STATE OF MICHIGAN
IN THE COURT OF APPEALS

SUSAN R. BANK,
an individual,

Plaintiff / Appellant,

-v-

MICHIGAN EDUCATION ASSOCIATION – NEA, and
NOVI EDUCATION ASSOCIATION, MEA – NEA,
incorporated labor unions,

Defendants / Appellees.

COA No.: 326668

Lower Court
6th Judicial Circuit, Oakland County
Case No. 14-139221-CL
Honorable Rae Lee Chabot

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APPELLANTS' BRIEF

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STATEMENT OF JURISDICTION

In 2013, Plaintiff/Appellant Susan Bank, a Novi public school teacher, attempted to resign from the Defendant/Appellee Michigan Education Association ("MEA") and the union representing her bargaining unit, Defendant/Appellee Novi Education Association ("Novi EA") (collectively "the Unions"). That attempt was rejected by the Unions because it was not submitted during the month of August.

Plaintiff brought suit, and on March 12, 2015, the Sixth Circuit Court for Oakland County dismissed Bank's case. The dismissal of this case was a final appealable order pursuant to MCR 7.202(6)(a)(i), and this appeal was timely pursuant to MCR 7.204(A)(1)(a). Therefore, this court has jurisdiction pursuant to MCR 7.203(A)(1).

QUESTIONS PRESENTED

I. Did the circuit court err in holding that Plaintiff-Appellant's contract claim was "hypothetical and moot"?

Plaintiff/Appellant says "Yes"
Defendants/Appellees say "No"
Circuit Court said "No"

II. Did the circuit court err in holding that Plaintiff-Appellant's duty-of-fair-representation claim was within the Michigan Employment Relations Commission's primary jurisdiction?

Plaintiff/Appellant says "Yes"
Defendants/Appellees say "No"
Circuit Court said "No"

III. Did the circuit err in holding that it lacked subject matter jurisdiction over Plaintiff-Appellant's right-to-refrain claim?

Plaintiff/Appellant says "Yes"
Defendants/Appellees say "No"
Circuit Court said "No"

INTRODUCTION

The Plaintiff-Appellant, Susan Bank, is a teacher employed by the Novi Community School District. She is included within a bargaining unit represented by the defendant unions, the Michigan Education Association-NEA ("MEA") and Novi Education Association–MEA-NEA ("Novi EA") (collectively the "Unions"). She attempted to resign from the Unions in 2013, but was not permitted to do so because her notice of resignation was not made during August 2013. MEA claims that its members can only resign during the month of August – this time period is commonly known as the "August window."

Bank filed a circuit court suit in Oakland County and alleged that the "Continuing Membership Application" form she signed was not an enforceable contract under which the Unions could demand dues payments, the Unions violated the duty of fair representation by not informing her of the August window, the Unions violated Public Employment Relations Act ("PERA") by threatening her in an attempt to make her remain a union member and by not allowing her to resign outside of August

On March 12, 2015, Oakland Circuit Judge Rae Lee Chabot dismissed the contract claim as "hypothetical and moot." 3/12/2015 Order at 2. The duty of fair representation claim was dismissed on primary jurisdiction grounds. The PERA violation related to limiting the right to resign was dismissed on subject matter jurisdiction grounds. 3/12/2015 Order at 2.

It is from this Order that Bank seeks relief.

STATEMENT OF FACTS AND PROCEEDINGS

On August 19, 2002, Bank entered into an agreement with the Unions by signing a form titled "Continuing Membership Application" (the "Application"). A copy of this Application is attached as Exhibit A. At the time she entered into this Application, Michigan law permitted

union security clauses in collective bargaining agreements. These clauses typically required that those within a bargaining unit, as a condition of employment, either be a member of the union and pay dues, or that nonmembers of the union pay an "agency fee" that was generally the equivalent of 80%-90% of the full dues amount. This type of agency-fee requirement was outlawed when, in 2012, the Michigan legislature enacted 2012 PA 349, Michigan's right-to-work law, which permits public-sector employees to refrain from paying dues and agency fees to their union representatives. MCL 423.210(3).

Even before 2012 PA 349 became law, covered employees did not have to be members of a union. However, those that chose to resign membership were almost always required to pay an agency fee. See *Abood v Det Bd of Educ*, 431 US 209 (1977). In Michigan, at least since 1973, PERA had allowed public-sector unions that had been designated as the mandatory collective bargaining agent to include agency fee requirements in collective bargaining agreements. See *Smigel v Southgate Community School Dist*, 388 Mich 531 (1972) and 1973 PA 25.

In 2004, the MERC decided the case of a teacher that sought to become an agency fee payer outside the August window. *West Branch-Rose City Educ Ass'n*, 17 MPER ¶ 25 (2004) (*West Branch II*), and *West Branch-Rose City Educ Ass'n*, 14 MPER ¶ 32006 (2000) (*West Branch I*). A copy of *West Branch II* is attached as Exhibit B, and a copy of *West Branch I* is attached as Exhibit C. In the West Branch litigation, one of the claims the MEA presented was that the MERC did not have jurisdiction over resignation matters. The MERC rejected this argument:

> The Union asserts that all members of the Association are voluntary members. [The teacher] entered into a membership agreement with the Association, thereby making himself eligible for the rights and benefits of membership as well as the reciprocal obligations of membership. Respondent contends that under these circumstances, where the Union was simply applying an internal rule, there can be no unfair labor practice. If this were the only issue

> raised in this case there would be no need for further analysis. However, since only nonmembers can request a reduction in their service fee, we must examine whether the Union's restriction on resignation improperly impacts [*Communication Workers of America v Beck*, 475 US 735 (1988)] rights. Thus, the essential PERA issue raised in this dispute is whether the Union's use of window periods with respect to the resignation of membership and the concomitant assertion of Beck rights violates its duty of fair representation.

West Branch II at 3.

Having found jurisdiction, the MERC proceeded to the merits and rejected numerous National Labor Relations Act decisions indicating that limitations on an employee's right to resign are improper. In particular, the MERC pointed out that PERA was missing the right-to-refrain language found in the NLRA. *West Branch II* at 5 n. 5. No appeal of *West Branch II* was filed.

In addition to the agency-fee ban previously discussed, 2012 PA 349 also created MCL 423.209(2)(b), which indicates that a public-sector employee may, "Refrain from . . . joining a labor organization or bargaining representative or otherwise affiliating with or financially supporting a labor organization or bargaining representative." This is the very language that in *West Branch II* the MERC noted was in the NLRA and not in PERA that thereby allowed it to reject the federal precedent. Act 349 also added the right to refrain to MCL 423.210(3).

Act 349 went into effect on March 28, 2013, and, per the statute, applied to collective bargaining agreements that were entered into or renewed after that effective date. The collective bargaining agreement governing Bank's employment expired on June 30, 2013. As of that date, Bank could not be required to pay the Unions' dues through the union security clause of her collective bargaining agreement.

The 2002 Application contains a provision, which Bank agreed to, that allowed for her school employer to deduct and withhold any amounts she owed to the Unions. This authorization states: "I authorize my employer to deduct Local, MEA and NEA dues, assessments and

contributions as may be determined from time to time, unless I revoke this authorization in writing between August 1 and August 31 of any year." Exhibit A, *supra*. Per this provision, the employer was only permitted to deduct dues and similar fees owed by her to the Unions.

In March 2012, the Michigan Legislature made it illegal for a public school district to withhold dues or fees for the union on behalf of the employee by enacting 2012 PA 53.[1] The Unions now have to collect these dues and fees themselves. The passage of 2012 PA 53 led MEA to create an e-dues program, by which it sought bank account and credit card information from its members and other employees covered by its collective bargaining agreements so that it could collect dues and agency fees. In June of 2012, 2012 PA 53 was enjoined by a federal judge. *Bailey v Callaghan*, No 2:12-cv-11504 (ED Mich) PACER Docket entry # 37. This injunction led the MEA to deemphasize the e-dues program.

Right to work passed on December 11, 2012. 2012 PA 349. This was during the e-dues lull. On December 28, 2012, a message from Steve Cook, MEA President, was sent to "local presidents, board members and staff." This was a factual finding by the ALJ in her September 2, 2014 Recommendation in the matter of Eady-Miskiewicz, a copy of which is attached as Exhibit D. This message revealed a portion of the MEA's plan to fight right to work:

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[1] This law, incorporated in MCL 423.210(1)(b), states:

> (1) A public employer or an officer or agent of a public employer shall not do any of the following:
>
> . . .
>
> (b) []A public school employer's use of public school resources to assist a labor organization in collecting dues or service fees from wages of public school employees is a prohibited contribution to the administration of a labor organization. However, a public school employer's collection of dues or service fees pursuant to a collective bargaining agreement that is in effect on March 16, 2012 is not prohibited until the agreement expires or is terminated, extended, or renewed.

> The membership application signed by every member indicates that if they wish to resign their membership, they must do so in August – and only August. We are sticking to that. Members who indicate they wish to resign membership in March, or whenever, will be told they can only do so in August. We will use any legal means at our disposal to collect dues owed under signed membership forms from any members who withhold dues prior to terminating their membership in August for the following fiscal year. Same goes for any current fee payers who choose not to pay their service fee.

Id. Act 349 became effective on March 28, 2013.

On May 9, 2013, the Sixth Circuit held that the injunction against 2012 PA 53 was improper. *Bailey v Callaghan*, 715 F3d 956 (CA 6, 2013). At that point, it was clear that the MEA was going to need to reinstitute and reemphasize its e-dues program.

Again, the collective bargaining agreement applicable to Bank's unit expired on June 30, 2013, and so, thereafter, the Unions could no longer use the union security provision as a basis for demanding dues. Also, since 2012 PA 53 was now effective, the school district could no longer collect dues or fees for the Unions. The Unions could only rely on the Application as a basis for dues and fees and had to collect those themselves. Thus, at the end of June 2013, these were both significant changes to the status quo.

Bank attempted to resign from the Unions in September of 2013, after both Right to Work and 2012 PA 53 were applicable. The Unions refused to honor her resignation. As the Unions stated in their Answer, in response to ¶ 17 of the Complaint, "[Susan Bank] was informed by her UniServ Director that, among other things, her attempted resignation in September of 2013 was untimely, and that pursuant to her Continuing Membership Application and Defendant MEA's Bylaws, resignations were only accepted in writing during the month of August." The Unions stated that Bank had "not appropriately resigned from Defendants and is not relieved of her contractual obligations to Defendants." Answer to ¶ 20 of the Complaint. The

Unions admitted that MEA "has publicly stated it may pursue legal collection actions to enforce its contractual rights." Answer to ¶ 22 of the Complaint.

On October 21, 2013, Bank received an email from a Novi EA official, David Kniaz, that stated:

> Hi there!
>
> I am just emailing because MEA sent the officers the list of people not signed up for e-dues yet for this school year, and I notice you were on it. I don't know if this was just an oversight, but I wanted to let you know that they plan to start the legal process soon. If you need the info on how to sign up for e-dues or how to arrange other payment options, let me know and I will get it to you! I just didn't want to see you have to go through the trouble of collections, etc. before I contacted you myself.
>
> Thank you! Let me know if you need the info!☺

Exhibit E.

On November 8, 2013, Bank spoke at a news conference announcing the formation of a new Michigan Senate committee that would examine right-to-work implementation issues. She testified before this committee on November 13, 2013.

Some actions at the MERC involving MEA will provide some context to the instant matter. The undersigned represents four Saginaw School teachers who claimed that, with the passage of 2012 PA 349, they had the right to resign from the MEA at any time and even if they did not, the MEA had a duty to inform them of the August Window. *Saginaw Educ Ass'n (Eady Mickiewicz),* Case Nos CU13 I-054 to I-060. The National Right to Work Legal Defense Foundation represented other school employees from other districts in similar actions; one of these cases will be discussed below.

A hearing in *Eady Mickiewicz* occurred on February 26, 2014. A copy of the transcript of this hearing is attached as Exhibit F. At this hearing, the MEA argued that its existence as a

union "predates PERA, predates MERC, the NLRA, most labor laws; and while the MEA appears frequently in front of [the] MERC, what it does, the benefits it offers, the forums in which it operates are not defined or limited by PERA." 2/26/14 Hearing at 24. It claimed that it had a "continuing membership policy since the 1950s, predating the passage of PERA and "the August resignation window period . . . since 1973." *Id*. at 25. MEA claimed that the MERC lacked jurisdiction over whether members could resign at any time since there was no effect on their employment: "MERC does not have roving jurisdiction . . . . Broadly speaking, MERC's jurisdiction is limited to matters affecting employment." *Id*.

Further, at that hearing MEA announced their new "Dues Collection Policy" through the testimony of executive director Gretchen Dziadosz. Exhibit G. This document indicated that "the member's account will go to collections when the accounts are over 90 days in arrears from the billing due date." February 28, 2014 was more than 90 days after the 2013-14 school year had begun.

Bank filed her Complaint on February 28, 2014. Essentially, the Unions contend that by signing the Application, Bank agreed to perpetually pay the Unions dues until such time as she was no longer employed or that she resigned from the Unions in a given year between August 1 and August 31 – the "August window." Bank sought a declaration that no such obligation to pay dues exists via the Application (i.e. that there was no enforceable contract both making her a member and requiring her to pay dues) and that the Application does not prevent her from resigning from the unions at any time (i.e. if there was an enforceable contact she had a statutory "right to refrain" from membership at any time – not just August).[2]

[2] While the term "right to refrain" was not included in the Complaint, in the claim titled "Defendants' conduct violates PERA," Bank noted "Defendants' refusal to allow bargaining unit members to resign during any month other than August is an impermissible attempt to restrain or

(Note continued on next page.)

Bank sent a resignation letter in August 2014 that the MEA accepted. So, she is no longer a member of the Unions.

On September 2, 2014, Administrative Law Judge Julia Stern issued her recommendation in *Eady-Miskiewicz*. Ex. D, *supra*. It was noted that there is not mention of the MEA's "bylaws or its website" on the Application. *Eady-Miskiewicz* at 4. Judge Stern discussed the internet presence of the MEA bylaws:

> The MEA bylaws are available on the MEA's website. The MEA's website includes a link to the bylaws, and a Google search for the MEA's bylaws directs one to the website. The website, however, does not include a specific link for resignations or window periods. . . . The MEA website address appears on almost all MEA publications . . . . Aside from making the bylaws available through its website and publicizing the website, the MEA does not regularly publish information about the window period of any its publications or send information about the window period to its members.

Id. at 3-4. Judge Stern indicated that despite the passage of 2012 PA 53, 2012 PA 349 and the implementation of the e-dues program "There is no indication that . . . the MEA sent any type of notice or reminder of the August window period to members who did not specifically ask about resigning." *Eady-Miskiewicz* at 10.[3] It was noted that during the hearing on the matter, the MEA's executive director indicated that the MEA had hired debt collectors for the 2012-13 membership year, but had not as, of then, hired collectors for the 2013-14 membership year. *Eady-Miskiewicz* at 12.

Judge Stern rejected the Unions' claim that, without an effect on employment, the MERC would lack jurisdiction:

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coerce a public employee in the exercise of her right to withhold financial support from the union." *Id*. at ¶ 50. Further, in the "Relief Requested" portion of that document, she sought "that this Court issue declaratory relief that she be allowed to resign from the Defendants at any time." Complaint at p 9. Michigan is a notice pleading state. *Thomas M Cooley Law School v Doe 1*, 300 Mich App 245, 285 (2013).

[3] "During the 2013-2014 school year, there were approximately 112,000 active status (excluding students and retirees) MEA members." *Eady-Miskiewicz* at 12.

> Prior to PA 349, therefore, under established Commission precedent, [the Unions'] enforcement of its windows period for resignation in this case would not have constituted an unfair labor practice because it did not impact [the Saginaw school teachers] employment. However, PA 349 added to § 9 of PERA an explicit right to refrain from the activities described in that section, including joining or assisting a labor organization.

Eady-Miskiewicz at 14.

On the merits, Judge Stern recommended that MEA members could resign at any time under the statute and that the Application did not constitute a waiver of that right:

> The addition of the right to refrain language [] in §9(1)(b) of PERA gave employees the right under §9 of PERA to resign their union membership at will and prohibited unions from restricting that right by rule or policy. The [Saginaw school teachers] had a §9 right to resign their union memberships outside of the MEA's August window period. They did not clearly and explicitly waive that right either by joining [the Unions] when [the MEA] had a bylaw that restricted when they could resign or by the Continuing Membership agreements which they signed.

Id. at 24. Judge Stern rejected the Saginaw teachers' claim that the MEA violated the duty of fair representation by failing to affirmatively notify all of its members about the resignation window. *Id*. at 26.[4]

On September 19, 2014, Bank filed a motion to compel discovery related to her duty-of-fair-representation claim and some other discovery related to the manner that the MEA had sought collections from various parties it believed owed it money. At the October 1, 2014, hearing on this discovery matter, the circuit court suggested that the parties file cross motions for summary disposition. Bank was to file a summary disposition on the contract claim and if that was not successful then the circuit court would return to the discovery matter.[5] .

[4] In *Eady-Miskiewicz*, both sides filed exceptions and there is no final decision from the MERC.

[5] The motion to compel was denied without prejudice on October 23, 2014. Judge Chabot indicated "Once the motions for summary disposition have been addressed, Plaintiff may renew the motion if appropriate." 10/23/14 Order at 2.

On October 3, 2014, Administrative Law Judge David Peltz issued his recommendation in *Teamsters Local 214 (Beutler),* Case No CU13 I-037, one of the resignation cases brought by the National Right to Work Legal Defense Foundation mentioned earlier. A copy of this Recommendation is attached as Exhibit H. Significantly, Judge Peltz recommended that MERC does not have jurisdiction over right-to-resign claims. He indicated that 2012 PA 349 was far more than the addition of the right to refrain and that this additional statutory verbiage prevented the MERC from having jurisdiction:

> The flaw in the theory relied upon by Judge Stern is that the analysis focuses almost entirely on the addition of the "right to refrain" language in Section 9(1)(b) of PERA and essentially ignores the other amendments to Sections 9 and 10 of the Act which were enacted as part of the right-to-work package of legislation. . . . A thorough examination of the 2012 amendments in their entirety leads to the unavoidable conclusion that the conduct of the sort complained of by Beutler, and by the [Saginaw school teachers] in the cases heard by Judge Stern, while perhaps remediable in another forum with adequate factual support, does not constitute an unfair labor practice over which [the MERC] has jurisdiction.

Beutler at 12.[6]

Returning to the instant action, the parties brought cross motions for summary disposition which were heard on February 25, 2015. Judge Chabot set forth her rationale from the bench:

> I agree with plaintiff. I think the actions by defendant are ridiculous. However, I don't think I have jurisdiction in this matter.
>
> The claim, pursuant to [PERA], is subject to the exclusive jurisdiction of the MERC, and thus, is not properly before this court. The claim regarding the duty of fair representation is also properly before the MERC under the primary jurisdiction doctrine.
>
> . . .
>
> Finally, the claim for declaratory relief and injunctive relief is not properly before court as it is based on hypothetical harm. . . .
>
> Since this court lacks jurisdiction . . . [it] may not address plaintiff's motion for summary disposition.

[6] Exceptions to *Beutler* have been filed and the MERC has not issued a decision yet.

2/25/15 Hearing at 14-15. A copy of this hearing transcript is attached as Exhibit I.

The Order dismissing the case for lack of jurisdiction was entered on March 12, 2015. A timely appeal as of right was taken from this Order on March 30, 2015.

ARGUMENT

To provide context to the circuit court's holding, Bank will first discuss the merits of each separate cause of action, the Unions' position regarding the merits on that claim and then Bank will discuss the jurisdiction or other procedural matters related to that claim. This process will be repeated for all three causes of action.

I. THE CONTRACT CLAIM WAS PROPERLY BEFORE THE CIRCUIT COURT AND THE REQUESTED RELIEF IS BASED ON THREATENED HARM.

A. Merits of the contract claim

This claim is there is no enforceable duty created by the Application that requires Bank to pay dues to the Unions. A holding in Bank's favor on this issue would obviate the need to consider either the duty-of-fair-representation claim or the right-to-refrain claim.

The Unions cannot successfully rely on the Application as an independent contractual basis that would require Bank to pay dues to the Unions. First, by the express terms of the Application, she did not agree to perpetually pay dues, nor did she agree to remain a member on their terms — she only authorized her employer to deduct any dues or fees, if she owed them. Second, assuming the Application is ambiguous, ambiguities are construed against the drafter. Third, even if she had agreed in the Application that she would pay dues and fees and could only resign during one month out of the year, the clause upon which the Unions rely became illegal making the entire Application unenforceable. Fourth, the Unions' bylaws cannot be imported into the application. Lastly, neither the federal contract clause nor its state equivalent prevents Bank's requested relief.

1. Based on the express term within the four corners of the Application, Bank did not agree to pay dues.

Michigan's law of interpreting contracts is clear and has been well summarized by this Court:

> That contracts are enforced according to their terms is a corollary of the parties' liberty to contract. *Rory v Continental Ins Co*, 473 Mich 457, 468 (2005). This Court examines contractual language and gives the words their plain and ordinary meanings. *Wilkie v Auto–Owners Ins Co*, 469 Mich. 41, 47 (2003). '[A]n unambiguous contractual provision is reflective of the parties' intent as a matter of law,' and '[i]f the language of the contract is unambiguous, we construe and enforce the contract as written.' *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375 (2003). Courts may not impose an ambiguity on clear contract language. *Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 198 (2005).

Coates v Bastian Brothers, Inc, 276 Mich App 498, 503 (2007).

The provisions of the Application are clear. The word "dues" is used five times in the Application. At no point within the four corners of the Application is there an express agreement whereby Bank promised to perpetually pay the Unions dues independent of those dues required in any governing collective bargaining agreement.

The first use of "dues" merely discusses their tax treatment: "Dues payments to the MEA-NEA-Local are not deductible for Federal Income Tax purposes. However, they may be deductible under other provisions of the Internal Revenue Code and/or Michigan Income tax provisions." Exhibit A, *supra*. These sentences do not create a separate promise to pay dues in the absence of a union security clause in the controlling collective bargaining agreement.

The second use of "dues" occurs in the next paragraph of the Application:

> As a participant in the Local-MEA-NEA Early Enrollment Membership Program, I am eligible to receive, prior to September 1, 2001, certain benefits normally available only to regular dues paying members of the associations, including coverage under the NEA Educators Employment Liability (EEL) Program. As a condition of eligibility for these benefits, I agree to pay the appropriate "unified" Active membership dues for the 2001-2002-membership

> year in accordance with the regular payment procedures. Should I fail to do so, my eligibility to receive benefits under the NEA EEL Program shall immediately terminate. In addition, I shall be liable for the cost of any benefits that were provided to me under the NEA EEL Program prior to September 1, 2001.

Id. As a primary matter, that language concerns matters dated 11 months before Bank signed the Application. Generously presuming it was meant to apply to the period between the date of her signature and the start of the 2002-2003 school year, that time has long since passed. That paragraph appears to have been created to allow teachers to receive insurance coverage from their signature date to the time they started their teaching duties. The paragraph did not create a separate promise to pay dues in the absence of a union security clause in the controlling collective bargaining agreement.

> The third use of "dues" states:
>
> PLEASE CHECK ONE (1) BELOW:
>
> □ Cash Payment – Membership is continued unless I reverse this authorization in writing between August 1 and August 31 of any year.
>
> □ Payroll Deduction – I authorize my employer to deduct Local, MEA and NEA dues, assessments and contributions as may be determined from time to time, unless I revoke this authorization in writing between August 1 and August 31 of any year.

Exhibit A, *supra*. Bank checked the "Payroll Deduction" option and not the "Cash Payment" option. The checked option runs only to her employer – the school district. It does not mention the Unions as entitled to anything other than to receive dues, assessments and contributions if these have been withheld by the employer. This provision is one sentence with two clauses. Since the first clause is unambiguously an authorization for the employer to deduct dues and fees, the second clause, which contains a method of revoking the authorization, can only apply to that same prior authorization. At the time this Application was made, such an authorized deduction (i.e., a dues or fees requirement in the union security clause of a controlling collective

bargaining agreement) was legally permissible, and the second clause in the sentence provided a method whereby Bank, or any other teacher, could revoke her previous authorization to have her employer withhold her dues. This revocation of the school district's withholding authority could have only taken place during the month of August. Again, the language is clear and unambiguous and no portion of this provision creates a promise by Bank to pay membership dues independent of the union security clause of a governing collective bargaining agreement, nor does she agree to any restrictions on how or when she may resign her union membership. To be read as the Unions are urging, the provision would have to say something such as 'I agree to perpetually pay dues, assessments and contributions as may be determined by the MEA and NEA even in the absence of a union security clause requiring such payments, and I further authorize my employer to deduct these dues…' But the actual language does not include anything similar to this hypothetical wording.[7]

The fourth and fifth mentions of dues occur in the section whereby a teacher could sign up for voluntary life membership in the MEA. Bank did not sign up for this.

2. Even if the Application were ambiguous on whether an independent dues obligation was created, with form contracts ambiguities are construed against the drafter.

If there is any ambiguity about whether Bank, through the Application, was obligated to pay dues, any such ambiguity would be construed against the drafter — the Unions.

[7] The Application is a form contract, and another provision of the form does appear to allow a teacher to contractually agree that she will only resign *membership* from the union during the month of August: "membership is continuing unless I reverse this authorization in writing between August 1 and August 31 of any year." See Exhibit A. However, Bank did not check off or otherwise agree to this portion of the form contract. A valid contract requires "a meeting of the minds [which] is judged by an objective standard, looking to the express words of the parties and their visible acts." *Stark v Kent Products, Inc*, 62 Mich App 546, 548 (1975). No objective standard would say that she agreed to a provision where she had the option of checking a box but chose not to, and where the box is visibly not checked, as we have here.

> In interpreting a contract whose language is ambiguous, the jury should also consider that ambiguities are to be construed against the drafter of the contract.[12] This is known as the rule of *contra proferentem*.
>
> [12] "This rule is frequently described under the Latin term of *contra proferentem*, literally, against the offeror, he who puts forth, or proffers or offers the language." Williston, supra, § 32:12, pp. 472-475.

Klapp v United Ins Group Agency, Inc, 468 Mich 459, 471 (2003). The Application is a form contract and form contracts are the type of contract *contra proferentem* appears to have been most often applied to. So if there were any ambiguity as to the meaning of the authorization provision, it is resolved against the Unions' position as the drafters, and could not require Bank to pay dues.

3. Assuming the Application did create an obligation on Bank to pay dues, it would no longer be enforceable since the dues withdrawal that was made illegal by 2012 PA 53 was central to the agreement between Bank and the Unions; therefore, the agreement cannot be severed.

As we have seen, the clause Bank agreed to only authorize her employer (the school district) to withhold dues and fees, it did not promise dues payments to the Unions. But, even if the clause did serve as a requirement that she pay dues to the Unions, this clause is no longer enforceable because it contradicts the plain language of 2012 PA 53, incorporated as MCL 423.210(1)(b), which prohibits a public school employer from using "public school resources to assist a labor organization in collecting dues or service fees from wages." Under this new statute, the authorization clause, "I authorize my employer to deduct Local, MEA and NEA dues," is disallowed.

As this authorization provision is now unenforceable, it is stricken from the Application. When a provision of a contract violates a statute, the entire contract is void unless the offending provision is severable:

> Illegal portions of a contractual agreement may be severed. *Stokes v Millen Roofing Co*, 466 Mich 660, 666(2002). However, in order to sever "the illegal portion, the illegal provision must not be central to the parties' agreement." *Id*. "If the agreements are interdependent and the parties would not have entered into one in the absence of the other, the contract will be regarded ... as entire and not divisible." *Id*., quoting 3 Williston, Contracts (3d ed), § 532, p 765.

AFSCME v Detroit, 267 Mich App 255, 262 (2005). This voids the Application as Bank filled it out and agreed to it.

Here, even a cursory examination of the Application shows that the dues authorization provision is central to the agreement. The Application covers little except for the manner of dues collection. Further, the Application has no severance provision which might save the rest of the agreement by narrowly removing the objectionable clause. Thus, even if the Application were construed to require Bank to pay dues, the passage of 2012 PA 53 stuck a central portion of the agreement, making the remainder void.

4. The bylaws cannot be imported into the four corners of the Application to create either an obligation requiring Bank to pay dues or for her to only resign her membership in August of any given year.

The Unions contend that the MEA's bylaws should be imported into the Application. But the Unions do not mention the bylaws in their Application. Further, they admit that they have no policy or procedure for informing members of the bylaws, and in the instant matter Bank has sworn that she never received a copy of any bylaws.

As a matter of contract law, the bylaws cannot be used as extrinsic evidence. Extrinsic evidence to aid in understanding an agreement can only be introduced when there is an ambiguity in the agreement. Ambiguity in a contract has been defined as, "when its provisions are capable of conflicting interpretations." *Klapp*, 468 Mich at 467. But, as here, "[i]f the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous." *Meagher v Wayne State Univ*, 222 Mich App 700, 722 (1997). Where there

is no facial or patent ambiguity in an agreement, the court will not look to extrinsic or parol evidence due to the "parol evidence rule, which prohibits the use of extrinsic evidence to interpret unambiguous language within a document." *Shay v Aldrich*, 487 Mich 648, 667 (2010). And "courts are not permitted to create ambiguity where the terms of the contract are clear." *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 200 (2005).

Where, however, there is "latent" ambiguity, the courts will sometimes look to extrinsic or parol evidence:

> An ambiguity may either be patent or latent. This Court has held that extrinsic evidence may not be used to identify a patent ambiguity because a patent ambiguity appears from the face of the document. However, extrinsic evidence may be used to show that a latent ambiguity exists. With respect to a latent ambiguity, we have explained as follows:
>
> > A latent ambiguity, however, is one "that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." Because "the detection of a latent ambiguity requires a consideration of factors outside the instrument itself, extrinsic evidence is obviously admissible to prove the existence of the ambiguity, as well as to resolve any ambiguity proven to exist."
>
> A latent ambiguity exists when the language in a contract appears to be clear and intelligible and suggests a single meaning, but other facts create the "'necessity for interpretation or a choice among two or more possible meanings.'" To verify the existence of a latent ambiguity, a court must examine the extrinsic evidence presented and determine if in fact that evidence supports an argument that the contract language at issue, under the circumstances of its formation, is susceptible to more than one interpretation. Then, if a latent ambiguity is found to exist, a court must examine the extrinsic evidence again to ascertain the meaning of the contract language at issue.

Shay, 487 Mich at 668-9 (internal citations omitted). Note that even with latent ambiguity, there must be other "facts" that "create the necessity for interpretation or a choice among two or more possible meanings." *Id*. There are no such facts present here. Bank agreed in her Application to

authorize her employer to deduct any dues she owed from her paycheck — nothing more. The Application, which is the only agreement she entered into with the Unions, placed no restrictions on her ability to resign from the Unions. Consequently, there is no reason to consider the bylaws as extrinsic or parol evidence in interpreting the Application. This is even more so since there is no mention of the bylaws in the Application, the MEA has no policy or practice of informing members of the bylaws when they join, and since Bank did not receive a copy of the bylaws.

In *West Branch I*, a teacher sought to resign from the MEA outside the August window so as to immediately become an agency fee payer. An administrative law judge ruled in favor of the unions and the teacher filed exceptions with the MERC. In its factual predicate, the MERC noted that there was a union security clause, that the union's bylaws attempted to limit resignations to August, and that the teacher had filled out the "Continuing Membership Application" form and checked the payroll deduction option. In examining the teacher's claim, the MERC focused on two issues: (1) whether the teacher had received notice of his right to be an agency-fee objector; and (2) whether the teacher had received notice of the August window. Only the second issue is relevant here.

Regarding the August window, the teacher indicated that he was unaware of it before he sought to resign. *Id*. The MERC noted that the union bylaws submitted into evidence were dated "nine years after Charging Party first became a member of the Union, and there was nothing in the record establishing that language pertaining to the window period was included within any prior version of the bylaws." *Id*. at 4.[8] The MERC also noted there was no evidence that the

[8] In *Eady-Miskiewicz et al* the Unions showed that the bylaws had long included the window period. Bank is not claiming that the bylaws were not in existence when she signed the Application.

teacher was "ever provided with, or even given access to, a copy of the by-laws prior to his resignation." *Id.*

The MERC began its analysis by discussing the impact of the "Continuing Membership Application":

> In recommending dismissal of the charges, the ALJ relied upon the "Continuing Membership Application" which [the teacher] signed upon his hiring . . . . However, that document does not in any way indicate that the district's employees have the option to decline membership in the Union and become an agency fee payer. It is true that the "Continuing Membership Application" makes reference to a one-month window period in August of each year. However, that language only restricts [the teacher]'s ability to revoke his or her dues checkoff authorization. There is nothing in the document limiting [the teacher]'s ability to resign from the Union. The National Labor Relations Board . . . has found that a dues check-off authorization constitutes an agreement between the employee and the employer as to the precise method by which union dues are to be paid, and that such an agreement does not itself obligate an employee to remain a full union member.

Id. The MERC held that the union failed to provide the teacher with notice of his right to refrain from joining the union and also failed to provide him with "information concerning its own internal rules regarding continuing membership obligations." *Id.*

Premising its finding on the fact that "the [union] failed to provide [the teacher] with notice of his rights and obligations under both PERA and the MEA constitution and bylaws," the MERC held in favor of the teacher and noted that it therefore "need not address the broader issue concerning the legitimacy of the Union's policy restricting the ability of its members to resign." *Id.* Aside from ordering the union to pay interest on a minor award of dues, the MERC ordered the union to "**ensure that the MEA bylaws are easily accessible to all Union members, and/or explicitly notify each member of the existence of the one-month period on resignations**." *Id*. (emphasis added).

On appeal, this Court vacated the MERC's ruling since the "issue of notice was not raised in [the teacher]'s exceptions" to the ALJ's recommendation. *Michigan Educ Ass'n v Dame*,

unpublished opinion per curiam of the Court of Appeals, decided Jan. 24, 2003 (Docket No 230803).[9] A copy of this opinion is attached as Exhibit J. Thus precluded from considering whether the teacher had been provided notice of the August Window, in *West Branch II*, the MERC then held there was no right to resign largely based on the absence of explicit right-to-refrain language. But, the MERC did not repudiate its prior analysis of the Application. The Unions have therefore been on notice since at least 2000 that the Application only governs dues deductions, does not control membership, and that it "does not itself obligate an employee to remain a full union member." *West Branch I*. Nor was there any indication in *West Branch II* that the Application constituted a separate dues requirement that would exist with or without a valid union security clause requiring dues or fees in a governing collective bargaining agreement.

In their opposition to Plaintiff's Motion for Summary Disposition on Contract Claims, the Unions essentially admit that if the Application is read in isolation there is no requirement on Bank to pay dues:

> [Bank] is incorrect that [the Unions] are solely relying upon the language in the Continuing Membership Application to assert that [Bank] is bound to be able to resign her membership with Defendants in any given year. [The Unions] have always stated that the Continuing Membership Application *and* [the Unions]' Bylaws form the contractual relationship.

Defendants' Response in Opposition to Plaintiff's Motion for Summary Disposition on Contract Claims at 2 (emphasis in original). The Unions contend that Bank must "inform herself" about the MEA bylaw "containing its August resignation window." *Id*. at 3. Implicitly, this duty applies to the approximately 112,000 other MEA members as well. The Unions contend that when the Application and bylaws are read in conjunction "PA 53 has no impact upon the contractual relationship between [Bank] and [the Unions] with regard to these issues." *Id*.

[9] In that case, the teacher failed to file a brief with this Court. *Michigan Educ Association* at n. 4.

Finally, the Unions spend a good portion of their brief on the irrelevant question of whether Bank had subjective knowledge of the bylaws.

The Unions cite *Cleveland Orchestra Comm'n v Cleveland Federation of Musicians,* 303 F2d 229 (CA 6, 1962), *Dunn v Detroit Federation of Musicians,* 268 Mich 698 (1934), *Mayo v Great Lakes Greyhounds Lines*, 333 Mich 205 (1952), and *Ottawa County Employees Ass'n v Ottawa County General Employees,* 130 Mich App 704 (1983) for the proposition that where an individual joins a union he is governed by its bylaws and constitution. This is true as far as it goes, none of the cases covers the factual situation here – that the union wants dues independent of any collective bargaining agreement and that it wants to incorporate the MEA bylaws into an initial "membership" agreement without making any mention of the bylaws in the agreement that the individual signed. The only case that has ever dealt with this factual situation was *West Branch I*, where such an attempt was held to be improper.

The Unions try and blunt the impact of 2012 PA 53 by focusing on the bylaws instead of the application:

> [I]t is of no import that PA 53 prohibited an employer from making deductions from [Bank]'s paycheck. Without conceding that [Bank] is correct in any way in how she tries to limit the language of the Application or if it is impacted by PA 53, [Bank] still had an obligation to pay the union pursuant to the union's governing documents if she did not resign during August. The MEA's Bylaw I clearly has no relation to an employer's dues and is unaffected by the passage of PA 53.

Defendants' Response in Opposition to Plaintiff's Motion for Summary Disposition on Contract Claims at 12. In essence, the Unions contend that the Application is merely a vehicle to membership and that once an individual reaches that status, the Application is of little import – only the bylaws matter. Thus, they focus on Act 53's impact on the bylaws as opposed to the Application despite the fact that the only document signed was the Application and there is nothing in that document indicating a signee will be bound by the bylaws. Apparently, all public

school employees are supposed to intuitively recognize that, by allowing the school district to take their dues, they have agreed to 21 pages of bylaws that are nowhere to be seen or referenced.

The Unions further claim that Bank had a duty to "make herself aware of MEA's bylaws, and her claims of ignorance cannot stand." Defendants' Response in Opposition to Plaintiff's Motion for Summary Disposition on Contract Claims at 14. Interestingly, one of the cases that the Unions cite for this proposition actually says the opposite.

The case is *Monroe v International Union UAW*, which concerned whether an employee had to use internal union grievance procedures before filing a suit. The Unions only cite the district court decision, wherein the court states:

> These decisions have held that union members cannot rely on their own ignorance of intra-union procedures, on their failure to determine the same, or, indeed, on misrepresentations by union officials. . . . It is true, as Plaintiff points out, that neither the UAW Constitution, nor the verified copies of Solidarity, the UAW magazine . . . specifically mention the fact that exhaustion of the intra-union procedure can lead to reinstatement of the grievance. This absence is probably because such reinstatement is not a formal part of the collective bargaining agreement between the UAW and GMC. Rather . . . the practice is set out in letter amendments to the agreement.
>
> Nevertheless, this absence does not absolve a union member from becoming aware of all intra-union procedures, and possible remedies flowing therefrom, whether they be inside, or outside, of the union constitution or the collective bargaining agreement. Prior cases have held that union members could undoubtedly "become aware," . . . of these procedures, and remedies, through formal means, such as reading the union constitution or Solidarity . . . , or through, perhaps, informal means, such as questioning union officials or others familiar with intra-union procedures. Although the availability of the UAW Constitution, in the case herein, is somewhat unclear, nothing else in the record indicates that the balance of formal, or informal, means of acquiring information were not available to the Plaintiff.

Monroe v International Union UAW, 540 FSupp 249, 261 (SD Ohio 1982). On appeal, there was a significant limitation to the district court's broad language. There, the Sixth Circuit indicated

that intra-union grievance exhaustion will be required "**Where the union member is fully advised of appeal procedures** and the union constitution mandates that they be exhausted and where those procedures give full relief as defined in [*Clayton v International Union, UAW*, 451 US 679 (1981)][10] we hold that the balance falls in favor of requiring exhaustion." *Monroe v International Union UAW*, 723 F2d 22, 25-26 (CA 6, 1983) (emphasis added). At the circuit court, the Unions merely noted that the district court decision in *Monroe* was affirmed and failed to discuss that the proposition they were citing the case for had been significantly modified by the Sixth Circuit.

The Unions do properly cite to one Sixth Circuit case that somewhat supports their argument. In *Rogers v Bd of Ed of Buena Vista Schools*, 2 F3d 163 (CA 6, 1993), the Sixth Circuit held that a Michigan school teacher had a duty to exhaust internal union remedies, despite his unawareness of their existence:

> Plaintiff argues finally that he should not be required to exhaust because he did not know of his remedies under the MEA Constitution and by-laws. Plaintiff also maintains that [a union official] told him that his only remedy was the present lawsuit, and that this misrepresentation excuses his failure to exhaust also. We reject both contentions. The MEA Constitution is a written document, which plaintiff should have reviewed to ascertain his rights under it. Simple ignorance is no excuse for failure to exhaust.

Id. at 167. The *Rogers* panel cited its previous *Monroe* decision but did not explore whether there was any tension between the two. But, even with *Rogers*, there is nothing to indicate that the

[10] *Clayton* concerned where it was proper to require an employee to use internal union grievance procedures before filing suit under § 301(a) of the Labor Management Relations Act, 1947, 29 USC § 185(a). In that case, the Supreme Court discussed the UAW constitution and noted that the employee had been made aware of its existence: "The District Court sustained this defense, finding that Clayton had failed to exhaust the internal appeals procedures; that those procedures were adequate as a matter of law; **that Clayton had been advised of their existence**; and that his failure to exhaust could not be excused as futile." *Clayton*, 451 US at 684 (emphasis added).

Sixth Circuit considered the question of whether the MEA properly disclosed the existence of the bylaws to the teacher when he (presumably) signed the Application.

Essentially, the Unions contend that Bank should be bound by their bylaws since those are available on the internet. While Michigan courts do not appear to have addressed the issue of consent to an agreement available online, it has been addressed in other jurisdictions. The "seminal case"[11] on the matter of consent to material available online is *Specht v Netscape*, 306 F3d 17 (CA 2, 2002). In *Specht* the issue was whether or not someone who downloaded software had agreed to arbitration. The arbitration provision was available on the website, but was not required viewing to download the software, nor was there a checkoff to indicate that it had been viewed and read. For that reason, then-circuit court Judge Sotomayor held that users could not be held to the terms found in that agreement. As summarized in Blum, *Offer and Acceptance in Cyberspace*, 47 Md BJ 18 (2014):

> Judge Sotomayor rejected Netscape's argument that the presence of a scrollbar on the side of the page put the users on inquiry notice of the admonition to review the terms of service at the bottom of the page. She also contrasted Netscape's website to other sites and software programs that force users to affirmatively and explicitly state their agreement to terms of service before using the website or program. Judge Sotomayor found that because the users did not explicitly agree to the terms of service and no reference to the terms was visible on Netscape's page without further investigation, a reasonably prudent Internet user would not have understood him or herself to be assenting to Netscape's terms of service by downloading [the software], and accordingly no contract had been formed.
>
> Other cases have continued to adhere to the framework set forth by then-Judge Sotomayor in *Specht*. See, e.g., *Kwan v Clearwire Corp*, No. C09-1392JLR, 2012 WL 32380 (WD Wash 2012). Under this model, the gold standard for expressing consent to a website's terms of service is an explicit action by which the user manifests his or her agreement to abide by those terms, such as clicking a button labeled "I agree" before being allowed to access the website's services.

[11] *Specht* was called the "seminal case" by Blum, *Offer and Acceptance in Cyberspace*, 47 Md BJ 18 (2014). In addition, *Specht* appears to have been cited in approximately four hundred law review articles.

Compare this requirement with what is urged by the Unions here — that Bank agreed to the terms and conditions of the MEA bylaws, even though these were not incorporated into or referenced in her Application, merely because this document was available online on a webpage. Here, there is no manifest expression of intent by Bank to be bound to the requirement that she only be able to resign from the Unions during August. So even assuming facts most favorable to the Unions — that the bylaws were available online or at the asking, this is not sufficient to hold that a contract was formed where the teacher did not acknowledge in some way an agreement to adhere to them or where the bylaws were not referenced in the Application or any other agreement the teachers entered into.

With no knowledge of the bylaws or its contents, and no incorporation of the bylaws into the Application, there is no objective indication that the parties had a 'meeting of the minds' and that Bank agreed to any bylaw provisions whether they are a requirement to pay dues or a limitation on resignations to the month of August. To the extent that there is any tension between *Specht* and the Unions' cases, *Specht* represents the better option. There is no indication that the Michigan courts would create a rule whereby a contracting party could hide key terms at the initiation of a contractual relationship and thereby bind the other party. This is what the Unions seek.

5. A ruling in Plaintiff's favor would not violate the Contracts Clause of either the state constitution or the federal constitution.

The Unions have raised the affirmative defense that either 2012 PA 53 and/or 2012 PA 349 should not apply since they could implicate "state and federal constitutional rights preventing the impairment of contracts." Defendants' Answer, Affirmative Defense 5. They made no mention of this in their briefing in their opposition to Bank's brief regarding summary disposition on the contract claim.

The Application is not indefinite. Absent a resignation, it renews every August 31. As another jurisdiction has persuasively stated the general rule for applying a statute to a renewing contract:

> ...the Court first notes that the Tenth Circuit has held that Oklahoma follows the general rule that "[a]ll statutes in force at the time the contract or insurance is made (**or renewed**) **will be considered to be part of the contract provided that such statutes bear on the subject matter of the contract and define the rights and liabilities of the parties to the agreement**."

Stangl v Occidental Life Ins Co of North Carolina, 804 FSupp 2d 1224 (WD Okla 2011) (emphasis added). The Application, when it renewed on Aug. 31, incorporated any applicable changes in the law (i.e., 2012 PA 53) which had taken place in the interim. In this case, the change in the law was one which made the dues authorization provision illegal, and thus the entire Application unenforceable.

B. The Unions threatened Bank with collections. Further, Bank sought discovery on the Unions' collections activities, which the trial court prevented

The Unions do not claim that this court lacks jurisdiction to determine whether their Application constitutes a valid contract with Bank. Rather, they claim that such a claim is not ripe for adjudication because they have not yet begun a collections action. Thus, they seem to agree that the circuit court has subject matter jurisdiction to interpret the legal effect of the Application.

The parties do agree that as of her filing a letter in August of 2014, Bank is no longer a member of the MEA or Novi EA. Thus, any declaratory relief as to her current membership status would be moot. Not surprisingly, that is the limit of the parties' agreement.

Brazenly ignoring the October 21, 2013 "trouble of collections" email, the Unions contended:

> This Court cannot "fashion appropriate and effective relief to resolve the alleged controversy" because no "actual controversy" exists. Plaintiff has . . . resigned her

> membership in Defendants Associations and has terminated her dues-paying obligation. Moreover, at no time before or after her resignation became effective on September 1, 2014, have Defendants threatened or initiated any legal action to collect the $1075.69 in membership dues that Plaintiff has not paid to date. See Answer to Complaint, pp 8-9. Accordingly, any injury that she seeks to prevent through a declaratory ruling is "merely hypothetical."

Defendants' Motion for Summary Disposition and Brief in Support at 17 (emphasis added). The Unions reference their Answer to the Complaint at pages 8-9, which, in relevant part, states:

> 21. The Defendants have indicated that they will begin debt collection actions against her. See a copy of an October 21, 2013 email from David Kniaz, attached as Exhibit C.
>
> **ANSWER: The allegation in paragraph 21 is denied for the reason that the same is not true. Defendants further state that the October 21, 2013 email speaks for itself.**
>
> 22. Defendant MEA has publicly acknowledged that it will pursue legal collections actions again members who unsuccessfully attempted to resign after the month of August.
>
> **ANSWER: Defendant MEA admits that it has publicly stated it may pursue legal collections actions to enforce its contractual rights.**
>
> . . .
>
> 24. Because of Defendants' failure to informer her of her rights, Plaintiff . . . is being threatened with a legal action to collect membership dues and/or agency fees from her that can no longer be required by law.
>
> **ANSWER: The allegations in paragraph 24 are denied for the reason that the same are not true.**

Answer to Complaint and Affirmative Defenses at 8-9.

The Answer can be read to justify the Unions' claim that no collections action has been filed (a point that is not in dispute). But, nothing there supports its claim that "at no time . . . have Defendants threatened . . . any legal action to collect the $1075.69 in membership dues that Plaintiff has not paid to date." The October 21, 2013 email, Exhibit E, *supra*, constitutes a threat. The Unions do not try to argue to the contrary. Perhaps the Unions seek to avoid having to argue

that the use of the smiley face at the end of the email means that, as a matter of law, the email cannot constitute a threat. While reticence to make such an argument is understandable, the email does exist.

Nor is that email the only threat. The collections email was addressed to Bank personally, but more generally, MEA president Steve Cook threatened any teacher who did not pay dues:

> On December 28, 2013, after the passage of PA 349, MEA President Steve Cook sent an email to local presidents, board members and staff discussing the MEA's response to that statute. … Cook's email also stated that the MEA would use any legal means at its disposal to collect the dues owed under signed membership forms from any member who withheld dues prior to terminating their membership in August for the following fiscal year.

Eady-Miskiewicz at 9, There is also the "Dues Collection Policy," Exhibit G, that was announced for the first time two days before Bank filed the instant action.

This Court has held the existence of a legal threat is sufficient to allow for declaratory relief. *US Aviex Co v Travelers Ins Co*, 125 Mich App 579, 586 (1983). That case involved an insurance matter and the alleged insurer claimed that it did not have a duty to defend certain claims. The insured was being threatened with legal action by a state agency. When a trial occurred on the declaratory matter "the state had not filed a lawsuit." *Id*. at 584. The threat alone was sufficient to allow declaratory relief in that case and it is sufficient here.

When this case was filed, it was two days after MEA announced its dues collection policy.[12] Over 90 days had passed since the MEA claimed Bank owed dues (starting September 1, 2013). A local union official had already threatened her with a collections action. MEA could have sent Bank to collections at any instant and damaged her credit rating. Some federal district courts have held "potential harm to . . . credit ratings" sufficient to support a preliminary

[12] The timing of this announcement might not have been coincidental. MEA was likely aware that a 6-month statute of limitations for PERA claims related to the August Window was going to end on February 28, 2014. See MCL 423.216(a).

injunction. *Countrywide Home Loans, Inc v Arbitration Alliance Int'l, LLC*, 2004 WL 987131 (D Utah 2004). See also, *US v Marty*, 2011 WL 4056091 (ED Cal 2011) (issuing permanent injunction against individual filing liens against IRS agents because of "irreparable injury" of "damaging their credit ratings"); *Butler v Aetna US Healthcare, Inc*, 109 FSupp2d 856, 871 (SD Ohio 2000) (recognizing "potential damage to credit rating" as a "potential harm" but denying preliminary injunction for other reasons). Further, the Sixth Circuit has held that credit-rating damage is sufficient to confer Article III standing. *Lambert v Hartman*, 517 F3d 433, 437 (CA 6, 2008).

The above is sufficient evidence to show reversible error. But even if it were not, there is another problem in that the trial court prevented Bank from obtaining discovery on MEA's collection activities and then relied on the absence of that evidence to justify dismissal. Discovery requests were made to the Unions. Included was a request seeking information regarding the manner in which MEA used collections actions. The Unions' response to this and the other discovery requests led Bank to file a motion to compel and for sanctions.[13] Bank had every intention about seeking information about if, how, and when MEA planned on filing collections actions for the 2013-2014 school year.

Before this motion was filed, the Unions deposed Bank. Bank had scheduled depositions of two MEA officials that were to occur after the motion to compel was heard. The goal was to have the scope of discovery ironed out before the depositions of these union officials occurred. Based on discussions with the parties at the motion to compel, the circuit court ordered that Bank

[13] While not intending to get this Court mired in the minutia of a discovery conflict, one of the Unions' objections gives a good indication of their intransigence. In part, the Unions refused to provide information related to collections actions since it "is irrelevant to the subject matter of this action and not reasonably calculated to lead to the discovery of admissible evidence for political reasons." Defendant Michigan Education Association's [Interrogatories Response] at 13.

file her motion for summary disposition on the contract claim, which would be heard at the same date as the Unions' summary disposition claim. The motion to compel would be held in abeyance pending resolution of the cross motions for summary disposition. The depositions of the MEA officials would also be held in abeyance since it was expected that many of the issues related to the motion to compel would also arise during those depositions.

In essence, the circuit court stopped Bank from obtaining information on collections by not addressing the merits of her motion to compel and by then indicating that there is no evidence of a threat. Further, at no point has MEA indicated that it will not seek dues from Bank; rather, it says it has not taken her to collections *yet*. While there is nothing definitive in the record at this time, upon information and belief, MEA has filed numerous collections actions related to the 2013-2014 school year.

But, the discovery matter is really of little consequence. Given the email threat, there is a clear need for declaratory relief here and, as shown above, Bank should be granted summary disposition on her contract claim.

II. THE DUTY OF FAIR REPRESENTATION CLAIM WAS PROPERLY BEFORE THE CIRCUIT COURT AND WAS NOT WITHIN THE PRIMARY JURISDICTION OF THE MERC.

A. Merits of the duty of fair representation claim

This claim would need to be decided if it was determined that the Application actually did create a pathway by which those that signed it would be bound by the Unions' bylaws. Bank contends that in light of all of the changes occurring to dues through 2012 PA 53 and 2012 PA 349 that the Unions had an affirmative duty to clearly notify its members (all of the approximately 112,000 of them) about the options before the 2013 August window and what MEA thought was necessary for a member to resign.

Bank has filed a duty of fair representation claim alleging that the Unions failed to properly inform her how she needed to resign under 2012 PA 349. As a primary matter, the circuit court's decision to halt discovery while trying to determine if there was a way to resolve this action as a matter of law has prevented full factual development of this issue. Since some of the duty of fair representation matters were wrapped into the discovery dispute, Bank was prevented from filing for summary disposition on this aspect with the aid of discovery since she was ordered to follow the circuit court's requested process and that any discovery matters might be reconsidered after the dispositive matters were decided.

The circuit court's grant of the Unions' summary disposition motion on this claim thereby obviated the need for the circuit court to reconsider any discovery matters since it has managed to dismiss the entirety of the action. One consequence of the procedural history of this matter is that since there was no summary disposition motion filed on the merit of this claim, the Unions have yet to address the merits.

Be that as it may, even without discovery, Bank has a strong argument that she should win this claim as a matter of law.

In *Goolsby v Detroit*, 419 Mich 651 (1984), the Michigan Supreme Court held that the duty of fair representation applied in cases filed under Michigan's Public Employment Relations Act. The Michigan Supreme Court then adopted the three responsibilities from *Vaca v Sipes,* 386 US 171 (1967):

> [T]he Supreme Court of the United States made it clear that a union's duty of fair representation is comprised of three distinct responsibilities: (1) "to serve the interests of all members without hostility or discrimination toward any", (2) "to exercise its discretion with complete good faith and honesty", and (3) "to avoid arbitrary conduct". A union's failure to comply with any one of those three responsibilities constitutes a breach of its duty of fair representation.

Goolsby, Mich at 664.

In *Vaca*, the Supreme Court was faced with a jurisdictional question in the context of a suit where an employee alleged that the union failed to properly pursue a grievance where his employer had fired him. This type of claim would eventually come to be known as a hybrid claim. See e.g. *Breininger v Sheet Metal Workers Int'l Ass'n Local Union No 6*, 493 US 67, 84 n 8 (1989).

In *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v Lockridge*, 403 US 274 (1971), the United States Supreme Court rejected the contention that duty-of-fair-representation claims must be based on a violation of the collective bargaining agreement, i.e. a hybrid claim:

> Indeed [in *Vaca*], we held that an action seeking damages for injury inflicted by a breach of a union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective agreement.

Id. at 299.

In *Hunter v Wayne-Westland Community School District*, 174 Mich App 330 (1989), this Court held that it was a violation of the duty of fair representation to refuse to grant seniority to a nonmember who was in a bargaining unit. The case arose when two school districts merged. The two districts had been represented by separate local bargaining units. The union representing the larger of the two districts, Wayne-Westland, became the collective bargaining agent and it refused to give seniority to a school psychologist who had been in the smaller district, Cherry Hills, and had not joined the local. This Court cited the Wayne-Westland Education Association's president:

> She had never signed a membership form in the Cherry Hill Education Association. She was not a member of the bargaining unit. She did not pay dues to the Cherry Hill Education Association; therefore, she was not a member of the Cherry Hill Education Association. And that was the reason why she did not receive retroactive seniority.

Id. at 336. It was explained that discrimination based on lack of fealty to the union was not a proper basis for denying seniority:

> A union may not neglect the interests of a membership minority solely to advantage a membership majority; members are to be accorded equal rights, not arbitrarily subjected to the desires of a stronger, more politically favored group. "These tenets strike home when a union attempts to prefer workers based solely on how long they have been loyal to the guild." The only factor distinguishing [the psychologist] from other former Cherry Hill employees who received retroactive seniority was her lack of union membership while at Cherry Hill. The WWEA owed her a duty of fair representation and breached that duty.

Id. at 337.

As a primary matter, it must be noted that a mandatory public-sector union has the First Amendment right to have and express its views on public policy. There is nothing wrong with having a visceral feeling that a public policy choice is a wrong one and speaking powerfully about it. President Cook could be speaking for a majority of his members when he indicated that the MEA was opposed to right-to-work.

But, while a union has its First Amendment expressive rights, it also has its obligations under the duty of fair representation. A potential conflict of interest the union faced when right-to-work passed is readily apparent. The MEA had to decide how to prevent its members from exercising their worker freedom rights – a policy the MEA disagreed was beneficial – without violating the duty of fair representation.

In attempting this endeavor, *Goolsby* required the MEA "to exercise its discretion with complete good faith and honesty." The problem is that the MEA knew many or most of its members would not know about the bylaws and the resignation process. The MEA had been on notice since 2000 that the Commission wanted it to "ensure that the MEA bylaws are easily accessible to all Union members, and/or explicitly notify each member of the existence of the one-month period on resignations." The *Eady-Miskiewicz* case showed that 900 to 1,500

members used the August window in 2013. *Eady-Miskiewicz* at 12. But as of the February 26, 2014, nearly 8,000 MEA members had not signed up for e-dues and not were paying cash. *Id*. This sheer number alone should be sufficient to show that the MEA failed to provide sufficient information on resignations to its members.

Judge Stern rejected this very claim, however:

> [S]ome of these 8,000 members may have been unaware of [MEA]'s resignation process. Others may have been unaware that they needed to resign their union membership in order to escape a financial obligation to [MEA] after PA 349 took effect, or that there was and is a distinction between being a member of a bargaining unit and being a member of the union representing that unit. In recognition that employees needed information about the effect of PA 349 on their rights and responsibilities, the Legislature specifically directed the Department of Licensing and Regulatory Affairs to provide this type of information to employees, as well as to public employers and labor organizations. This to me indicates that the Legislature understood that unions did not have an affirmative duty to educate their members concerning the changes wrought by PA 349.

Eady-Miskiewicz at 26.

The fact that under MCL 423.210(7)(c) LARA was given a small appropriation to "Inform public employers, public employees, and labor organizations concerning their rights and responsibilities under the amendatory act" does not relieve the unions of their duty to do the same. The duty of the MEA to not act in its naked self-interest against a minority of its members was not eviscerated by this provision.

B. The circuit court has jurisdiction over duty of fair representation claims and the doctrine of primary jurisdiction does not apply to such claims.

The Unions admit that in *Demings v Ecorse*, 423 Mich 49 (1985), the Michigan Supreme Court has made it clear circuit courts and MERC have concurrent jurisdiction over duty of unfair labor practice claims. But, then they contend that this concurrent jurisdiction is illusory since under the doctrine of primary jurisdiction, unfair labor practice claims must be brought at

MERC. What the Unions really are seeking is to have *Demings* overturned, which this Court cannot do.

The Michigan Supreme Court defined "primary jurisdiction" as "'appl[ying] where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Rinaldo's Const Corp v Michigan Bell Telephone Co*, 454 Mich 65, 71 (1997). Three factors were identified for consideration when deciding whether an agency should have primary jurisdiction:

> First, a court should consider "the extent to which the agency's specialized expertise makes it a preferable forum for resolving the issue. . . ." Second, it should consider "the need for uniform resolution of the issue. . . ." Third, it should consider "the potential that judicial resolution of the issue will have an adverse impact on the agency's performance of its regulatory responsibilities."

Id.

In *Demings*, the Michigan Supreme Court started its opinion as follows:

> The issue is whether the Michigan Employment Relations Commission has exclusive jurisdiction of fair representation actions brought under the public employment relations act. We hold that the circuit court has concurrent jurisdiction with the MERC.
>
> The PERA was modeled on the National Labor Relations Act. Under the NLRA, courts have concurrent jurisdiction with the National Labor Relations Board of fair representation actions. There are a number of reasons for concurrent jurisdiction. The right of fair representation was developed judicially by the United States Supreme Court. The right concerns substantive matters not within the expertise of the NLRB or the MERC and individual rights that might be better protected by the courts.

Id. at 53-4. It was explained that, in the federal context, generally there is deference to agency expertise, but that there is an exception for duty of fair representation cases:

> The general rule is that the NLRB has exclusive jurisdiction of unfair labor practice charges. The federal courts and the states must defer to the administrative agency. This "preemption doctrine was created to permit administrative agencies

> to develop rules within their area of expertise which would be enforced uniformly."
>
> Nevertheless, exceptions to the rule of exclusive agency jurisdiction of unfair labor practices have developed. In [*Vaca v Sipes*, 386 U.S. 171, 188 (1967)], the United States Supreme Court held that "the unique role played by the duty of fair representation doctrine in the scheme of federal labor laws, and its important relationship to the judicial enforcement of collective bargaining agreements in the context presented here, render the ... pre-emption doctrine inapplicable." The courts, both state and federal, have concurrent jurisdiction of fair representation actions.

Id. at 57-58 (footnotes omitted).

The Michigan Supreme Court discussed the reasons the federal court did not defer to the agency:

> The United States Supreme Court elaborated at least four reasons for rejecting exclusive agency jurisdiction and distinguishing the right of fair representation from other unfair labor practices. First, "[t]he doctrine was judicially developed" and "the board adopted and applied the doctrine as it had been developed by the federal courts." Second, fair representation actions involve review of substantive areas not within the field of expertise of the board. Third, the courts are the best protectors of individual rights including enforcement of the right to fair representation. Finally, the right of fair representation figures prominently in breach of contract actions under § 301, and it would be incongruous for "a court that has litigated the fault of the employer and union to fashion a remedy only with respect to the employer."

Id. at 58 (footnotes omitted). The Michigan Supreme Court then indicated that the federal experience should guide in Michigan:

> The early history of the enforcement of the right of fair representation in Michigan is similar. Albeit in cases arising under the NLRA, the right of fair representation was recognized in this state before 1973, when unfair labor practices by unions were brought under the jurisdiction of the MERC. As a result, trial and appellate courts of this state had experience adjudicating fair representation claims before the MERC obtained any jurisdiction.
>
> . . .
>
> The [Supreme] Court's analysis of the absence of administrative expertise in fair representation actions is as applicable to the MERC as it is to the NLRB. Where deference is accorded the MERC, it is based on the expertise the agency

> has developed in the area. But like the NLRB, the MERC has no more expertise than the courts in fair representation cases. As the Court of Appeals noted, these "rights are usually enforced by courts, not by administrative agencies. There is no reason to believe that MERC's expertise in handling fair representation claims exceeds that of the courts."

Id. at 59-61 (footnote omitted).

The Michigan Supreme Court indicated that concurrent jurisdiction was important because there could be times where MERC lacked the institutional capacity to protect individual employees as well as the courts could:

> The [Supreme] Court's third reason for rejecting exclusive jurisdiction also relates to the institutional capacities of the two forums. The Court suggested in *Vaca* that courts are better able to protect the rights of individual employees than agencies: "The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in the bargaining unit." In terms of protecting individual employee rights, "the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." The Court concluded that it is not enough to have this right enforced by the board. "Were we to hold, as petitioners and the Government urge, that the courts are foreclosed ... from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."
>
> While this passage can be interpreted more narrowly, we believe its full import was elucidated by this Court in [*Bebensee v Ross Pierce Electric, Inc*, 400 Mich 233, 249, n 7 (1977)]. After quoting the relevant section in *Vaca*, this Court noted: "In other words, the structure of the NLRA quite properly emphasizes the protection of the collective interest of workers. The courts must remain a forum where the employee can present complaints of abuse of his individual rights by the union." The Court in *Vaca* recognized the institutional differences between courts and an administrative agency and concluded that courts were more concerned with individual rights. This factor figured prominently in the *Vaca* decision that there was concurrent jurisdiction, and should be accorded similar consideration in our decision. The institutional argument is as applicable to the MERC as it is to the NLRB. Once again, we agree with the observation of the Court of Appeals: "MERC's resources may be allocated in such a way that fair representation claims are not accorded the same attention or priority that claims affecting a bargaining unit at large are."

Id. at 61 (footnote and some citations omitted).

The Michigan Supreme Court indicated that duty of fair representation claims need access to the courts in order to protect individual employees. The Unions' arguments about agency competence and expertise were rejected in *Demings*. The Unions make no effort to explain why the Michigan Supreme Court would have allowed concurrent jurisdiction over duty of fair representation claims over strenuous arguments that MERC alone should hear these types of cases, only to have them almost all shuttled back to MERC under the doctrine of primary jurisdiction. Unless *Demings* is overturned, it is clear that duty of fair representation claims can be brought in the courts, and once brought there, should remain there.

Further, the matter in question, whether individual employees should have been informed of their options about resignation given changes in the law regarding right to work is more legal than administrative. The question is whether the onus is put on the MEA's 112,000 members to become legal scholars so that they can understand the intricacies of membership, First Amendment rights (agency fees), right to work, and dues deductions, etc. Most of these matters have been decided at very high levels of the courts. Matters where agency expertise might be more relevant could include what is a mandatory subject of bargaining or the running of union elections, whether certain public employees should be in a bargaining unit, etc.

The duty of fair representation claim was properly brought before the circuit court and should not be sent to MERC. This Court should return this matter to the circuit court or grant Bank summary disposition on this claim as a matter of law.

III. THE RIGHT-TO-REFRAIN CLAIM ALLOWING BANK TO RESIGN AT ANY TIME WAS PROPERLY BEFORE THE CIRCUIT COURT.

A. Merits of the right-to-refrain claim

In the Complaint section captioned "Defendants' Conduct Violates PERA," Bank alleged that Defendants violated PERA, specifically MCL 423.209(2) and MCL 423.210(3) by refusing to allow her to resign at any time. 2012 PA 349 was meant to incorporate federal law on the right to resign by adding right-to-refrain language found in the NLRA.

The National Labor Relations Act, 29 USC 157, states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, **and shall also have the right to refrain from any or all of such activities** except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Id. (emphasis added).

In 1985 the United States Supreme Court decided *Pattern Makers' League of North America v NLRB*, 473 US 95 (1985). In that case, the issue was defined as "whether a union is precluded from fining employees who have attempted to resign when resignations are prohibited by the union's constitution." *Id*. at 101. The Supreme Court noted that its prior cases had left open "the extent to which contractual restrictions on a member's right to resign may be limited by the Act." *Id*. at 101 n.9. The Supreme Court cited the right-to-refrain language in 29 USC 157 to support the right to resign. *Id.* at 100.

The union in *Pattern Makers* argued that it should be allowed to have the ability to restrict resignations due to 29 USC 158(b)(1)(A), which states:

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents-

> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

Pattern Makers, 473 US at 101.

The Supreme Court rejected this argument:

> The congressional purpose to preserve unions' control over their own "internal affairs" does not suggest an intent to authorize restrictions on the right to resign. Traditionally, union members were free to resign and escape union discipline. In 1947, union constitutional provisions restricting the right to resign were uncommon, if not unknown. Therefore, allowing unions to "extend an employee's membership obligation through restrictions on resignation" would "expan[d] the definition of internal action" beyond the contours envisioned by the Taft-Hartley Congress.

Id. at 102 (footnotes omitted).

Thus, *Pattern Makers* has stood for the proposition that under the NLRA, union members can resign at any time. See eg, *Quick v NLRB*, 245 F3d 231, 241 n 8 (CA 3, 2001) (citing *Pattern Makers* for proposition that "Section 8(a)(1)(A) prohibits union restrictions on a member's right to resign."); *Int'l Broth of Boilermakers v Local Lodge D-129*, 910 F2d 1056, 1060 (CA 2, 1990) (Citing *Pattern Makers* for proposition that "National Labor Relations Act (NLRA), 29 USC 157, which grants employees the right to 'refrain from any or all [concerted] ... activities,' has long guaranteed a union employee's right to resign from union membership at any time.")

Three years after *Pattern Makers*, the Supreme Court decided *Communications Workers v Beck*, 487 US 735 (1988). There, it held that, under the NLRA, nonmembers could object to agency fees unrelated to "exclusive representation" activities. *Id*. at 762-63.

The NLRB then had to decide how to implement *Beck*. As it normally does, it chose to create its rules through the adjudicative process as opposed to using Administrative Procedure Act formal rulemaking. The case chosen was *California Saw and Knife Works*, 320 NLRB 224 (1995) ("These consolidated cases present a range of questions representing rights and duties

under union-security clauses authorized by Section 8(a)(3) that have been triggered by the holding in Beck but were unanswered by the Supreme Court.") *Id*. at 225.

One issue that was addressed in *California Saw* was "window periods" and resignations. The window period discussed in *California Saw* concerned the time for filing *Beck* objections. The NLRB indicated that window periods for the timing of filing *Beck* objections themselves are permissible, but that employees are allowed to resign at any time regardless of those windows:

> The General Counsel rather makes the limited allegation that the window period is violative of Section 8(b)(1)(A) of the Act solely as applied to employees who resign their membership following the expiration of the January window period. The General Counsel reasons that a union member who resigns after the January window period has passed is compelled to wait until the following January to register a Beck objection. The General Counsel accordingly asserts that the window period impermissibly burdens the resignation rights of those individuals who resign their union membership following the window period.
>
> On careful consideration, we agree with the judge that the January window period, as applied solely to individuals who resign their union membership after the expiration of the window period, effectively operates as an arbitrary restriction on the right to be free to resign from union membership. *Pattern Makers v NLRB*, 473 US 95, 107 (1985); *Machinists Local 1414* (Neufeld Porsche-Audi), 270 NLRB 1330 (1984). A unit employee may exercise *Beck* rights only when he or she is not a member of the union. An employee who resigns union membership outside the window period is thereafter effectively compelled to continue to pay full dues even though no longer a union member, and the window period in this circumstance operates as an arbitrary restriction on the right to refrain from union membership and from supporting nonrepresentational expenditures. In light of our duty to uphold the fundamental labor policy of "voluntary unionism" emphasized by the Court in *Pattern Makers*, supra, we agree with the judge that the January window period, as applied solely to employees who resign their union membership after the expiration of the window period, constitutes arbitrary conduct violative of the IAM's duty of fair representation.

Id. at 236.

One important characteristic of federal administrative law is that most often agency interpretations of ambiguities in statutes are adhered to by the courts. See generally, *Chevron USA Inc v Natural Resources Defense Council*, 467 US 837 (1984). Thus, there is a contention

that the NLRB could alter the interpretation in *Pattern Makers* or the interpretation in *California Saw*. But, assuming there are ambiguities in the NLRA that thereby give the NLRB the potential to alter either case, *Pattern Makers* has remained the law and *California Saw* has remained the law.

In *West Branch II*, without explicitly mentioning the NLRB's then-nine-year-old *California Saw* opinion, the MERC chose not to follow the Supreme Court and NLRB case law about permitting a union member to resign at any time and instead chose to follow a case wherein the court elevated the union's administrative concerns over the employee's ability to resign at any time:

> Given the similarity between the language of PERA and that of the National Labor Relations Act (NLRA), the Commission is often guided by federal cases interpreting the NLRA. However, while Board precedent is often given great weight in interpreting PERA in those cases where PERA's language is analogous to that of the NLRA, this Commission is not bound to follow NLRB precedent. Particularly in this area, where Board members disagree, and where the statutory language of PERA differs from that of the NLRA, [FN5] we choose to follow the better reasoned approach of Nielsen.

West Branch II at 4-5 (some citations omitted).

Footnote five, which supported the claim that the Commission should deviate from the NLRB in this circumstance, stated:

> In its decisions, the Board relies on the "right to refrain" from union activity found in Section 7 of the NLRA. The analogous section of PERA, Section 9, does not contain this language and we will not infer it in the absence of clear legislative intent. While, clearly, union membership cannot be required under PERA, in this case [the teacher] joined the Union voluntarily.

Id. at 5 n 5 (emphasis added).

Eight years later, the Legislature amended MCL 423.209 to add the right-to-refrain language. The statute now reads:

> (1) Public employees may do any of the following:

> (a) Organize together or form, join, or assist in labor organizations; engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; or negotiate or bargain collectively with their public employers through representatives of their own free choice.
>
> (b) Refrain from any or all of the activities identified in subdivision (a).
>
> (2) No person shall by force, intimidation, or unlawful threats compel or attempt to compel any public employee to do any of the following:
>
> (a) Become or remain a member of a labor organization or bargaining representative or otherwise affiliate with or financially support a labor organization or bargaining representative.
>
> …
>
> (3) A person who violates subsection (2) is liable for a civil fine of not more than $500.00. A civil fine recovered under this section shall be submitted to the state treasurer for deposit in the general fund of this state.

Id.

Judge Stern recommended that the insertion of the right-to-refrain language was meant to have PERA follow the NLRA case law:

> In PA 349, the Legislature inserted into PERA language from the NLRA giving employees the right to refrain from §9 activities, language that had been omitted from previous versions of PERA. I conclude that the Legislature's intent was to incorporate into PERA the right to refrain as it has been interpreted under the NLRA, including what union conduct constitutes unlawful restraint or coercion of the exercise of that right.

Eady-Misckiewicz at 15. This is obviously correct.

B. Subject matter jurisdiction of right to refrain

At the MERC, there are conflicting opinions whether allegations of violations of those statutes provide that tribunal with jurisdiction. The first to be decided was *Eady-Miskiewicz*, *supra*. In that September 2, 2014 decision, Judge Julia Stern held that the MEA's resignation

window was unlawful since it limited the Saginaw school teachers' right to refrain from union membership.[14]

The Unions had argued that MERC lacked jurisdiction over resignations since this was an internal union matter and there was no employment consequence to the charging parties. Judge Stern rejected this argument:

> [A] union's restrictions on the right to resign union membership are not internal union matters protected by the provision giving the union the right to prescribe its own rules with respect to the acquisition or retention of membership. . . .
>
> . . . The addition of right to refrain language in §9(1)(b) of PERA gave employees the right under §9 of PERA to resign their union memberships at will and prohibited unions from restricting that right by rule or policy. The Charging Parties in this case had a §9 right to resign their union membership outside of the MEA's August window period. . . . I conclude that [MEA and its affiliated local union] continued maintenance and enforcement of the August window period contained in the last sentence of its bylaws violated §10(2)(a) of PERA because it constituted an unlawful restriction on employees' right to resign. I also conclude that Respondents violated §10(2)(a) of PERA by refusing Charging Parties' request to resign outside the August window period.

Id. at 24.

Thus, the path Judge Stern took to find subject matter jurisdiction over the right-to-refrain claim was that MCL 423.216 gives the MERC subject matter jurisdiction over unfair labor practices. That statute states: "Violations of the provisions of section 10 [MCL 423.210] shall be deemed to be unfair labor practices remediable by the commission." MCL 423.210(2)(a) in turn states: "A labor organization or its agents shall not . . . [r]estrain or coerce public employees in

[14] She noted that the charges filed had alleged a violation of MCL 423.209(2) but that the issue had been dropped in the charging parties' brief. *Eady-Miskiewicz* at 8. Although the Saginaw school teachers had largely abandoned the claim, Judge Stern rejected the argument that the threat to hire a bill collector was a violation of PERA: "I conclude . . . that Respondents did not violated §10(2)(a) of PERA by threatening to hire a debt collector or file suit to collect the sums it claim were owed by the Charging Parties." *Id*. She also rejected the merits of the duty of fair representation claim that was brought regarding whether MEA and its local had a duty to inform the charging parties of their rights under Michigan's new right-to-work law. *Id*. at 24-26.

the exercise of the rights guaranteed in section 9." Read in conjunction, MCL 423.209(a) and MCL 423.209(b) indicate that a public employee has a right to not join a labor organization. Judge Stern therefore considers a union attempting to restrict the right to resign (absent a clear waiver) to be an unfair labor practice.

In *Beutler, supra*, Judge Peltz disagreed with this analysis, stating:

> A thorough examination of the 2012 amendments in their entirety lead to the unavoidable conclusion that the conduct of the sort complaint of by Beutler, and by the charging parties in the cases heard by Judge Stern, while perhaps remediable in another forum with adequate factual support, does not support an unfair labor practice over which [MERC] has jurisdiction.

Beutler at 12.

In order to understand Judge Peltz's arguments, it might be helpful to set forth the changes that were made in MCL 423.209 as a result of the passage of 2012 PA 349. Strikeouts are language removed from the statute and all capitals is language that was added:

> **Sec. 9. (1) ~~It shall be lawful for public employees to organize~~ PUBLIC EMPLOYEES MAY DO ANY OF THE FOLLOWING:**
>
> **(A) ORGANIZE together or to form, join, or assist in labor organizations; ~~,~~ ~~to~~ engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; ~~,~~ or ~~to~~ negotiate or bargain collectively with their public employers through representatives of their own free choice.**
>
> **(B) REFRAIN FROM ANY OR ALL OF THE ACTIVITIES IDENTIFIED IN SUBDIVISION (A).**
>
> **(2) NO PERSON SHALL BY FORCE, INTIMIDATION, OR UNLAWFUL THREATS COMPEL OR ATTEMPT TO COMPEL ANY PUBLIC EMPLOYEE TO DO ANY OF THE FOLLOWING:**
>
> **(A) BECOME OR REMAIN A MEMBER OF A LABOR ORGANIZATION OR BARGAINING REPRESENTATIVE OR OTHERWISE AFFILIATE WITH OR FINANCIALLY SUPPORT A LABOR ORGANIZATION OR BARGAINING REPRESENTATIVE.**
>
> . . .

. . .

(3) A PERSON WHO VIOLATES SUBSECTION (2) IS LIABLE FOR A CIVIL FINE OF NOT MORE THAN $500.00. A CIVIL FINE RECOVERED UNDER THIS SECTION SHALL BE SUBMITTED TO THE STATE TREASURER FOR DEPOSIT IN THE GENERAL FUND OF THIS STATE.

http://www.legislature.mi.gov/documents/2011-2012/billconcurred/House/pdf/2011-HCB-4003.pdf

Essentially, Judge Peltz held that MCL 423.209(2) should be read to limit the meaning of "right to refrain" under MCL 423.209(1)(b) to violations of conduct described in MCL 423.209(2). *Teamsters Local 214 (Beutler*), Exhibit H at 12. Despite MCL 423.210(2)(a), which states that a labor union may not "Restrain or coerce public employees in the exercise of the rights guaranteed in section 9," Judge Peltz contends that §9(2) and (3) were not included in "Section 10 of PERA, the section of the Act which identifies the specific conduct by a public employer or labor organization which constitutes an unfair labor practice remediable under Section 16, MCL 423.216." *Beutler* at 13.

He rejected the idea that §10(2)(a) was sufficient to allow for the new right to refrain claims as unfair labor practices:

> In finding that the MEA unlawfully interfered with the right of charging parties to refrain from union activity, Judge Stern relies not on Sections 9(2) or 10(3) of PERA, but instead on Section 10(2)(a) of the Act, which provides that a labor organization shall not "[r]estrain or coerce public employees in the exercise of the rights guaranteed in section 9." The prohibition on restraint or interference with Section 9 rights, however, was not added to the Act as part of the "right-to-work" package of legislation. Rather, that language existed in the same form prior to 2012. There is no indication within 2012 PA 349 that the Legislature intended to confer new jurisdiction upon the Commission, especially given that other subsections added to PERA in 2012 specifically provide for independent remedial measures. For example, Section 10(5) makes any agreement in violation of Section 10(3) unenforceable, while Sections 9(2) and Sections 10(8) of the Act provide for civil fines. Similarly, Section 10(10) of PERA, as previously

> described, authorizes the filing of a civil suit for damages or injunctive relief by any person who has suffered an injury as a result of a violation of Section 10(3).

Beutler at 16 n 7.

Judge Peltz also noted that 2012 PA 349 created MCL 423.210(3), which states in pertinent part that "an individual shall not be required as a condition of obtaining or continuing public employment to . . . [b]ecome or remain a member of a labor organization or bargaining representative." *Id*. MCL 423.210(10) allows civil actions for violations of MCL 423.210(3): "A person who suffers an injury as a result of a violation or threatened violation of subsection (3) may bring a civil action for damages, injunctive relief, or both." Judge Peltz seemed to imply that a violation of MCL 423.210(3) could be filed both at the circuit court since he cited to MCL 423.210(10) and at MERC since he stated that it is "Section 10(3) of the Act which sets forth the conduct that could comprise an unfair labor practice under the right-to-work amendments to PERA," *Beutler* at 14. As noted previously, MCL 423.216 gives MERC jurisdiction over all violations of MCL 423.210.

But, Judge Peltz believed that the "condition of obtaining or continuing public employment" language from MCL 423.210(3) provided a similar limit on actions that would constitute unfair labor practices:

> My finding that the Legislature, in enacting the right-to-work package of legislation, intended to limit the scope of unfair labor practice proceedings to those union actions having a discernible impact on employment is consistent not only with prior Commission case law, as set forth above, but also with the language of the 1963 Michigan Constitution, which is the express source of authority for the passage and enforcement of PERA. Article 4, Section 48 of the Constitution states, "The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." (Emphasis supplied). . . . [T]here is simply no constitutional or statutory authority for administrative regulation by the Commission of the internal affairs of unions or the relationship between a union and its members, other than to the extent there is an impact on conditions of employment. For that reason, the Commission has consistently declined to exercise jurisdiction over internal union

> disputes, such as those involving the election of officers or the retention of membership in the labor organization. Such claims may be asserted by individual employees in civil court as ordinary breach of contract claims; however, disputes of this nature are not subject to resolution by the Commission.

Teamsters Local 214 (Beutler) at 16 (emphasis added).

To the extent that Judge Peltz is correct that right-to-resign matters can be brought "in civil court as ordinary breach of contract claims," the circuit court clearly had jurisdiction. Alternatively, if Bank must show a violation of MCL 423.310(3) to thereby trigger MCL 423.210(10) she can do that because the Unions have set up a mechanism for imposing fines that under federal precedent would constitute an impact on employment.

In *Pattern Makers*, the union in question argued that its actions "does not interfere with workers' employment rights because offending members are not discharged, but only fined." *Pattern Makers*, 473 US at 107. The Supreme Court indicated that employment is affected when a fine can constitute the entirety of a paycheck. *Id*.

In the instant action, the MEA has submitted a copy of its bylaws. A copy of these bylaws are attached as Exhibit K. Under these bylaws, any member in good standing can file a charge against any other member. MEA Bylaw IX(A). The basis of these charges can include "[v]iolation of any provision of the . . . Bylaws . . . of [MEA]." MEA Bylaw IX(B)(1). Penalties for a violation can include "[a] fine in an amount not to exceed one (1) year's MEA and NEA dues, to be paid to the local association." MEA Bylaw IX(K). MEA membership dues currently are currently $640 for any member making $42,667 or more annually. MEA Bylaw II(B)(2)(a).[15] There are also dues owed to local units and to the National Education Association. Further, currently MEA has a special dues assessment for its members. For the 2013-2014 school year,

[15] The $42,667 figure was arrived at by dividing $640 (the dues cap) by 1.5%, the percentage of salary owed and rounding up.

this amount was $50 for anyone making over $42,666. *Id*. Thus, annual dues just to the MEA can be $690 plus local and national dues as well.

This amount is sufficient to reach the paycheck threshold discussed by the Supreme Court in *Pattern Makers*. Just as with the union in *Pattern Makers*, the MEA has the ability to fine members who attempt to resign in contravention of the union bylaws. Just as in *Pattern Makers*, this fine amount can be significant. While there has been less indication that MEA is using this method to stop resignations and is instead using collection actions, when Bank filed this suit the dues collection policy was all of two days old and MEA President Steve Cook had indicated that "We will use any legal means at our disposal to collect dues owed under signed membership forms from any members who withhold dues prior to terminating their membership in August for the following fiscal year." Therefore, Bank had legal justification to seek a declaration on this matter.

Thus, there appear to be three possible ways for a public school employee to challenge the MEA's resignation window policy: (1) through MCL 423.216, MCL 423.210(2)(a), and MCL 423.209(a) – which results in a cause of action that only MERC can hear (the *Eady-Miskiewicz* method); (2) through a breach of contract claim in the circuit court – one of the methods described by Judge Peltz;[16] and (3) through MCL 423.210(10) and MCL 423.210(3) – this third method gives a challenger the option of filing either at MERC as an unfair labor practice or in the circuit court under MCL 423.210(10). This third method is dependent upon a finding that there is an impact on employment – a condition that is met through the MEA fine process, which allows for fines for resignations outside of August.

[16] The MERC held that a civil contract action related to an agency fee owed under a union bylaw was not a violation of PERA. *Ass'n of School and Community Service Administrators*, 1987 MERC Lab Op 710 (August 27, 1987). A copy of this opinion is attached as Exhibit L.

Thus, this declaratory request related to Bank's right to refrain, and therefore resign outside the August window, was properly brought at the circuit court.

RELIEF REQUESTED

For the reasons stated above, Bank's contract claim is ripe and summary disposition in her favor should be granted. Further, the duty-of-fair representation claim is not within the MERC's primary jurisdiction. To the extent that claim is ready for determination at this time, it should be decided in Bank's favor – otherwise, it should be remanded so that sufficient discovery and briefing can occur. Bank's request to have her right to resign outside the August window was within the circuit court's subject matter jurisdiction and should have been decided in Bank's favor.

Respectfully Submitted,
/s/ Patrick J. Wright
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Dated: May 26, 2015