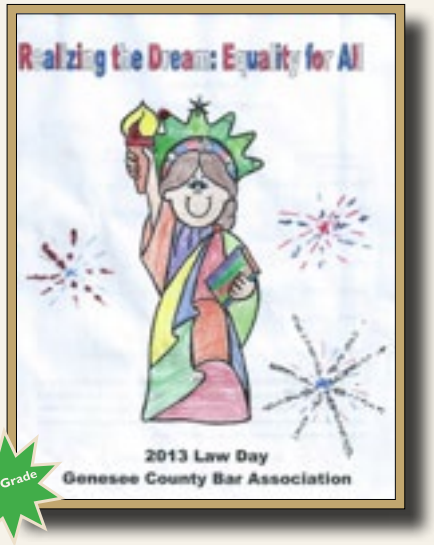
March/April 2013

BAR BEAT

Genesee County Bar Association



Congratulations
Law Day Contest Winners!

Genesee County Bar Association
315 E. Court St., Flint, Michigan 48502-1611
(810) 232-6012
For editorial information, call (810) 232-6000.

Published bimonthly by the State Bar of Michigan, 306 Townsend St., Lansing, MI 48933, for the Genesee County Bar Association. For advertising, call (517) 346-6315.

Table of Contents

Advertisers

Law Day 2013: Realizing the Dream: Equality for All

By Sherri L. Belknap

Sherri L. Belknap

Twenty-thirteen marks the 150th anniversary of the issuance of the Emancipation Proclamation. This year's theme provides the opportunity to promote the ideal of equality under the law through exploring the movements for civil and human rights.

The Genesee County Bar Association Law Day Committee is busy planning for this year's Law Day activities; they will include a Mock Trial Competition, community outreach through Teens & the Law, and a coloring contest for elementary school students.

Local elementary schools were provided with our Annual Coloring Contest information. All coloring posters will be displayed in the Flint Public Library in the month of May. The top ten coloring posters for each grade were displayed at the March Membership Meeting where Genesee County Bar Association members voted for the winners (see front cover). The winners will receive gift certificates from Barnes & Noble.

On April 26, 2013, Genesee County area high school students will begin juror orientation at the Masonic Temple where Genesee County Bar Association members will demonstrate how to pick a jury. Students will complete juror questionnaires and be picked randomly to participate. After the jury orientation, the students will have lunch at the Masonic Temple before converging on the Genesee County Courthouse.

In the afternoon, the students turn into attorneys, witnesses, and jurors. The teams will present the case of "*People* v *Avery Michaelson*" before Genesee County Circuit Court Judges. Avery Michaelson is charged with possession with intent to deliver marijuana, carrying a concealed weapon, and possession of a firearm during commission or attempted commission of (a) felony (Felony Firearm).

The Law Day Committee can always use volunteers to plan the event, mentor student participants and help write cases and judge contests. We encourage you to consider joining us for our next event.

Park Rangers Settle Whistleblower Lawsuit against Genesee County for $400,000

By Tom R. Pabst, Michael A. Kowalko, and Jarrett M. Pabst

Tom R. Pasbst

Two park rangers, Ranger Michael O'Leary and Ranger Adam Thrash, recently settled their lawsuit against Defendant Genesee County and its Superintendent of Parks, Amy McMillan, for $400,000.

The lawsuit arose out of an investigation into the issuance of traffic tickets by the rangers to Mr. Aonie Gilcreast, husband of Francis Gilcreast. Ms. Gilcreast is the head of the Genesee County chapter of the NAACP. Mr. Gilcreast refused to yield to an emergency vehicle with its flashers on and then refused to stop when ordered to do so by Park Ranger O'Leary. Ranger O'Leary pursued Mr. Gilcreast to his house, whereupon Mr. Gilcreast rushed inside and jumped in the shower, claiming, "You're not the real cops." The rangers called for backup. The deputy sheriff who arrived to assist Ranger O'Leary was confronted by Mrs. Gilcreast, who asked, "Do you know who I am?"

In fact, the Genesee County Park Rangers, O'Leary and Thrash, are "real police officers," and they issued Mr. Gilcreast a traffic ticket for failure to yield. Defendant Genesee County and its Superintendent of Parks, Amy McMillan, tried to get Ranger O'Leary to void the ticket, claiming "he was out of his assigned area," and/or he "didn't handle the whole matter well." Ranger O'Leary refused to void the ticket. Defendant Superintendent McMillan is not a trained police officer and never went through the police academy that police officers normally go through, as had the rangers.

Chief of the Park Rangers, Defendant Gregory Parks, is also a "real police officer" and did go through the police academy, and he candidly said, "These two rangers, O'Leary and Thrash, did nothing wrong whatsoever." Other park rangers have operated "outside of their assigned area," and received no discipline for doing so.

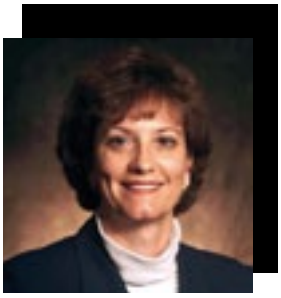
For upholding of the law, basically for doing their jobs, Park Rangers O'Leary and Thrash were neither commended nor congratulated. Ranger O'Leary was suspended and then terminated, losing a job and position that he cherished. Ranger Thrash was suspended without pay for 10 days and, while he still has his job, he continues to be subjected to the daily scrutiny of Defendant McMillan.

The key to the rangers' victory was their counsel proving that the rangers were "Type II" Whistleblowers, e.g., that their employer, Genesee County and its Superintendent of Parks, Amy McMillan, took adverse employment action against them for participating in Defendants' follow-up investigation concerning the issuance of the tickets in question. Pursuant to MCLA 15.362, an employer cannot take an adverse action against an employee ". . . because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body . . . ."

Shortly before trial, this case was settled for $400,000.

U.S Supreme Court Update: Employment Law

By Joan N. Pierson and Chelsea Wilkins



Joan N. Pierson

On Monday, November 26, 2012, the United States Supreme Court heard arguments in a case that could determine when a company is liable for harassment committed by one of its employees. The Court took *Vance v Ball State University, et al* with the intention to define what "supervisor" means in the context of a Title VII civil rights claim.

The high court previously addressed the issue of Title VII employer liability in *Faragher v City of Boca Raton*[1] and *Burlington Industries, Inc v Ellerth*.[2] In these two 1998 cases, the Court held that under Title VII, an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the victim.[3] However, following these cases, the definition of "supervisor" proved to be a point of disagreement among the nation's courts.

The Second, Fourth, and Ninth Circuits have held that the employer liability applies to harassment by employees who have authority to direct and oversee the victim's daily work.[4] This broad interpretation is in line with the EEOC's definition, which states a supervisor is someone who has the authority to direct the daily work of the victim and recommend employment decisions.[5] The First, Seventh, and Eighth Circuits, however, have limited employer liability to those instances where the harasser has the power to hire, fire, promote, transfer, or discipline the victim.[6]

The *Vance v Ball State University cas*e involves the alleged harassment of Maetta Vance, a catering assistant in the Catering Department at Ball State University (University). Ms. Vance was allegedly subjected to racial and physical intimidation by other University employees, including Sandra Davis, a catering specialist in the department. The "Catering Specialist" position includes the duty to oversee and lead "Catering Assistants," as well as other employees.

The Seventh Circuit, following circuit precedent, affirmed the grant of summary disposition in favor of the University. The Seventh Circuit decision relied on the more narrow definition of "supervisor," under which Davis did not have sufficient authority over Vance to find the University vicariously liable.[7] The appeal to the Supreme Court focused on the definition of "supervisor" for purposes of vicarious liability.

During an oral argument session filled with hypotheticals ranging from being subjected to country music to being assigned onion-chopping duty, the Justices challenged the attorneys on the advantages and disadvantages of the differing definitions of "supervisor." Vance's attorney, Daniel R. Ortiz, argued that the narrow Seventh Circuit definition produces "truly perverse results." He explained that under the Seventh Circuit rule a person with complete control over day-to-day activities of another employee may not be a "supervisor," yet a person in human resources, based solely on the ability to hire and fire, may be the "supervisor."

The University's attorney, Gregory G. Garre, seemingly to the dismay of Justice Scalia, did not argue that the Seventh Circuit standard should be adopted. Rather, Garre argued that summary judgment should be affirmed because under any definition Davis was not a "supervisor" to Vance. Garre additionally requested the Court to apply the facts of this case to a standard that will provide lower courts with more guidance.

Deputy Solicitor General Sri Srinivasan appeared on behalf of the Department of Justice and advocated that the Court adopt a standard similar to the EEOC. He echoed Mr. Ortiz's concerns with the Seventh Circuit standard, however, he also agreed that the record, as developed, warrants a grant of summary judgment in favor of the University.

Depending on the Court's decision in this case, employers and courts across the country may, or may not, be given more guidance on which employees are "supervisors" for the purposes of vicarious liability in a Title VII harassment case. What will not change is that employers may still be held liable for harassment perpetrated by one employee against another if they were negligent in addressing the issue.

Endnotes

1 524 US 775 (1998).

2 524 US 742 (1998).

3 If the harasser is a co-worker, rather than a supervisor, the employer's potential liability is based on negligence. *Faragher,* 524 US 775, 789; *Ellerth,* 524 US 742, 760.

4 *See, e.g., Mack* v *Otis Elevator Co*, 326 F3d 116 (2d Cir 2003); *Whitten v Fred's, Inc*, 601 F3d 231 (4th Cir 2010); *McGinest v GTE Serv Corp*, 360 F3d 1103 (9th Cir 2004).

5 EEOC Guidance Document No. 915.002 ("*Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors"*) (June 18, 1996).

6 *See, e.g., Noviello v City of Boston*, 398 F3d 76 (1st Cir 2005); *Parkins v Civil Constructors of Ill, Inc*, 163 F3d 1027 (7th Cir 1998); *Ryan v Capital Contractors, Inc*, 679 F3d 772 (8th Cir 2012).

7 The Seventh Circuit Court of Appeals stated that Davis and Vance were coworkers and, therefore, negligence was necessary to impose liability on the University.

The Supreme Court and the Cost of College Texts

By Ernest I. Gifford

Ernest I. Gifford

It may not be as important as the same sex marriage issue presently before the Supreme Court, but a book resale case that is before the Court is as important to copyright lawyers.

Kirtsaeng v. John Wiley & Sons, Inc. may help reconcile two seemingly inconsistent sections of the Copyright Act.

The "first sale" doctrine as set forth in 17 U.S.C. Section 109 of the Copyright Act provides that "the owner of a particular copy … *lawfully made under this title* (emphasis supplied) is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy …" .

However, 17 U.S.C. Section 602 provides that importation of copyrighted goods without the copyright owner's permission is copyright infringement.

The question presented to the Court in this case is whether the "first sale" doctrine applies to goods made and legally acquired abroad. If the doctrine applies to such goods then the copyright owner's right to control further distribution, including importation, is extinguished with the sale made outside the U.S. If it does not then copyright owners would have the right to bar retailers, such as Costco, from lawfully purchasing copyrighted goods outside of the U.S. and selling those goods in their U.S. outlets.

Section 109(a) seems to say that the doctrine of first sale applies to such goods and Section 602 (a) (1) seems to say that it does not.

Supap Kirtsaeng was a student from Thailand. He financed his education in part by reselling textbooks on eBay. His family and friends purchased the cheaper English version of textbooks published in Thailand and shipped them to him for sale to students in the U.S. Among the books that he purchased in this way were copies of eight titles published by John Wiley and Sons, (Wiley) and marked "not for export." The books are substantively the same but differ from their U.S. version only in the quality of the paper and the binding. Wiley brought suit against Kirtsaeng for "importing" the text books claiming that doing so was an infringement as defined in 17 U.S.C Section 602 of the Copyright Act.

At trial the judge prevented Kirtsaeng from utilizing the "first sale" doctrine as a defense and the jury found for Wiley, awarding Wiley $600,000 in damages, $75,000 for each title that defendant had "imported."

Continued on next page

The Supreme Court . . .

Continued from page 7

The 2nd Circuit Court of Appeals in 654 F.3rd. 210 (2011) affirmed the lower court's decision by holding that the language "under this title" in Section 109(a) really means "made in the U.S." and therefore the "first sale" doctrine does not apply to goods made elsewhere.

The Supreme Court granted certiorari, 132 S. Ct. 1405, Supreme Court 2012, and oral arguments were heard on October 29, 2012. (Supreme Court Docket 11-697)

The question before the Court is whether "under this title" in Section 109 requires the goods to be manufactured in the U.S. for the "first sale" doctrine to apply. Kirtsaeng has argued that Sec. 109 trumps Sec. 606 and that Sec. 109 only requires that the goods be purchased lawfully where made and sold and that there is no support for the interpretation "under this title" to mean "made in the U.S.A."

Wiley argued that legislative history supports the position that Congress intended that copyright owners should be able to divide up their marketing areas and that Sec 602 was provided to enable the enforcement of distribution arrangements involving foreign licensees of their copyrights.

Of major concern is how the decision will impact retailers like Costco who import goods that are made abroad and which do not violate copyright laws in the country of origin. How will the decision impact consumers and the prices they pay for such goods?

The U.S. government filed an amicus brief and, at oral arguments, seemed to take a position that the government would keep the import provisions of Section 602 intact but would provide that the first sale in the U.S. would extinguish the copyright owner's rights. The problem with that, of course, is that if the goods are prevented from entering the U.S. there could be no "first sale" in the U.S.

In a decision announced on March 19 in *Kirtsaeng v. John Wiley and Sons*, No. 11-697, 213BL 72102, (U.S. March 19, 2013) the Supreme Court decided 6-3 to reverse and remand, holding that the "first sale" doctrine applies to a copyrighted work lawfully made abroad.

About the Author

Ernest Gifford is a principal in the IP firm, Gifford, Krass, Sprinkle, Anderson & Citkowski, PC with a main office in Troy. He has taught IP law for over 30 years at Oakland University.

Who's On the Bench? Magistrate-Judge Michael Hluchaniuk

By Roberta J.F. Wray

Hon. Michael Hluchaniuk

If you have never had occasion to practice in Federal Court, you might not know Magistrate-Judge Michael Hluchaniuk (pronounced Lu-chan-ik). He has been part of the U.S. Department of Justice for over 32 years, 27 of them with the U.S. Attorney's Office, primarily in Bay City.

In December 2007, Hluchaniuk was appointed to the position of Magistrate-Judge in the Federal District Court in Flint. A Southeastern Michigan native, Hluchaniuk is a 1969 graduate of The University of Michigan, with a B.S. in Industrial Engineering, and Wayne State University Law School (1972). He joined the GCBA in 2008. His legal career includes private practice as well as public service with Jackson County and Greater Lansing Legal Aid, and the Michigan Court of Appeals.

One of the most frequent mistakes made by young attorneys appearing in Federal Court, according to Judge Hluchaniuk, is their failure to follow the Federal Rules of Court, especially in civil matters. He says there seem to be fewer practitioners in Federal Court, partly because of the differences in the rules. In addition, he says, attorneys seem to be discouraged from federal practice because of the odds of drawing a judge in Detroit where there are 18 as compared with two in Flint. (The second Flint-based judge will be taking the bench as soon as the courthouse remodeling to accommodate him is completed).

Hluchaniuk was born in Allen Park, has a vacation home in northern Michigan and considers Michigan the ideal climate. He enjoys outdoor activities, especially fishing and anything on or near the water.

According to the Flint Journal, at Hluchaniuk's investiture U.S. District Judge Gerald Rosen commented that "even the FBI couldn't find anything negative to say about him" during their background check. He and his wife had two children. Their son passed away suddenly in March 2011. Their daughter lives in Maryland. They have three grandchildren.

Disability Law and Practice

By Robert J. MacDonald

Robert J. MacDonald

Thousands of people in our community struggle with physical impairments and illnesses that hamper their ability to earn a living. In a disability law practice, our first role is to listen to the person seeking our help and to understand his/her circumstances. Only then can we have a meaningful discussion with the person about his/her goals and potential claims.

Some persons with impairments desperately want to work. These people may benefit from understanding their rights under the Americans with Disabilities Act and Michigan's Persons with Disabilities Civil Rights Act. They may need to be directed to a range of medical, social and vocational services.

For younger, unattached people with milder impairments who cannot find employment in our depressed local economy, it sometimes makes better sense to explore job opportunities elsewhere rather than invest significant time in an unlikely claim for Social Security benefits.

Persons who are not able to sustain full-time work, who are not engaged in substantial, gainful activity and whose impairments are expected to last at least a year are candidates for Social Security Disability or Supplemental Security Income. Persons with particular medical conditions and persons over the age of 50 may still qualify despite their ability to do some type of work under the Listings of Impairments or Grid Regulations.

Social Security Disability Insurance Benefits are payable because of the person's prior earning record. Sometimes a person can draw auxiliary benefits based on another person's earning record, like a deceased spouse, or a deceased, disabled or retired parent. Clients awarded Social Security Disability generally become eligible for Medicare two years after benefit eligibility begins.

SSI benefits, by contrast, are essentially welfare benefits for the disabled, and a household's assets and income affect eligibility. SSI recipients can receive Medicaid. To help disabled workers maximize their income, consideration should also be given to workers' compensation, short and long term disability benefits, disability pensions or possible personal injury claims.

Social Security claims can be filed electronically or at the nearest district Social Security office. Flint offices are located on Robert T. Longway and on Carpenter Road. In Michigan, if a claim for benefits is denied, a claimant can appeal by filing a Request for Hearing. A claimant's representative is now required to file these requests electronically. We have six local Administrative Law Judges at the Office of Disability Adjudication and Review on Second Street in Flint who conduct hearings. The wait for a hearing now is about 9-12 months.

The Social Security Administration recently initiated a policy to keep the identity of the ALJ secret until the day of the hearing, which makes it somewhat harder to prepare for a hearing since judges tend to focus on different factors. Perhaps this policy will be revisited. The SSA has, for some years, maintained an electronic file for each claimant that representatives can access and supplement. The SSA expects counsel to develop the record and some judges ask for a prehearing brief to summarize the evidence and arguments supporting an award of benefits. Further appeals can be taken to the Appeals Council and, if appropriate, to the federal courts.

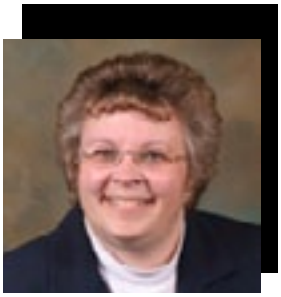
Genesee County is fortunate to have a number of skilled attorneys with a depth of knowledge regarding Social Security rules and practice that can meet the needs of the disabled in our community.

About the Author

Robert J. MacDonald is a member of MacDonald, FitzGerald & MacDonald PC which has represented disabled workers in Genesee County since 1938. In addition to Social Security Disability cases, he has a significant workers' compensation practice. He is currently the Chairman of the Michigan Association for Justice's Workers' Compensation Committee, and the author of "Workers' Compensation Cases" in ICLE's Michigan Basic Practice Handbook.

Collection of Recipes

By Barbara C. Dawes



Barbara C. Dawes

"Collection of Recipes", the GCBA Family Court Committee cookbook, is available now. Our cookbook contains recipes from a variety of people involved in the legal community, including attorneys, legal assistants, clerks, and legal secretaries. There are recipes for appetizers, breakfast, soups & stews, salads, main courses and, of course, lots of dessert recipes.

The cost of the cookbook is $20, or $15 each if you purchase three or more copies. (If you would like the cookbook mailed, there is an additional $5.00 charge). Upon completion of the sale, the proceeds will be donated to one or more local charities. The Family Court Committee intends to make the donation in May.

The number of copies is limited so don't delay in ordering your *"Collection of Recipes"* cookbook. To purchase one or more, please contact the Genesee County Bar Association at (810) 232-6012 or Attorney Barbara C. Dawes at (810) 733-2050.

Be Reasonable: How Business Compensation Can Affect Divorce Cases

By John W. Haag, Sr., CPA, CVA, CFF

John W. Haag

When a divorcing spouse owns or is a partner in a closely held business, its value — particularly the total amount of compensation the business provides to its owners — can play a significant role in the financial outcome of the divorce. Whether you represent the business owner or his/her spouse, you'll need a professional valuator to determine reasonable compensation.

Voice of Reason

How owners' compensation is calculated can dramatically affect property settlements and support payments. For example, Larry owns a construction company and decides to claim an excessive salary to reduce the business's value and, in turn, the amount of the property settlement. Or, in a different scenario, Larry claims an artificially low salary to reduce alimony and child support obligations.

Ideally, reasonable compensation for an owner of a closely held business like Larry's is the compensation he would be paid in an arm's-length transaction for the services he performed. A valuation expert would, therefore, determine the amount that a hypothetical replacement employee would be paid to perform those same services. Reasonable compensation needs to reflect the services rendered and should not be confused with distributions of the business's earnings.

Every Owner is Unique

Valuators weigh a variety of factors when determining reasonable compensation for a specific owner. Using the previous example, experts would look at an owner's:

Role in the business. It is essential to look beyond job title. A law firm, for example, may employ numerous "partners," but they don't all fill the same roles. Some are rainmakers, while others fight in the litigation trenches or manage the firm's operations. A valuator considers the experience and qualifications necessary to fill the partner's specific job, as opposed to simply the qualifications the partner happens to possess.

Compensation relative to comparable positions. The compensation received by similarly situated employees at similar companies is often useful. Valuators gather such data from a growing collection of sources, including the Bureau of Labor Statistics, the Medical Group Management Association, the Economic Research Institute and professional associations.

Company's internal consistency. How does the owner's or partner's compensation compare with that of the business's non-owner employees? If the business consistently pays below-market rates for other employees, an above-market rate for an owner may be unreasonable.

Business characteristics and condition. The business's size, complexities, industry, competitive position, financial condition and history all bear on the reasonableness of compensation. Companies with a long record of high revenues from loyal customers generally can afford to pay high compensation, but smaller companies might pay a significant salary premium to woo those same employees.

Business location. A technology-based firm located in

an urban area will probably have greater access to comparable employees than a similar company in a rural area. The cost of living is relevant, too. An owner in San Francisco requires more compensation than an owner in Anchorage to maintain a similar standard of living.

Professional Practices Require More

When determining reasonable compensation for a partner in a professional practice, valuators consider some basic variables, including the type of professional services offered (such as tax, estate or financial planning or medical practice specialty), and the duration of the partner's practice.

Other factors might be the:

- Age and health of the partner,
- Hours worked and general productivity,
- Practice's market, and
- Number of locations in which the practice operates.

Management or administrative responsibilities handled by the practice partner will help to determine reasonable compensation.

Reasonable Doubt

Remember that what might appear reasonable may turn out to be anything but. Retain a qualified valuator to assess any owner compensation that could affect the outcome of a divorce case.

About the Author

John W. Haag, Sr., CPA, CVA, CFF, is a Senior Manager in charge of the Management Advisory Services group of the Midland, Michigan, office of Yeo & Yeo, P.C., CPAs and Business Consultants. He is a co-leader of the firm's Valuation & Litigation Support team and performs business appraisals for privately held companies. John has specialization in business valuations, litigation support, business plans and start-ups, troubled debt restructuring, mergers and acquisitions, and management studies. He is a Certified Valuation Analyst and holds the designation of Certified in Financial Forensics from the American Institute of Certified Public Accountants. Contact John via e-mail at johhaa@yeoandyeo.com or call 800.701.3574.

April Membership Meeting Featuring Alan Kanter, Arbitrator & Mediator

Alan M. Kanter is a nationally recognized mediator with a reputation for providing outstanding ADR Services. His honors and awards are far too numerous to mention, but include:

- Best ADR, Business Contract Law Attorneys by Detroit Business Magazine
- National Academy of Distinguished Neutrals (Fellow)
- International Academy of Mediators (Distinguished Fellow)

MEDIATION WORKS – for clients, attorneys and our courts! Please join us at the Flint Masonic Temple at noon on Monday, April 22, 2013 for a presentation by Mr. Kanter about the ADR process.

Larry J. Day, ADR Committee Chair

Genesee County Bar Association
315 East Court Street
Flint, Michigan 48502-1611

RETURN SERVICE REQUESTED

PRSRT STD
U.S. Postage
P A I D
Flint, MI
Permit No. 125