the litigation described above. ■

HOW TRENDS IN STREAMING SERVICES ARE STAGNATING WAGES

Ethan Lazzara

With the highest inflation in over thirty years, stagnant wages push workers further into financial insecurity. Ahead, I explain how the current content-driven business model of streaming services has led to shorter television shows, stagnating the wages of production crews.

Streaming services are online content providers that one accesses through purchasing a monthly subscription. The most popular provider is Netflix; however, in the past decade, other streaming services (such as HBOMax, Disney+, and Amazon Video) have started to challenge Netflix's dominance.

With an oversaturated market of streaming services, each service is competing with one another to have the next hit series. While a competitive television market is nothing new, the current market is far more influenced by immediate success than previous eras. In the past, new programs were given time to grow in popularity. *Breaking Bad* and *Mad Men* both drew less than a million viewers for their first two seasons, but went on to become two of the most celebrated television shows of all time.

The streaming model, at present, does not allow a show to develop. Their business model requires a constant influx of new members, which they hope to attract with a stream of new content. This has left shows with little time to grow fanbases. Streaming executives will deem the show a failure if it is unable to garner new customers upon release. Shows either become a mega-success like Netflix's *Stranger Things* or are quickly thrown to the dustbin, even if they enjoyed moderate success. Such cancellation of shows is a minor annoyance to viewers at home. However, for the writers and crew members in these shows, this shortened lifespan prevents them from achieving greater wages and benefits.

Under the current International Alliance of Theatrical Stage Employees (IATSE) contract, the wages and benefits of crew members are dependent on the number of seasons being produced. Crew members are given "Tier 1" wages for filming a pilot, and move up to "Tier 2" for the first and second season. If the show is renewed for three or more seasons, crew members are promoted into the top tier of "Current TV Rate." Despite recent contract negotiations between IATSE and the major studios, the tier system has remained in place to decide workers' wages on television shows. Unlike cable television, Netflix has been classified as "New Media" under the IATSE contract, allowing them to pay their workers a lesser wage until the third season of a show. This has allowed Netflix to produce shows for a cheaper price than its cable and network counterparts, but prevents crew members from advancing to the highest tiers of their contract.

This past year, streaming services have put a large number of their shows on the chopping block. Netflix has decided to cancel 21 television shows after their first or second season. Additionally, streaming services are pushing for fewer seasons per show. Netflix is ending 16 shows before the fourth season. According to Netflix's head of original content, Cindy Holland, the push for shorter term shows is to "stretch our investment dollars as far as we can," "if the audience doesn't show up, we think about the reason to continue to invest." However, Netflix has even begun canceling some of its popular shows. The show 1899 was canceled recently, despite receiving widespread critical acclaim and mainstream success. The service has also canceled other popular shows like *American Vandal* and *Daredevil,* allowing them to be picked up by opposing streaming services. This change causes the crew members to return to the first tier.

The cycle of stagnant wages became evident with the Netflix show, *Daredevil.* It was a massive success but was canceled after its third season, only to be picked up by Disney+ and rebooted from season one. The writers and production crew move up into the "Current TV Rate" tier of their contract, only to be dropped down to "Tier 2." Although the Disney+ series will continue as though the show was never canceled, the crew's wages start from the beginning.

This is not to suggest that production crew wages are the reason that Netflix has been pushing for shorter form shows and canceling popular shows, but it certainly has become a consequence of this strategy.

This cycle of depressed wages will continue as customers have become reluctant to start new shows, due to fears of cancellation. The production crews for these services are continuously bouncing between shows, stuck in the beginning tiers of their contract. Hopefully, pressure by consumers will motivate streaming services to give their shows a little more room to appeal to an audience. Even *Seinfeld* and the *Simpsons* needed more than one season to make history.

Editor's Note: Ethan Lazzara is a 2022 graduate of James Madison College, MSU. He interned at the UFCW Local 951 during college and plans to go to law school. ■

RULE 12(B)(6) AND OTHER JUDICIAL NOTICE

Rule 12(b)(6) standards allow defendants to go beyond the complaint to a greater degree than some lawyers and judges think.

Defendants can ask courts to take judicial notice of "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint." *Golf Village North v. City of Powell,* 14 F.4th 611, 617 (6th Cir. 2021)(citation omitted). This includes "judicial notice of proceedings in other courts of record." See *Rodic v. Thistledown Racing Club,* 615 F.2d 736, 738 (6th Cir.), *cert. denied* 449 U.S. 996 (1980) (dismissing §1983 claim) and *Walker v. Streeval,* 2020 WL 1794739 at *2 (E.D. Ky.) (dismissing *Bivens* claim).

EMS v. Gaal, 58 F.4th 877, 883-884 (6th Cir. 2023) has an excellent discussion on the district court's 12(b)(6) authority to consider matters reflected in bankruptcy filings. The Sixth Circuit rejected EMS' argument that the district court erred (1) in taking judicial notice of EMS's filing in Procom's bankruptcy proceeding, without converting the motion to dismiss into a Rule 56 motion and allowing EMS to present other evidence, and (2) in refusing to consider an affidavit filed by EMS. See also Judge Borman's discussion of Rule 12(b)(6) standards in *Dunigan v. Trooper Michael Thomas,* 2023 WL 2215954, at *4 (E.D.Mich.). JGA

WAGE HOUR DIVISION CORNER

Jennifer Fields, Division Manager
Wage Hour Division of BER

COA Reverses *Mothering Justice v Attorney General Dana Nessel.*

The Michigan Court of Appeals recently ruled that changes made by the Legislature in late 2018 that altered the previously adopted citizen referendums regarding mandatory paid sick leave and higher minimum wage rates were constitutional. (See *Mothering Justice v. Attorney General,* 2023 WL 444874 (Mich. COA issued 1/26/2023). The Court of Appeals reversed the 2022 decision of the Court of Claims. Because the reversal was given "immediate effect", the existing Paid Medical Leave Act (PMLA) provisions and minimum wage rates remain unchanged as of this writing. This case was appealed to the Michigan Supreme Court on February 10, 2023. Updates will be posted on the Wage and Hour website. Michigan's minimum wage rate is currently $10.10 per hour as of January 1, 2023.

Claims for unpaid wages, fringe benefits or minimum wages

Employees may file a wage or benefit related claim online at www.michigan.gov/wageclaim. Claims must be timely filed within the applicable statute of limitations period. An employee has 12 months to file a claim under the Payment of Wages and Fringe Benefits Act of 1978; 3 years to file minimum wage and overtime claims under the IWOWA of 2018, and 6 months for to file claims under the Paid Medical Leave Act 338 of 2018.

Prevailing Wage Legislation (HB 4007/SB 0006)

Bills have been introduced in the Michigan House and Senate to reinstate a Prevailing Wages on State Funded Construction Projects Act, similar to the former Act 166 of 1965, which was repealed in June 2018. The proposed new legislation would require that contracts on State Funded construction projects put out for bid by a contracting agent must include a requirement to minimally pay the state prevailing wage. (The Federal Davis Bacon rates apply to federally funded projects.) Currently, this agency maintains updated rate schedules on our website, pursuant to the DTMB requirement that approved contractors pay prevailing wage rates on certain state issued contracts awarded on or after March 1, 2022.

Youth Employment

Employers need to be in compliance with both the Federal FLSA child labor requirements and Michigan's Youth Employment Standards Act 90 of 1978. Michigan requirements as to youth workers under age 18 include approved work permits, work breaks, adult supervision and working hour limits. Visit www.michigan.gov/wagehour for more information on employing minors. ■

MERC ULP RULINGS

Aubree A. Kugler
White Schneider PC

Capitol Area Transportation Authority -and -Amalgamated Transit Union, Local 1039, Case No. 21-E-1120-CE (November 16, 2022)

The union alleged that the employer violated PERA by prematurely declaring impasse during negotiations for a successor agreement, and by engaging in bad faith and regressive bargaining. The record established that prior to declaring impasse, the employer met with the union approximately 70 times for bargaining over a period of about 18 months. In that time, the parties also participated in fact-finding and a report was issued by a neutral fact-finder appointed by the Commission.

Following the employer's declaration of impasse, it unilaterally implemented certain terms and conditions of employment, to include wage increases and changes to work assignments, overtime distribution, and vacation payouts. Although the parties continued to bargain, at that point the union filed its charge.

The Administrative Law Judge (ALJ) began his analysis with the well-established principle that the parties have a duty to bargain in good faith. He noted that this obligation does not, however, compel either party in negotiations to agree to any proposal or make a concession. Essentially, the requirement of good faith bargaining is simply that the parties manifest such an attitude and conduct that will be conducive to reaching an agreement.

The ALJ found that in considering whether the employer had acted in bad faith, it was necessary to examine the totality of the circumstances. As stated, the parties bargained for about 18 months over 70 sessions, and also submitted the matter to fact-finding. The ALJ found that during that time, there were a number of issues on which the parties had reached an agreement and on which the employer had made concessions. The ALJ found that the employer's failure to counter every offer presented by the union did not establish that it had engaged in surface level or bad faith bargaining, as the issues which remained were complex and the parties' disagreement on those issues was fairly well-entrenched.

Further, the ALJ noted that it is well-established that the parties must continue to bargain for a reasonable period of time concerning the substance of a fact finding report; generally, this has been found to be about 60 days after the issuance of the report. In that time, the parties must make an effort to reconcile their differences. Still, this duty does not require either party to adopt the recommendations of the fact finder. Therefore, the employer's failure to make concessions or new proposals after fact-finding does not in itself give rise to a finding that it violated PERA.

The ALJ examined the record as a whole, including the fact that by the time the fact-finding report was issued, the parties had already bargained for a significant period of time over the course of numerous sessions, some of which were attended by a neutral mediator. Further, both parties rejected portions of the report which did not align with their respective proposals. Additionally, the employer provided the union with its rationale for disagreeing with the fact-finder's recommendations. Thereafter, an additional six bargaining sessions were held. During those sessions, the employer made some new concessions prior to declaring impasse. The ALJ held that a finding of a PERA violation based on these facts would contravene Commission precedent and PERA itself.

Similarly, the ALJ rejected the union's assertion that the employer prematurely declared impasse. An employer violates PERA when it takes unilateral action prior to a legitimate impasse. The ALJ noted that the Commission has defined impasse as the point at which the positions of the parties have so solidified that further bargaining would be futile. At that point, the employer may generally take unilateral action as long as the terms and conditions of employment which it then implements are understood within its pre-impasse proposals. The ALJ noted that the determination of whether there is a bona fide impasse must also be made on a case by case basis, and must consider the totality of the circumstances and the entire course of conduct of the parties.

In this case, the ALJ applied a number of factors which have been set forth by the Commission in determining whether an impasse exists, to include the amount of time spent in bargaining, whether the positions of the parties have become fixed, the contemporaneous understanding of the parties as to the state of the negotiations, the importance of the issue or issues as to which there is disagreement, whether the parties have utilized mediation and fact finding. Here, the union asserted that the positions of the parties were not fixed at the time the employer announced it would be implementing portions of its last proposal, and therefore no impasse existed.

There was no dispute that proposals were made following the announcement and that those proposals did include some concessions. However, at the same time, the union also withdrew some of the concessions it made previously and remained firm on a number of issues the employer had identified as crucial. Further, the union's new proposals concerning wages deviated from its prior proposals and widened the gap between the parties on that issue. The ALJ found that a union does not prevent impasse by making proposals which it knows are unacceptable to the employer. The ALJ noted also that the declaration of impasse came at a point where, as stated, the parties had bargained for 18 months, exchanged dozens of proposals, and attended over 70 bargaining sessions, a number of which were attended by a mediator, and participated in a two-day fact-finding hearing, following which the parties rejected all of the recommendations that did not algin with their proposals. The ALJ found that under these circumstances, it cannot be concluded that continuing to bargain would have resulted in an agreement.

As to the union's last allegation, that following the declaration of impasse, the employer engaged in regressive bargaining by offering less favorable terms than in its prior proposal and by withdrawing from a tentative agreement entered into during the negotiations, the ALJ also concluded that no violation of PERA occurred. The employer did not dispute that it returned to the bargaining table and presented a proposal that contained new offers and modifications of previous tentative agreements.

The ALJ reasoned that making a contract proposal to the other party which is less favorable than a previous proposal is not per se evidence of bad faith bargaining, nor is alteration of a perhaps tentatively agreed upon piece of contract language. The party's conduct must be viewed in its totality to determine whether the allegedly regressive proposals are a tactic to avoid reaching an agreement. A party may modify its position, or offer less, over the course of extensive bargaining without engaging in bad faith. The ALJ compared the facts of this case to those of *City of Springfield,* 1999 MERC Lab Op 399, wherein the Commission did find a violation of PERA when the employer made a proposal after almost a year of bargaining which eliminated major elements of the prior tentative agreements and substantially altered the language of the expired contract. Based on the totality of the circumstances here, the ALJ concluded that the employer's package proposal did not demonstrate an intention on the part of the employer to avoid reaching an agreement.

As the totality of the circumstances did not support a finding that the employer had engaged in regressive or bad faith bargaining or had prematurely declared impasse, the ALJ recommended dismissal of the union's charge. No exceptions were filed, and the Commission adopted the ALJ's Recommended Order.

Suburban Mobility Authority for Regional Transit (SMART) -and- Shakeysha Burt, Case No. 22-H-1655-CE (October 20, 2022)

In this case where no exceptions were filed, the Commission adopted the Decision and Recommended Order of the Administrative Law Judge (ALJ) finding that no unfair labor practice had been committed by the public employer. The charge, filed by an individual employee, alleged that the employer had discriminated against her in hiring a different candidate for a supervisory role.

The ALJ issued an Order to Show Cause in response to the charge, relying on Commission precedent and pursuant to Rule 165(2)(d) of the Commission's General Rules, on the basis that the employee had failed to state a claim upon which relief could be granted. The employee failed to respond to that Order. The ALJ found that by itself, failure to respond to an Order to Show Cause is cause for dismissal of the charge in favor of the respondent employer.

Further, the ALJ stated that the employee's failure to respond notwithstanding, her charge did not state a claim under PERA where relief could be granted. The ALJ reiterated that the Commission's jurisdiction concerning claims by an individual against her employer is limited to the question of whether the employer interfered with, restrained, and/or coerced a public employee with respect to his or her right to engage in union or other protected concerned activities guaranteed under Section 9 of PERA. Not every action taken by an employer which is unfair or even illegal falls within the purview of the Commission. In this case, the employee failed to allege that she was restrained, coerced, and/or retaliated against with respect to rights guaranteed to her under PERA. As such, the ALJ found that the Commission did not have jurisdiction over the issue raised by the employee's charge. The charge was dismissed. ■

In the Matter of:
Felis Silvestris Catus
v
Canis Lupus Familiaris

Labor and Employment Law Section
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INSIDE *LAWNOTES*

Waiting for *Lawnotes*

- Channing Robinson-Holmes explains how the Michigan Supreme Court majority got it right on the Whistleblowers' Protection Act.
- Russell Linden reviews pro-labor Biden NLRB rulings. Warning: There are lots.
- To understand the FTC's plan to ban anti-compete contracts read Will Forrest.
- Julie Gafkay and Blake Padget separately write about expected Supreme Court rulings, one on Title VII religious accommodations, and the other on NLRB *Garmon* preemption.
- FMLA notice rulings by the Sixth Circuit are explained by Kimberly Coschino and Schuyler Ferguson.
- Benjamin King explains how a recent NLRB ruling protects workers wearing union insignias.
- Tips on how to make oral arguments by Stuart Israel and William Rehnquist.
- Doctor Joel Kahn explains why water is important for your health.
- Learn history in the new biography of Felix Frankfurter.
- Get up-to-date on MERC and Wage and Hour by Sidney McBride and Jennifer Fields.

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