LABOR LAW AND UNEMPLOYMENT COMPENSATION

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I. INTRODUCTION

It has been said that American labor law is in dire need of rationalization. The statutory framework within which it has evolved, and presently functions, is complex. The labor relations system created by the National Labor Relations Act, and its public sector counterparts, has dominated judicial ruminations for many years. Although Board and court decisions have “flushed out some of the interstices” of the

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Act, the system requires the development of innovative processes to reduce the polarization which presently characterizes it, and to render it more responsive to public interest concerns. The need to provide more continuity to the law is most evident from the cases analyzed by this author during the Survey period.

This Survey period saw the penetration of the arbitral forum by the judiciary; a disturbance of the formulae established for apportioning damages in duty of fair representation cases; a reaffirmation of the preeminence of the Public Employment Relations Act (PERA); an extension of the discrimination proscription, and renewed vitality of the Elliott-Larsen Civil Rights Act; and a lucid treatment of the separation of powers doctrine and its impact on the regulation of the practice of law. As in the past, the basis for this analysis are the Michigan appellate cases, and where essential to the refinement of an area of law, its parallel federal sector development.

II. ARBITRATION

The arbitration process is essential to peaceful labor relations. Despite its importance, however, courts have, from the inception of arbitration, conscientiously struggled with the issue of how much deference should be given to arbitrators' decisions. When courts ultimately relinquished their petty jurisdictional rivalries and enshrined arbitration as the "functional" equivalent of litigation, an effective partnership was consummated. Recently, however, there seems to be a qualified but disturbing retreat from the position which equates arbitration with litigation. This abandonment suggests judicial activism and is primarily reflected in the private sector decisions of the Michigan courts and the Sixth Circuit during the 1982-83 Survey period.

A. Police and Fire Arbitration

By virtue of Public Act No. 312 of 1969, police and fire services are subject to compulsory arbitration of labor disputes. The first such dispute to come before a Michigan court during the Survey period was Local 1277, AFSCME v. City of Center Line. Speaking through Justice Williams, a unanimous Michigan Supreme Court held that an Act 312 arbitration panel did not have the authority to compel the inclusion of a layoff clause into the parties' collective bargaining agreement. In so deciding, the supreme court reversed a court of appeals decision which had construed this aspect of Act 312 decision-making as falling within the purview of the arbitration panel's authority.

3. Id.
Public Act 312, as amended, entitles a union representing employees in the police or fire services and the governmental employer to invoke binding arbitration where a dispute exists concerning wages, hours or working conditions. The Michigan Supreme Court observed that the layoff issue heard and decided by the arbitration panel was not economic in nature. As such, the panel would not be bound to select the last best offer of settlement submitted by the parties, but would be free to fashion its own remedies. The award of the panel, however, must be derived from the express or implied terms of the existing collective bargaining agreement. In this case, it went beyond its scope.

In its analysis, the court cautiously noted that Public Act 312 does not specifically delineate the scope of an arbitration panel's authority. However, by looking to the Public Employment Relations Act (PERA) as a complement to Act 312, and reviewing the crucial language, the court ascertained that the issue before the panel did not fall within the statutory guidelines. "Wages, hours and other terms and conditions of employment" are deemed to be mandatory subjects of bargaining. The court held that it was only with respect to the mandatory subjects that there was a duty to bargain. Inasmuch as the layoff provision was not considered a mandatory subject of bargaining, and therefore beyond the scope of the arbitration panel's authority, the city did not violate the terms of its collective bargaining agreement by failing to bargain on the issue.

Certainly this decision of the court seems to be linearly consistent with previous case holdings in which the courts have suggested that management within the public sector maintains substantial governmental authority to make decisions regarding the scope and nature of services it is required to provide. The court cited as rationale for its

5. 414 Mich. at 652-55, 327 N.W.2d at 826-27.
6. Id. at 645-46, 327 N.W.2d at 823.
7. Id. at 654-55, 327 N.W.2d at 827.
10. Id. at 652, 327 N.W.2d at 826.
11. Id. at 654-55, 327 N.W.2d at 827.
12. However, the court noted, in dicta, that the arbitration panel had the authority to decide the effect of the layoff decision since this was deemed to be a mandatory subject of bargaining. Id. at 665, 327 N.W.2d at 831-32. Accord Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964) ("contracting out" of work previously performed by union members was a mandatory subject of bargaining, thereby imposing the requirement of duty to bargain).
13. 414 Mich. at 661, 327 N.W.2d at 830.
14. See, e.g., Board of Educ. v. Rockford Educ. Ass'n, 3 Ill. App. 3d 1090,280 N.E.2d 286 (1972) (court granted stay of arbitration because it determined that only the school board and not the arbitrators had authority to decide who should be appointed to a job). Delegation of decision-making to a third-party was thus curtailed.
decision the need to preserve a strong management rights clause.\footnote{15}{414 Mich. at 665, 327 N.W.2d at 831-32.}
Since the purpose of providing an alternative procedure for the resolution of disputes is to foreclose the possibility of strikes when an impasse in negotiations is reached, a different result would have emasculated the authority of the governmental entity. Ostensibly, the legislature did not intend to give the arbitration panel unbridled authority to compel agreement on permissive subjects of bargaining.

It is noteworthy to observe that this decision did not reflect any marked hostility toward the compulsory arbitration process. The court did not rely on the well-established theories of improper delegation of governmental authority\footnote{16}{See Board of Trustees v. Cook County College Teachers Union, 62 Ill. 2d 470, 343 N.E.2d 473 (1976); Morris Cent. School Dist. Bd. of Educ. v. Morris Educ. Ass'n, 84 Misc. 2d 675, 376 N.Y.S.2d 376 (1975).} and public accountability\footnote{17}{Id.} in rendering its decision. While it would be premature to say that this decision rendered moribund the objection that a submission of grievances in the public sector to an arbitration panel constitutes an unlawful delegation of governmental power, it is indeed enlightening to know that the courts do not have to rely on this objection in order to reach a defensible and proper result.

\section*{B. Public Sector}

The court of appeals heard other notable cases involving public sector arbitration during this Survey period. Unlike those involving the private sector\footnote{18}{See infra notes 27-47 and accompanying text.} where erosion of the principles upholding the efficacy of arbitral jurisprudence occurred, its decisions provided support for the internal grievance and arbitration processes.

In \textit{Grant Education Association v. Grant Public Schools},\footnote{19}{No. 61897 (Mich. Ct. App. Apr. 25, 1983) (not to be published).} the court of appeals addressed the issue of the clarification of an arbitrator's award. In that case, the plaintiff (grievant) commenced an action in circuit court to enforce the arbitrator's award or, alternatively, to have the award submitted to the arbitrator for clarification.\footnote{20}{Id. at 1.} The grievant had received an evaluation from the athletic director concerning her performance as a varsity girls' basketball coach.\footnote{21}{Id.} It was determined that there would not be a renewal of the grievant's coaching contract for the subsequent teaching season.\footnote{22}{Id.} The grievant then filed a grievance requesting that she be recommended as the basketball coach for the subsequent school year and
that her file be expunged of any negative references concerning the matter. 23 The arbitrator rendered an award in favor of the grievant, granting in full the requested remedies. The Superintendent made a motion to renew the grievant's contract, but the school board rejected this recommendation. 24

In remanding the matter to the arbitrator for further consideration, the court of appeals stated that a literal reading of the arbitration decision, which had required an administrative recommendation to be made to the school board for the grievant's re-employment, led the court to conclude that the arbitrator's decision did not constitute an order to renew the coaching contract. 25 Thus, the defendants may have followed the letter but not the specific intent of the award. The court determined that the ambiguities and factual inconsistencies provided reasonable grounds for disagreement as to the precise nature of the arbitration award, thus necessitating remand to the arbitrator for clarification. 26

The result reached by the court is sufficiently buttressed and fortified by the rationale sustaining arbitration. The court did not endeavor to interpret the arbitrator's award, thereby subjecting it to the philosophical vicissitudes of the judiciary. With this decision, it effectively, albeit temporarily, curtailed the insidious spread of judicial activism and preserved bilateral interests by requiring the arbitrator to construe the terms and intended impact of his own award. Judicial encroachments upon or excursions into unfamiliar terrain were wisely avoided.

C. Private Sector

A long-standing rule of arbitral jurisprudence provides that when parties have chosen arbitration as the vehicle to resolve their disputes, it is not for the courts to construe an arbitration decision, so long as the award draws its essence from the agreement of the parties. This aspect, or centerpiece, of arbitration was established in three landmark decisions known as the Steelworkers' Trilogy. 27 In several of the

23. Id.
24. Id.
25. Id. at 2.
26. Id.
27. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960). In this series of cases, it was determined that while arbitration is a creature of the contract, an arbitrator's authority is limited by the governing instrument of the collective bargaining agreement. Once it is established that a dispute is subject to the grievance process, the arbitrator's interpretation of contract terms which affect the dispute becomes controlling. For a detailed analysis of the Steelworkers' Trilogy, see
cases to follow, however, the Michigan Court of Appeals and various panels of the Sixth Circuit have departed from the holdings in the Trilogy.

In *Grand Rapids Die Casting Corp. v. Local 159*, an arbitrator's award which reinstated the grievant was vacated. In so determining, the court held that the arbitrator's decision did not "draw its essence from the collective bargaining agreement" because the decision did not make a finding as to whether the grievant had violated the company rule on absenteeism or whether just cause existed for the discharge.

The court criticized the arbitrator for suggesting that the parties revise the discipline procedure. The court was obviously disturbed by its perception that the basis for the arbitral decision was a disapproval of the procedure. Thus, the court determined that the arbitrator had violated his oath of fidelity to the process by substituting his own terms of reasonableness for those upon which the parties had previously agreed.

The court noted that while deference is to be given to arbitration awards, the deference is not unlimited. In this respect, the court stated:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources; yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. *When the arbitrator's words manifest an infidelity to his obligations, the courts have no choice but to refuse enforcement of the award.*

The court's ability to accord appropriate deference to an arbitrator's award was also tested in *Sears, Roebuck and Co. v. Teamsters Local 243*. In that case, the court of appeals affirmed a United States District Court decision which had held that an arbitrator exceeded his authority by amending the express terms of the agreement negotiated

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28. 684 F.2d 413 (6th Cir. 1982).
29. *Id.* at 416.
30. *Id.* at 415.
31. *Id.* at 416.
32. *Id.*
33. *Id.* (emphasis in original) (quoting United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 595, 597 (1960)).
34. 683 F.2d 154 (6th Cir. 1982).
by the parties. In reaching this decision, the court of appeals observed that an arbitrator has the authority to construe ambiguous contract language but lacks the authority to disregard or modify plain or unambiguous contract provisions. The court decided that the arbitrator had exceeded his authority by balancing the interests of the parties. It noted that the balancing test should only be used when the collective bargaining agreement is silent on the question of subcontracting.

In the only case in this area decided by a Michigan court during the Survey period, Staniszewski v. Grand Rapids Packaging Corp., the Michigan Court of Appeals addressed the limited scope of judicial review of arbitration awards. In Staniszewski, the defendant had discharged the plaintiff for violating shop rules. The plaintiff contested his discharge through the grievance procedure and was awarded, in an arbitration proceeding, reinstatement and "full backpay." A dispute subsequently arose as to what constituted the plaintiff's normal workweek for purposes of determining the amount of "full backpay." The employer argued that standard industrial practices provided for a forty-hour workweek, although the parties had previously stipulated that the normal workweek was fifty-two hours.

The court held that the term "full backpay" was latently ambiguous. The court defined a latent ambiguity as one which "arises when a writing on its face appears clear and unambiguous, but there exists some collateral matter which makes the meaning uncertain." Only then could parol evidence be used to explain such an ambiguity. The trial court determined that "full backpay" included fifty-two hours since that was the grievant's normal workweek and the arbitrator had indicated in his testimony that the award encompassed the grievant's normal workweek. The court of appeals affirmed the lower court's decision, noting that the trial court maintained the authority to enforce the arbitrator's award.

35. Id. at 156.
36. Id.
37. Id. In Klochko Equipment Rental Co. v. Local 324, 110 L.R.R.M. 2875 (E.D. Mich. 1982), the court dealt with a broad arbitration clause which was silent on the reasons for discharge. The court held that the arbitrator has the authority to draw on the industrial common law when a collective bargaining agreement does not expressly distinguish between unsatisfactory work performance and safety rule violations. 110 L.R.R.M. at 2877.
39. Id. at 98, 336 N.W.2d at 10.
40. Id.
41. Id.
42. Id. at 99, 336 N.W.2d at 11.
43. Id.
44. Id.
45. Id.
The most disturbing aspect of the court of appeals decision, however, was that in its affirmation, it concluded that the trial court’s ruling which construed the term “full backpay” was correct. In so concluding, the court stated that “[s]ince the trial court has the authority and obligation to enforce the award, it must have the [derivative] authority to determine the meaning of the arbitrator’s award.” In light of the elaborate line of cases which support the position that it is an arbitrator who must decide the meaning and scope of his award and not the court, this dicta flies squarely in the face of precedent. The impropitious comments do not augur well for the arbitral process and suggest that perhaps in the private sector, courts may become less inclined to remain passive.

Several of the decisions rendered by the Michigan and Sixth Circuit Court of Appeals during this Survey period have undermined the arbitration system by interpreting arbitrators’ awards and disturbing the finality aspect of their decisions. As conceived, the system was designed to provide speed, economy and equity in the resolution of industrial relations disputes. Even a partial abrogation of the national and local policies favoring arbitration as a responsive, thorough and binding method of dispute resolution will only serve to undermine the efficacy of the process and taint the credibility of its results.

III. DISCRIMINATORY EMPLOYMENT PRACTICES

Ostensibly influenced by the United States Supreme Court’s preoccupation with employment discrimination during the 1982-83 term, the Michigan courts rendered more decisions affecting the law of discriminatory practices in the workplace than in any other area of labor relations. The strides engendered by the federal decisions reflect an increased activism on the part of the judiciary to extend the parameters of the discrimination proscription. The philosophical underpinnings of these decisions have spilled over into the Michigan judicial forum.

46. Id.

47. See Steelworkers’ Trilogy, supra note 27.

48. In March 1983, the United States Court of Appeals for the Ninth Circuit rendered a crucial decision on the issue of whether an employer who paid female employees in one establishment less than male employees in another establishment violated Title VII of the 1964 Civil Rights Act. The court answered this question in the affirmative. In so holding, it noted that a charge of sexual discrimination pursuant to Title VII is broader than the Equal Pay Act, and although to qualify for a violation of the Equal Pay Act it must be demonstrated that the employer’s conduct was similarly violative of Title VII, the converse is not true. To allow otherwise would subvert the intention of Congress and thereby deprive victims of discrimination of an appropriate remedy. Bartelt v. Berlitz School of Languages of America, Inc., 698 F.2d 1003 (9th Cir. 1983).
One of the most important developments during the current Survey period was the renewed viability of the Elliott-Larsen Civil Rights Act once the Michigan Court of Appeals erased the doubts as to the Act's constitutionality.

A. Sex Discrimination

In the first significant sex discrimination case handled by the Michigan Court of Appeals during the Survey period, *Northville Public Schools v. Civil Rights Commission*, the claimant notified her employer that she intended to utilize her accumulated sick leave and personal leave days for childbirth and recuperation. Her request was denied by the school board, although she was provided with a temporary leave of absence without pay for a period equivalent to the sum of the sick leave and personal leave days. The claimant's case took a rather arduous journey through various civil rights commission levels and finally reached the judicial forum. The court of appeals held that the school district's refusal to allow its female employees to use sick days for maternity purposes constituted sexual discrimination within the meaning of the superceded Fair Employment Practices Act.

In reaching its decision, the court noted the persuasive effect of federal precedent, but properly subordinated it. The court of appeals stated that the cases on which the circuit court had primarily relied in reaching its decision were "not necessarily a reliable guide as to what our Legislature intended" inasmuch as these cases were decided prior to the legislative enactment on employment discrimination.

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52. Id. at 575, 325 N.W.2d at 498.
53. Id. at 576-77, 325 N.W.2d at 498-99.
Furthermore, Congress had outwardly undone the mischief generated by Gilbert by enacting a superceding Title VII amendment.\textsuperscript{56}

In \textit{Department of Civil Rights ex rel. Cornell v. Edward A. Sparrow Hospital Association},\textsuperscript{57} the court of appeals was required to determine whether the plaintiff qualified for backpay and attorney fees once a prima facie case of discrimination was established.\textsuperscript{58} The court noted that the Michigan statute clearly makes an award of backpay discretionary. Plaintiff could have continued to work while challenging the dress code. Her election to discontinue work coupled with the discretionary nature of the relief afforded by the statute rendered the lower court ruling meritorious. The plaintiff initiated her lawsuit under the former Fair Employment Practices Act which did not provide for an award of attorney fees to the prevailing complainant. The Elliott-Larsen Civil Rights Act was found to be inapposite to this factual matrix.\textsuperscript{59}

Despite what appears to be a proper holding in the case, the decision of the court to withhold backpay is quixotic thinking at best. While backpay awards are clearly discretionary, it seems to thwart the overall purpose of this remedial piece of legislation to establish the existence of an unfair employment practice and simultaneously preclude the framing of relief for the complainant. Notably, Judge MacKenzie raised this very point in her dissent in \textit{Sparrow}.\textsuperscript{60}

This perplexing decision of the appellate bench leaves the victim of discrimination remedially destitute. Although the type of discrimination involved in this case was clearly not tantamount to the more typical, purposeful and invidious discrimination where one is deprived of gainful employment opportunities, it would seem that the statutory purpose of the Civil Rights Act in eradicating discrimination becomes further frustrated when complainants are given meaningless verdicts in their favor. Certainly through the exercise of the discretion which

\textsuperscript{56} \textit{Id.}
\textsuperscript{58} \textit{Id.} at 391-92, 326 N.W.2d at 521.
\textsuperscript{59} \textit{Id.} at 392-93, 326 N.W.2d at 521.
\textsuperscript{60} Congress' purpose in vesting a variety of "discretionary" powers in the courts was not to limit appellate review of trial courts, or to invite inconsistency and caprice, but rather to make possible the "fashion[ing] [of] the most complete relief possible."

It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination (footnote omitted).

the legislation has provided, the court could have fashioned a form of relief based upon the egregiousness of the employers' conduct. Its election to do otherwise has not only placed this area of the law in a state of flux, but more importantly, perpetuated the very injustices the drafters of the legislation envisioned would cease to exist.

B. Marital Discrimination

This Survey period saw several interesting marital discrimination cases unfold. In the first case, *Heath v. Alma Plastics Company*, the plaintiff filed an action alleging both sex and marital discrimination in violation of the Elliott-Larsen Civil Rights Act and the minimum wage law in paying her less than was paid to similarly situated males. The circuit court found that the defendant had discriminated against the plaintiff and awarded compensatory and punitive damages.

On appeal, it was determined that the factual finding of sex discrimination was well supported by the evidence at trial. Nevertheless, the court determined that the granting of liquidated damages was discretionary and declined to award them, explaining that they would be "too punitive."

During the Survey period, *Miller v. C. A. Muer Corp.* presented a case of first impression for the Michigan courts. The plaintiff had been employed as a waiter at one of the defendant's restaurants. When he announced his intention to marry a co-worker, he was informed that the defendant corporation's "no-spouse rule" precluded married couples from working in the same restaurant. The plaintiff terminated his employment and proceeded to marry his fiancee. He then filed an action based on the Elliott-Larsen Civil Rights Act, seeking relief on the basis that the no-spouse rule violated the section of the Elliott-Larsen Civil Rights Act which prohibits discriminatory employment practices based on marital status.

Inasmuch as this represented a case of first impression, the Michigan court had to look to analogous statutes in other jurisdictions in order to assign a proper meaning to marital status. The court was hampered in its decision-making by several factors: (a) marital status is not defined in the Elliott-Larsen Civil Rights Act and, (b) there is a split among the jurisdictions as to whether no-spouse rules should be permitted or held to be violative of employment practices. In looking to the legislative purpose and objectives of the Elliott-Larsen Civil

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62. Id. at 140, 328 N.W.2d at 599.
63. Id. at 144, 328 N.W.2d at 601.
Rights Act, the court held that the legislature's intent would be fur­thered "by construing the term 'marital status' to include a prohibition against discriminatory employment practices based on the identity of one's spouse."\textsuperscript{67} Finding that the distinction did not qualify for the bona fide occupational qualification reasonably necessary to the normal operation of the business, the court held for the plaintiff.

C. \textit{Age Discrimination}

This Survey period yielded a very noteworthy age discrimination case by the United States Supreme Court.\textsuperscript{68} With the United States Supreme Court's five-to-four decision in \textit{EEOC v. Wyoming},\textsuperscript{69} the effect of the federal discrimination proscription on state laws was established. In \textit{Wyoming}, the Court determined whether the \textit{Age Discrimination in Employment Act} (ADEA) covering state and local governments was a valid exercise of the commerce clause under the Tenth Amendment or section 5 of the Fourteenth Amendment. The gravamen of this case was the involuntary retirement of a state employed game warden at age 55 pursuant to a Wyoming statute.\textsuperscript{70} The plaintiff initiated an action in federal district court. The suit was dismissed on the theory that an attempt to regulate the state's employment relationship with its game wardens was a violation of the tenth amendment's immunity\textsuperscript{71} as articulated in \textit{National League of Cities v. Usery}.\textsuperscript{72}

The Supreme Court opinion, written by Justice Brennan, held that the purpose of the tenth amendment immunity doctrine is to protect states from federal intrusions that might threaten their separate and independent existence.\textsuperscript{73} The primary consideration in determining whether the ADEA could effectively supercede state law was if the states' compliance with federal law directly impaired their ability "to structure integral operations in areas of traditional governmental functions."\textsuperscript{74} Finding that the social policy of dismissing those wardens unfit to perform their responsibilities would not be hampered, nor would there be substantial and unintended consequential effects on

\begin{itemize}
\item \textsuperscript{67} \textit{Id.} at 782, 336 N.W.2d at 217.
\item \textsuperscript{68} For the reader who desires to become more familiar with recent trends in age discrimination, see Vercruysse, \textit{Summary Judgments Under the Age Discrimination in Employment Act: The Rational View}, 61 MICH. BAR J. 522 (July 1982).
\item \textsuperscript{69} 103 S. Ct. 1054 (1983).
\item \textsuperscript{70} \textit{Id.} at 1059.
\item \textsuperscript{71} \textit{Id.} at 1060.
\item \textsuperscript{72} 426 U.S. 833 (1976).
\item \textsuperscript{73} 103 S. Ct. at 1060.
\item \textsuperscript{74} \textit{Id.} at 1061 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)).
\end{itemize}
state decision-making in other areas, the court held that the ADEA applied to state governments and their local subdivisions.75

The implications of this decision for Michigan practitioners is clear. Forced early retirements (primarily in the public sector), heretofore deemed lawful under municipal charters, are now unlawful pursuant to the holding in Wyoming.

IV. DUTY OF FAIR REPRESENTATION

The duty of fair representation involves the obligation of a union to fully and fairly represent the employees for whom it acts as the exclusive bargaining representative.76 The early decisions in this area arose in the context of union discrimination.77 The more recent duty of fair representation cases have been directed at the union's failure to assume responsibility for processing a worker's grievance to arbitration where arbitration is the final step of the grievance procedure.

The seminal Survey case which dealt with the duty of fair representation and served as a federal precursor for the Michigan cases to follow was Bowen v. United States Postal Service.78 In this case, the petitioner-employee was discharged subsequent to an altercation with a co-worker. Shortly thereafter, he filed a grievance with the union against the employer based upon express provisions of the collective bargaining agreement.79 The union did not pursue the matter to arbitration, and the petitioner-employee then sought damages and injunctive relief against the union and the employer in federal district court.80 Judgment was entered on a jury determination which held that Bowen was wrongfully discharged and the union had increased his damages by handling his grievance in an arbitrary, capricious and perfunctory manner, thereby breaching its duty of fair representation.81

75. 103 S. Ct. at 1062.
76. Although the duty of fair representation is not derived from the National Labor Relations Act (29 U.S.C. §§ 151-69 (1976)), court and NLRB decisions have rendered it "a federal obligation which has been judicially fashioned from national labor statutes." Abrams v. Carrier Corp., 434 F.2d 1234, 1251 (2d Cir. 1970), cert. denied, 401 U.S. 1009 (1971). See also Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of America v. Lockridge, 403 U.S. 274 (1971); Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957). In large measure, the evolution of this duty can be attributed to the statutorily mandated concept of exclusivity. See National Labor Relations Act § 9(a), 29 U.S.C. § 159(a) (1976); Railway Labor Act § 2, 45 U.S.C. § 152 (1976).
78. 103 S. Ct. 588 (1983).
79. Id. at 590.
80. Id. at 590-91.
The Fourth Circuit Court of Appeals affirmed the district court's judgment, but disturbed the award of damages against the union. The court held that because the employee's "compensation was at all times payable only by the Service, reimbursement of his lost earnings continued to be the obligation of the Service exclusively. . . . [Thus] no portion of the deprivations . . . was chargeable to the Union."82

In a five-to-four majority decision, the United States Supreme Court held that the petitioner's damages were caused by the union's breach of its duty of fair representation, and accordingly, apportionment of damages was required.83 In so holding, the Court applied the governing principle of Vaca v. Sipes84 that "'damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.'"85

In an insightful analysis, Justice Powell, writing for the majority, addressed the equities of assessing the primary financial burden on the union. The Court's rationale emphasized that the grievance procedure is "'[f]undamental to federal labor policy.'"86 Such a procedure provides parties with a meaningful and harmonious means of determining and defining their rights and obligations. The Court said, however, that while the bargaining relationship requires commitment on the part of both parties to maximize its efficacy, the union maintains the "'pivotal role in the process since it determines whether to press an employee's claim.'"87

Obviously, this perceived inequity is non-existent. The union has sought and acquired the exclusive right to act on behalf of the members of the bargaining unit. Circumscribed within the fundamental right is the duty to discharge the agency responsibility faithfully and exhaustively.

Blunting the impact of the majority decision was a persuasive dissent written by Justice White and joined by Justices Marshall, Blackmun and Rehnquist. The minority position relied on cases subsequent to Vaca v. Sipes which had held that a "'union is liable in damages to the extent that its misconduct 'add[s] to the difficulty and expense of collecting from the employer.'"88 In this context, damages

82. 642 F.2d 79, 82 (4th Cir. 1981).
83. 103 S. Ct. at 599.
85. 103 S. Ct. at 595 (quoting Vaca v. Sipes, 386 U.S. 186, 197-98) (emphasis added by Bowen Court).
86. 103 S. Ct. at 596.
87. Id.
88. Id. at 602 (White, J., concurring in part and dissenting in part) (quoting Czosek v. O'Mara, 397 U.S. 25, 29 (1970)).
imposed on a union would be minimal since the main responsibility would rest with the party who committed the wrongful discharge, the employer. 89

The interesting aspect of Bowen which provides many of the undercurrents for the successive sections of this article is the effect the slim majority was able to achieve through its decision. As one of the most important cases decided during this Survey period, the ramifications of Bowen for internal union affairs are substantial. In essence, the parameters of the duty of fair representation have been redefined. Repercussions of this reassessment of liability include a) increasing union vulnerability to lawsuits, thereby adversely increasing the risk of frivolous grievances being filed in arbitration, b) disturbing the financial stability of labor organizations and, c) reducing the likelihood that meaningful collective bargaining will occur because parties will prematurely substitute arbitration for the negotiations and predispute resolution stages of the collective process.

In a case decided subsequent to Bowen, but which did not cite the Bowen opinion, the Sixth Circuit continued to follow previous precedent in holding that more than a possibly negligent mistake in judgment must be proven in order to establish that a union has breached its duty of fair representation. In Poole v. Budd Co., 90 the union had declined to proceed to arbitration with the plaintiff's grievance. The district court held that the plaintiff had failed to prove any breach of duty by the union and, accordingly, granted summary judgment in favor of the defendants, the employer and the union, on the plaintiff's wrongful discharge claims. 91 The plaintiff appealed the case to the Sixth Circuit which affirmed the district court's holding.

The court stated that, at most, the plaintiff had shown an error in judgment by the union, which might establish negligence. 92 Relying upon pre-Bowen cases, the court held that "[m]ere negligence is insufficient to establish a breach of the duty of fair representation." 93 Since the plaintiff had failed to meet his burden of proof, the court affirmed the grant of summary judgment.

Although the Budd court did not cite Bowen, the Sixth Circuit's holding could represent an effort on its part to retreat from the holding and dicta in Bowen which suggested that the mere negligent treatment of a grievance would subject the union and, of course, the employer to liability for damages. 94 The ruling by the Sixth Circuit in

89. 103 S. Ct. at 602 (White, J., concurring in part and dissenting in part).
90. 706 F.2d 181 (6th Cir. 1983).
91. Id. at 182.
92. Id. at 184.
93. Id.
94. See supra notes 78-87 and accompanying text.
Budd may indicate that the court is not willing to accept the posture of the United States Supreme Court in Bowen.

In retrospect, it would seem that the effects of Bowen and its progeny, while serious, are readily transparent. The requirement that liability will be reapportioned in accordance with the degree of fault assigned in a tandem suit against the union and the employer provides a fairly strong incentive for parties to a collective bargaining agreement to carefully police the grievance procedure. Although Bowen disturbed the liability governed by traditional federal common law principles, the negative side effects mentioned earlier in this section could be avoided if unions and employers proceed with continued persistence in attempting to perfect their collective bargaining and grievance procedure modalities.

Nevertheless, there remains a paramount concern that judicial intervention into the arbitration process will be commonplace where fair representation cases are involved. Clearly, in view of the considerations articulated in Section II of this article, arbitral finality becomes emasculated. Since an arbitrator does not have the actual authority to determine whether the union has engaged in conduct which is "arbitrary, discriminatory or in bad faith," the courts ultimately become involved in the dispute. This involvement inevitably leads to judicial interpretation of the collective bargaining agreement, a responsibility heretofore reserved exclusively to the person jointly appointed by labor and management to dispose of the grievance, the arbitrator.

V. FEDERAL PREEMPTION

The gravamen of the federal preemption doctrine is an actual or potential conflict between national and state entities which regulate activity under the Labor-Management Relations Act (LMRA). The state has the authority to invoke jurisdiction over matters which by "litigated elucidation" have not been carved out of its bailiwick. The activity which falls under its umbrella of regulation is deemed protected.

The conflicts to which the preemption theory is applied arise out of the jurisdiction of the National Labor Relations Board. To determine whether preemption analysis is required to resolve regulatory scheme conflicts, a two-part test is generally employed: (a) whether the matter in issue is part of the central scheme of the federal act, and (b) whether the actual or potential conflict between forums require preemption. The latter is determined by balancing the focus and pur-

pose of the federal act against the weight to be assigned to the local concern.98

One of the most interesting yet illustrative cases addressing the preemption doctrine was Morris v. Chem-Lawn Corp.99 The employee brought an action against her employer on a breach of employment contract claim, asserting violation of her section 1985100 rights and claiming that her discharge was predicated upon her support of the formation of a union. The United States District Court, through Judge Freeman, held that the claims which the plaintiff posited were identical to claims of unfair labor practice in violation of the National Labor Relations Act, and thus she was precluded from securing the benefits of the state substantive law upon which she requested relief. The court, relying upon the initial line of preemption analysis developed in Garmon,101 cautiously observed:

When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.102

Despite the fact that the plaintiff had prepared her complaint so as to trigger the substantive aspects of state law, the court noted that the application of the preemption doctrine is only affected by the nature of the conduct supporting the claim, not the legal theories set forth in the complaint.103 Section 8(a)(3) of the National Labor Relations Act provides that it is an unfair labor practice for an employer to discriminate “in regard to hire or tenure of employment . . . to discourage membership in any labor organization.”104 The nature of the conduct under scrutiny is not “of peripheral concern to the federal labor laws” nor does it “touch interests deeply rooted in local feeling and responsibility.”105 Since the plaintiff’s claim fell exclusively within the rubric of paramount governmental concerns, it was deemed preempted by federal labor laws.106

98. Id. See also Farmer v. United Bhd. of Carpenters, 430 U.S. 290 (1977).
101. See supra note 97 and accompanying text.
102. 541 F. Supp. at 482.
103. Id. at 483.
105. 541 F. Supp. at 483.
106. For a case which does not specifically deal with the regulation of labor relations but which is nevertheless instructive insofar as it demonstrates the applicability of federal legislation where the states have otherwise sought to regulate this type of activ-
A question of first impression was raised in *Rodriguez v. Grand Trunk Western R.R. Co.*[^107] in which the defendant contended that the trial court erred in concluding that the Federal Employers' Liability Act (FELA)[^108] venue statute was applicable to a personal injury action brought in a state court. Action was commenced in Wayne County under FELA. The defendant then sought to invoke the jurisdiction of Oakland County to determine whether it had been negligent in failing to provide the plaintiff with a safe place to work. The trial court denied the defendant's motion, ruling that the FELA venue provision superceded the state's statute, and that venue in Wayne County was proper.[^109] On appeal, the court reversed and remanded the case, holding that where an action has been brought in a state court, the venue is to be determined by the trial court in accordance with the Michigan venue statute.[^110]

The holding pronounced by the *Rodriguez* court relating to the constitutionality of the state venue statute was extrapolated from dicta in *Bauman v. Grand Trunk Western R.R. Co.*[^111] In *Bauman*, the supreme court ably noted:

> Limiting the venue of plaintiff's action to the county of his residence does not deprive him of any right or privilege granted by either the Constitution of the State or by the Constitution of the United States. It is within the power of the legislature to prescribe where actions may be brought and to impose reasonable limitations with reference thereto.[^112]

By relying upon this dicta, the *Rodriguez* court properly found that no constitutional defect existed in the statutory scheme and that the venue statute did not impermissibly intrude upon or affect the exercise of the plaintiff's fundamental right of access to the court's system.[^113] Therefore, the state venue statute governs venue in FELA actions brought in a state court.

In reviewing the preemption cases decided during this Survey period, it is significant to note that the courts have broadened the preemption doctrine at the same time that they have reaffirmed the tradition vis-a-vis legislation, see Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marktg. and Bargaining Bd., 416 Mich. 706, 332 N.W.2d 134 (1982).

[^109]: 120 Mich. App. at 601, 328 N.W.2d at 90.
[^110]: *Id.* at 604, 328 N.W.2d at 91.
[^112]: *Id.* at 286, 91 N.W.2d at 282, quoted in *Rodriguez*, 120 Mich. App. at 604, 328 N.W.2d at 92.
[^113]: 120 Mich. App. at 605, 328 N.W.2d at 92.
tional factors which preserve state jurisdiction. If the state interest is sufficiently compelling, then the preemption doctrine will not be used as a guise to oust the state of the power to regulate activities which might simply be deemed tangential or of peripheral concern to the federal act. Although federal preeminence could be achieved by the application of the commerce clause, the recent decisions of the court of appeals suggest that the primary concern of the court is not whether a potential conflict between state and federal legislation exists, but rather an actual conflict in an area which Congress has dominated.

VI. PUBLIC EMPLOYMENT RELATIONS ACT (PERA)

The Public Employment Relations Act (PERA) was enacted in 1965 for the purpose of providing and regulating the organizational rights of public employees. Since its implementation, judicial interpretations of the law have extended the scope of its coverage to include local court administrative personnel.

The judicial challenges raised under PERA during this Survey period are not as extensive as those raised during the previous term. Nevertheless, the growing emphasis of the law appears to affect the rights of probationary employees in the education sector. It is this group of public employees to which the first set of appellate decisions are addressed.

A. Probationary Employees—Status of Rights and Obligations

Challenged in the first case was the notice provision of the Michigan Teachers' Tenure Act. In *Dailey v. Mackinac Island Board of Education*, the plaintiff, a first-year probationary school teacher, was informed that his contract would not be renewed for the subsequent year because of economic conditions. The trial court refused to grant mandamus relief for reinstatement, and the matter was appealed to the Michigan Court of Appeals.

In affirming the lower court ruling, the court of appeals held that the notice provision of the Michigan Teachers' Tenure Act is activated only when a contract is discontinued for non-economic reasons. The court summarily rejected the plaintiff's position that the "defendant may not discontinue the employment of a probationary teacher for

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116. See Raymond & Nuyen, supra note 50, at 842-52.
119. Id. at 189, 327 N.W.2d at 431.
any reason unless that teacher has first been notified at least 60 days from the close of the school year that his or her work has been unsatisfactory." The court noted that this was a correct interpretation only where a contract had been terminated because of unsatisfactory work performance, which was not the situation presented in the instant case. Accordingly, the court held that the tenure act "is not applicable to probationary teaching contracts terminated for economic reasons."121

In Napoleon Education Association v. Napoleon Community Schools,122 a "dual motive" case, the court of appeals affirmed a Michigan Employment Relations Commission (MERC) determination that the plaintiff, a probationary teacher, had been dismissed for engaging in protected concerted activity under section nine of PERA.123 The defendant claimed that there had been a misallocation of the burden of proof by MERC.

The commission had used a burden of proof analysis developed by the NLRB and clarified by the First Circuit in NLRB v. Wright Line.124 The commission quoted the following section of the NLRB opinion:

'First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.' 251 NLRB #150, p 1083; 150 LRRM 1169 (1980).125

As in Wright Line, the question on appeal was which burden had been shifted. As the First Circuit had done in Wright Line,126 the court of appeals concluded that the commission's "references to defendant's failure to meet its burden were references to defendant's burden of production."127

As to the defendant's claim that the commission's decision was not supported by the evidence, the court noted that "the great weight of the evidence does not rest with either side . . . therefore, [we] defer to MERC's judgment."128 Accordingly, the MERC decision was affirmed.

120. Id.
121. Id. (citing Boyce v. Royal Oak Bd. of Educ., 407 Mich. 312, 285 N.W.2d 196 (1979)).
124. 662 F.2d 899 (1st Cir. 1981).
125. 125 Mich. App. at 400, 336 N.W.2d at 481 (quoting MERC opinion).
126. See 662 F.2d at 904-07.
127. 125 Mich. App. at 404, 336 N.W.2d at 484.
128. Id. at 406, 336 N.W.2d at 484. The court noted that there is a general
B. Duty to Bargain—Mandatory v. Permissive Subjects of Bargaining

In *City of Detroit v. Michigan Council 25, AFSCME*129 the court of appeals affirmed MERC's decision that the subject matter of a recently enacted ordinance represented a mandatory subject of bargaining, and “that through the ordinance the city had unilaterally made changes without properly fulfilling its statutory obligations to meet, confer and bargain with [its labor organization].”130 The court reasoned that the composition of the Board of Trustees of the General Retirement System and the Policemen and Firemen Retirement System of the City of Detroit and the powers they exhibited were substantial and had a significant effect upon conditions of employment by determining who was entitled to increases or premature benefits under the duty disability pension benefit package.131

The decision in *City of Detroit*, which includes a portion of the MERC analysis, indicates an eagerness to overcome the stigma attached to its decision-making prowess. Labor practitioners of all persuasions were concerned with the court of appeals' previous ruling in *AFSCME v. Macomb County Road Commission*132 in which MERC and the court of appeals had difficulty determining the existence or non-existence of a bargaining impasse. Certainly, the *City of Detroit* case is a legitimate retreat from the legal imbroglio created by MERC. Both the commission and the court of appeals endeavored to broadly interpret the duty to bargain in order to expand its reach, taking into consideration that public employees do not maintain the strike weapon. The court of appeals recognized the inequities which existed in the change of membership in the Board of Trustees in the retirement system and acted swiftly and decisively to protect employee rights.

VII. UNEMPLOYMENT COMPENSATION

Unlike the prior year which produced substantial appellate litigation and legislation,133 the development of unemployment compensation law was not extensive during this Survey period. Nonetheless, there were several significant decisions that deserve mention.

reluctance on the part of courts to disturb administrative decisions. Courts will defer to the board's expertise “and not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views.” *Id.* (quoting MERC v. Detroit Symphony Orchestra, 393 Mich. 116, 124, 223 N.W.2d 283, 287-88 (1974)).

130. *Id.* at 214, 324 N.W.2d at 580.
131. *Id.* at 218-19, 324 N.W.2d at 581-82.
A. The Labor Dispute Qualification

Michigan law disqualifies a person from securing unemployment benefits if the unemployment grows out of a labor dispute transpiring in the establishment of the claimant, or if the dispute is not on the premises, but is one which is "functionally integrated" with the struck establishment, and operated by the same employer.134 To be subject to disqualification, the claimant must be found to be "directly involved" in the dispute.135 In this Survey period only one case arose concerning the scope of involvement in a labor dispute.

In Anderson v. Top O'Michigan Rural Electric Co.,136 the claimants were members of Local 876 of the International Brotherhood of Electrical Workers, whose collective bargaining agreement contained a no-strike clause. When the office workers went on strike, the workers refused to cross the picket line. Claimants' subsequent applications for unemployment benefits were denied because they were deemed to have been involved in a labor dispute. Claimants then located other employment. When they were laid off from their successor jobs, they re-applied for benefits and were notified that the disqualification no longer applied. In the interim, the former employer contacted the claimants and re-offered their positions. Claimants refused to accept the offers, maintaining their desire to be extricated from the labor dispute still in progress. The Michigan Employment Security Commission (MESC) determined that the claimants were not disqualified from securing benefits, and the employer, Top O'Michigan Rural Electric Company, appealed.137

The Michigan Court of Appeals held that claimants who have been disqualified from unemployment benefits and who serve the requisite requalification period, and then subsequently reapply for benefits may no longer be disqualified if the basis for refusing to return to the same work does not meet the statutory criteria for "suitable work."138 The court arrived at this decision by analyzing the distinction between suitable and non-suitable work offers. Work available due to a labor dispute was found not to be suitable within the meaning of the Act, and thus should not serve to disqualify the claimants.139 The merits of the labor dispute were considered inconsequential to the resolution of the case.140

135. Id.
137. Id. at 278, 324 N.W.2d at 604.
138. Id. at 281-82, 324 N.W.2d at 605-06.
139. Id.
140. Id. at 283, 324 N.W.2d at 606-07.
B. Representation at Hearings

In a case of first impression, and one which should be of special interest to practitioners in this specialized field of law as well as to the members of the legal profession in general, the court of appeals decided whether an agent representing a claimant at a MESC hearing had to be a duly licensed attorney. An obvious case for *amicus curiae* activity, the State Bar of Michigan intervened in *Michigan Hospital Association v. MESC*.\(^{141}\)

Challenged in this case was whether an employer could be represented in a proceeding before MESC by counsel or other duly authorized agent. The court began its analysis by examining the phrase “duly authorized agent.”\(^{142}\) After defining an agent as one who has an express or implied authority to represent or act on behalf of another person, the court went on to discuss the scope of judicial and legislative powers in the area of the definition and regulation of the practice of law.\(^{143}\) Concluding that representation of clients in contested cases before administrative bodies fell within the scope of the practice of law, the court determined that the use of unskilled practitioners would undermine the legislative intent of ensuring that claimants in contested cases receive competent aid.\(^{144}\)

A more insightful analysis of whether a non-attorney can represent an employer in proceedings before the MESC was found in *State Bar of Michigan v. Galloway*.\(^{145}\) In an effort to reduce the negative fallout effects of their prior decision, the Michigan Court of Appeals completely reversed itself and held that non-attorneys are not precluded from serving as agents in administrative proceedings.\(^{146}\)

The decision of the court was divided into three important sections, each of which will be analyzed separately. In the first part, the court addressed the specific issue of whether section 31 of the Michigan Employment Security Act (MESA),\(^{147}\) prevents agents who are not licensed attorneys from appearing before the commission on behalf of individuals claiming benefits under the Act.\(^{148}\) The court reviewed the language of the Act, and then proceeded to review the amendatory language to section 31 which added this clause: “An employer may be represented in any proceeding before the commission by counsel or


\(^{142}\) *Id.* at 670, 333 N.W.2d at 320.

\(^{143}\) *Id.* at 670-71, 333 N.W.2d at 320-21.

\(^{144}\) *Id.*


\(^{146}\) *Id.* at 279, 335 N.W.2d at 478.

\(^{147}\) MICH. COMP. LAWS ANN. § 421.31 (Supp. 1983-84).

\(^{148}\) 124 Mich. App. at 276-79, 335 N.W.2d at 477-78.
other duly authorized agent.” The State Bar had assumed a typical posture and argued that the legislative term “duly authorized agent” permits a non-attorney to represent an employer “only to the extent that such representation is ministerial in nature and falls short of constituting the practice of law.”

The court of appeals unequivocally rejected this position and observed that the language of the amendatory provision should be read in conjunction with the earlier enacted language of section 31 and that neither should render the other a nullity. “Where statutes are in pari materia, each must be given effect if such can be done without repugnancy, absurdity or unreasonableness.” The court proceeded to note that if a specific statute is enacted subsequent to the adoption of a generally worded statute, then the more specifically worded statute would be given force and effect in the event of a conflict. Thus, an agent need not be an attorney to appear before MESC. The court made it abundantly clear, however, that the specific language of the amendatory provision entitled individuals to be represented by agents of their own selection only before the MESC. Practitioners concerned with the unauthorized practice of law should take solace in the fact that the decision provided a distinction between administrative proceedings of a fact-finding nature, and proceedings in courts of law.

The second part of the decision addressed the issue of whether the judiciary had the power to reject the legislative enactment and to declare it null and void. The court answered this question in the negative, contending that the separation of powers doctrine prohibits the judiciary from impinging upon legislative territory. The State Bar had argued that the ultimate authority to define and regulate the practice of law lies in the judiciary and that, accordingly, it could reject legislative enactments if they are found to contravene public policy. The court rejected this argument in toto. It then concluded that while the judiciary has the inherent power to regulate the qualifications of persons who may be permitted to practice law, such authority can also exist in the legislature. Certainly, the legislative body has an equal voice in demanding that control be exercised over the regulation of the

150. Id. at 276, 335 N.W.2d at 477.
151. Id. at 277, 335 N.W.2d at 477 (citing Rochester Community Schools Bd. of Educ. v. State Bd. of Educ., 104 Mich. App. 569, 578-79, 305 N.W.2d 541, 545 (1981)).
152. 124 Mich. App. at 277, 335 N.W.2d at 478.
153. Id. at 279, 335 N.W.2d at 478.
154. Id. at 279-83, 335 N.W.2d at 478-80.
155. Id. at 280, 335 N.W.2d at 479.
practice of law in furtherance of its responsibility to protect the public welfare. The court terminated its discussion on this issue by quoting Justice Levin, who wrote separately in State Bar of Michigan v. Cramer:

> The judiciary may assert but does not legitimately have the inherent, constitutionally implied power to bar non-lawyers from pursuing their vocations on a finding of impingement on work sometimes or traditionally done by lawyers. Occupational licensing of non-lawyers is a legislative prerogative; unless the Legislature were to authorize non-lawyers to appear in court, there is no intrusion of judicial power.

The final area addressed by the court was the statutory preclusion of a corporation representing an employer in proceedings before the MESC. The court swiftly disposed of this issue by comparing the conflicting language in section 51 which prevents a corporation or voluntary association from practicing or appearing as an attorney-at-law for a person in court or before a judicial body with the amendatory language, and applying the established rules of statutory construction. It properly held that the latter statute does not prohibit corporations from representing employers under section 51.

As expected, the State Bar of Michigan has sought leave to appeal from the Michigan Supreme Court. Cautious in formulating a prognostication, the author believes that the Michigan Supreme Court will be equally cautious about rendering a decision which would have devastating effects for persons maintaining vocations outside of the practice of law but which nevertheless involve parallel responsibilities. It would behoove the court to preserve the court of appeals' distinction between those who practice law in courts of law versus those who provide guidance and expertise to claimants in administrative fact-finding proceedings. From a constitutional perspective, only by preserving this distinction, as obviously intended by the legislature, can the separation of powers doctrine remain intact.

VIII. CONCLUSION

A noted scholar and jurist once remarked about the role of the judge and the judicial process:

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156. Id.
159. 124 Mich. App. at 283-85, 335 N.W.2d at 480-81.
160. Id. at 284, 335 N.W.2d at 481.
The work of a judge is in one sense enduring and in another sense ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years. Little by little the old doctrine is undermined. Often the encroachments are so gradual that their significance is at first obscured. Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew.161

To deal with abstract dogmas, definitions, illusions, myths, vagaries, moral values, and to provide some type of symmetrical development in the law requires adherence and commitment to the “pervading spirit of the law.” The amalgam of decisions cited in this article suggest that despite the introspection, deliberation and analysis by the courts, symmetrical development in the law is impossible, or at best, difficult to attain. Achieving equilibrium in regulating the interests between labor and management and simultaneously maintaining social utility was not achieved vis-a-vis the diverse judgments analyzed in this article. Perhaps the judicial process only requires intervention, not consistency, creativity or symmetry. If that is the case, then the courts have essentially met their task.