Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

Name: Frank S. Cantrell

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INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website http://www.tncourts.gov). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) ***and*** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Deputy Director/General Counsel, Memphis Area Legal Services, Inc., 109 N. Main, Suite 200, Memphis, TN 38103

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1979; 006661

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee. License is active. See date and number above.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

1979-1983- Associate at Weintraub, DeHart, et al.

1983-1987- Solo law practice

1987-1989- Associate at Shields, Carlyle & Velander

1989-2001- Partner at Jackson, Shields, Yeiser & Cantrell

2001-2004- Solo mediation and arbitration practice (I continue to do mediations and arbitrations)

2004-present- Memphis Area Legal Services, Inc. (hired as a staff attorney; promoted to General

Counsel; then promoted to Deputy Director)

1979-1992- Adjunct Professor, Legal Method, Memphis State University School of Law

2002-2008- Adjunct Instructor, Employment Law, Webster University

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

My present law practice is with Memphis Area Legal Services, Inc. (MALS). The major areas where I handle cases are consumer law (90%), employment law (5%) and education law (5%). I also supervise managing attorneys and staff attorneys who practice in those areas and in the areas of housing law, family law, benefits law, and elder law. Our practice at MALS involves both trial practice and transactional work.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

1979-1983- As an associate in a medium-sized firm setting, I represented management in labor and employment matters in state courts and federal courts, and before administrative bodies. It was both a national practice that took me to many other states and a local practice in the Memphis area. I appeared, tried cases, and argued before state and federal trial courts, appellate courts, and administrative bodies. I handled nonjury and jury cases (primarily nonjury), and wrote briefs and other legal pleadings of every description. Among the administrative bodies, I

appeared frequently before were the National Labor Relations Board, the Mississippi Workers' Compensation Commission, the Arkansas Workers' Compensation Commission, and the Equal Employment Opportunity Commission. I also represented employers in negotiating collective bargaining agreements. I represented clients in arbitrations and in mediation before Federal mediators. I counseled and trained clients on how to comply with the law to avoid legal problems. I drafted employment policies, collective bargaining agreements, and other documents for clients. I normally acted as lead counsel, but sometimes assisted the more experienced attorneys on their cases.

1983-1987- In a solo law practice, I continued to do all of the above and also had a general litigation practice. While my practice has always been primarily civil law, during this period I also handled General Sessions Court level criminal cases. And, I did divorces, contract and tort litigation, business negotiations, etc. I represented plaintiffs and defendants, individuals and businesses. I handled generally anything that came in my door.

1987-1989- Joining a small firm, as an associate, I continued to do all of the types of work that I had done before in both of the previous settings. Again, I was normally lead counsel, but also assisted the partners with their cases.

1989-2001- As a partner in a small employment law firm, that grew while I was there from 5 lawyers to approximately 13, I once again represented management in all types of cases, in a trial practice. I had also developed a fairly large workers' compensation defense practice throughout West Tennessee, frequently trying cases in nearly every judicial district in West Tennessee. Likewise, many of our employment law clients were located in West Tennessee, including Somerville, Alamo, Mason, Humboldt, Ripley, Covington, Jackson, and Lexington. We also had a national practice. By this time, in addition to my own caseload, I was doing quite a bit of supervision of less experienced attorneys who would handle cases under my leadership. I was usually lead counsel in my cases, with assistance from less experienced attorneys. Or, I would sit as second chair in order to supervise and develop the less experienced attorneys.

2001-2004- Once again in a solo practice, I focused exclusively on ADR and training. I served as a mediator and arbitrator. I qualified to join the Federal Mediation and Conciliation Service (FMCS) panel of approved labor arbitrators and joined other panels as well. I arbitrated cases in many states, including Tennessee, Georgia, Alabama, North Carolina, Florida, Illinois, and Nebraska. I also qualified to become a securities arbitrator with the New York Stock Exchange and the National Association of Securities Dealers, then with the merged arbitration service of FINRA. I have served as arbitrator in several of these cases, including two which went to full hearing. I was also on the panel of the National Arbitration Forum where I served as an arbitrator in credit card disputes.

2004-present- In a legal aid law firm setting, I began as a staff attorney in the consumer and housing law unit. I handle cases in all civil courts of Shelby County (with the exception of Probate), including General Sessions, Circuit, Chancery, and U.S. District Court. When I was promoted to General Counsel, I added the responsibility of supervising the overall delivery of legal service to all of our clients. And, I represent the firm itself. I am also one of several managers who review applications for assistance received by our firm and decide which to

accept and which to decline. As Deputy Director, I am also involved in the administration of the firm. I continue to handle a case load, though it has been reduced in order to accommodate the need to supervise the other attorneys in their cases. I have also continued to serve as a mediator and arbitrator, separate from my employment with Memphis Area Legal Services, Inc., although my mediations now far outnumber the arbitrations.

In my career, I have tried hundreds of cases and handled many appeals. I have done everything necessary in a case from initial interview and assessment, pleadings, written discovery and depositions, motions and memoranda, negotiation, mediation, trials and arbitrations, appeals, briefs, appellate oral argument, and enforcement of judgments. I have appeared in every civil court in Shelby County, with the exception of Probate. I have also tried cases in nearly every courthouse in West Tennessee. I have argued before the Tennessee Court of Appeals and the Tennessee Supreme Court.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Among my cases of note:

Moore v. It's All Good Auto Sales of Memphis, Inc., 2012 WL 4603026, ___ F. Supp. ___ (W.D. Tenn. 2012)- In this case, in which I am co-counsel (supervising another attorney in the case), the District Court adopted our argument concerning the use of Civil RICO and the common law theory of negligent misrepresentation in a suit against a used car dealer. In an opinion selected for publication, the, Court allowed the case to proceed in the face of a motion to dismiss.

Auto Credit of Nashville v. Wimmer, 231 S.W. 3d 896 (Tenn. 2007)- On behalf of the Tennessee Alliance for Legal Services (TALS), I was one of the leaders on the team that researched and wrote the *amicus* of TALS on the issue of proper notice of sale under the Uniform Commercial Code. I received the B. Riney Green Award from TALS for my work in this case.

Jernigan v. Henry I. Siegel Company, et al., No. 02S01-9510-CV-00101 (Tenn. May 3, 1996)- This is one of a number of workers' compensation cases that I handled and that was appealed to the Tennessee Supreme Court. In this case, we were successful in obtaining a reversal of the trial court ruling and we assisted in establishing the level of proof required on the elements under Tenn. Code Ann. §50-6-242 (which allowed exceptions to the statutory caps on workers' compensation awards). I was lead counsel in this case at trial and on appeal.

Blocker v. MagneTek Triad, No. 92A03-9412-CV-452 (Ind. Ct. App. *appeal dismissed by consent* Nov. 8, 1995)- I represented the Defendant, a major electronics manufacturer, in this putative class action brought on behalf of former employees seeking "vacation pay" and liquidated damages under a state wage statute. We argued that the statute would be preempted by ERISA if interpreted as the plaintiffs maintained it should. While the preemption issue was on appeal, we successfully opposed class certification in the trial court. I was lead counsel in

that case at the trial and appellate levels.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

From 2001 to the present, I have served as a mediator in many cases, primarily (but not exclusively) in the area of employment law. I have also served as an arbitrator in approximately ten cases that went to full evidentiary hearing and several others that were determined by document review or settled in advance of hearing.

In the vast majority of the mediations, which have occurred throughout the period of 2001 to the present, I was jointly selected by the parties. In a few, I was chosen by the Equal Employment Opportunity Commission, through their pro bono mediation program.

I also served as a pro bono mediator through the Shelby County Citizen's Dispute mediation program and through the Mediation and Restitution Reconciliation Services (MARRS) mediation program. On those occasions, I was appointed by the program.

In the arbitration cases, I was normally chosen by the parties under the procedures of the arbitration service utilized by the parties (e.g. FMCS, FINRA, etc.). I was chosen for one arbitration, by counsel for the parties, outside of any arbitration service.

My mediations involve the range of employment law topics (discrimination, workers' compensation, wage and hour, retaliation, etc.), family law, and general civil litigation. Those that I did through Shelby County Citizen's Dispute involved criminal complaints referred to the program by the court system in hopes of working them out without charging a crime (neighbor disputes, fights, vandalism, etc.). The MARRS mediations were referred by Juvenile Court and involved young people, without prior records, who had been charged with conduct such as shoplifting or vandalism. It is a victim/offender process where the victim and the alleged offender meet face to face to discuss the situation and try to reach a resolution.

My labor and employment arbitrations normally involved interpretation of a collective bargaining agreement or a challenge to an employee discharge. My securities arbitrations involve either customer allegations of wrongdoing by broker/dealers or failure of an employee to comply with a promissory note.

My only experience as a judicial officer came in sitting as a special judge in City Court on a couple of occasions in the 1980's.

While confidentiality limits much of what I can say about my mediation and arbitration cases, some are public. For example, in the 2004-2005 period, I served as the arbitrator in a public

dispute, City of Port Richey and William Downs, FMCS File No. 04-02365. In that case, the former chief of police was challenging his termination by the city. Another of my arbitration decisions, C-E Minerals and United Steelworkers of America, Local 234, 2003 WL 25880576 (C.C.H.) (May 18, 2003), was published by the Commerce Clearing House Labor Arbitration Awards and on Westlaw (and is attached pursuant to item 34). In that case, I was required to interpret a collective bargaining agreement and rule on whether or not employees were entitled to receive vacation pay while on extended lay off. In another published decision, Cemex, Inc. and Local D-79, 2003 WL 25880626 (C.C.H.) (May 6, 2003), I was called upon to interpret a contract provision involving loss of employment based on absence from work.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not applicable

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

Not applicable

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I submitted an application for a judgeship in Part 2 of the Chancery Court of the 30th Judicial District. The Commission met September 23, 2002. My name was not submitted to the Governor as a nominee.

I submitted an application for a judgeship in Division 7 of the Circuit Court of the 30th Judicial District. The Commission met February 12, 2004. My name was not submitted to the Governor as a nominee.

EDUCATION

14. List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Memphis State University, 1976-79, J.D.; class rank 2 of 124; Comments Editor, Law Review; Moot Court National Competition Team; I received American Jurisprudence Awards in eight courses, as well as a West Publishing Company Hornbook Award and a Corpus Juris Secundum Award.

Memphis State University, 1973-76, B.A.; Major in Political Science; *cum laude*

Southwestern at Memphis (now Rhodes College), 1971-72; I left in good standing to transfer to Memphis State University.

PERSONAL INFORMATION

15. State your age and date of birth.

60; April 5, 1953

16. How long have you lived continuously in the State of Tennessee?

50 years

17. How long have you lived continuously in the county where you are now living?

50 years

18. State the county in which you are registered to vote.

Shelby

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No, except minor traffic violations

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

Not applicable

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Yes

Taylor v. Memphis Area Legal Services, Inc., et al, 2:12-cv-02467-JDT-tmp, filed June 15, 2012 in the United States District Court for the Western Division- I am a defendant in this suit brought by a pro se plaintiff against all four federally funded legal aid offices in Tennessee and another pro bono organization, as well as seven employees and one board member of those firms. The suit seeks relief under 42 U.S.C. 1981, 1983, 1985, 18 U.S.C. 245, 18 U.S.C. 1512, 18 U.S.C. 1514, 42 U.S.C. 2000d, Public Law 93-355, Public Law 95-222, the First, Fifth, Thirteenth, and

Fourteenth Amendments to the United States Constitution, torts, and other theories.

Frank Cantrell v. Vicki Cantrell, 160587, filed in 1998 in the Circuit Court for the 30th Judicial District. This was a divorce based on irreconcilable differences.

I was a party in either 2 or 3 cases in the 1980's, but they are so old that I do not have exact information:

1) I filed suit for a fee once and agreed to submit it to the Memphis Bar Association Fee Dispute Committee.

2) I filed suit over a car accident when the other driver ran a stop sign and broadsided my car on the driver's side. I settled that case.

3) I was once contacted by a collection attorney over a credit card that my co-maker had agreed to pay. I paid the balance and am not even sure whether or not a suit was filed.

Susan Cantrell v. Frank Cantrell, 66660, filed in 1979 in the Circuit Court for the 30th Judicial District. This was a divorce based on irreconcilable differences.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

I am a member of Christ United Methodist Church. I am a member of the YMCA. I have held no offices in either organization.

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

Memphis Bar Association (Member, Board of Directors 2007, 2010, 2011; YLD Board of Directors 1983 – 1986, YLD Treasurer 1987; Labor & Employment Law Section Treasurer 2006, Secretary 2007, Vice Chair 2008, Chair 2009; ADR Section Secretary 2002-2004, Vice-Chair 2004, Chair 2005)

National Bar Association, Ben F. Jones Chapter (By-Laws Committee Chair 2008)

Tennessee Bar Association

American Bar Association (Member, Labor & Employment Law Section)

Memphis Bar Foundation

Tennessee Bar Foundation

Leo Bearman, Sr., American Inn of Court, Emeritus Member (Program Chair 2008-2010; Mentoring Chair 2007-2008)

Tennessee Alliance for Legal Services (Board 2008-present; Vice Chair 2011-2012; Chair 2013)

Tennessee Association of Professional Mediators (Board Member 2013)

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school which are directly related to professional accomplishments.

2007- B. Riney Green Award awarded by the Tennessee Alliance for Legal Services for promoting inter-program cooperation and strengthening the provision of legal aid in Tennessee

2012- A.A. Latting Award for Community Service, awarded by the Ben F. Jones Chapter of the National Bar Association

30. List the citations of any legal articles or books you have published.

Supreme Court Ruling Clarifies Role of Arbitration, The Daily News, Jan. 17, 2002, at 1

A Business Perspective of the "Reformed" Tennessee Workers' Compensation Law, (Co-

Author) Mid-South Business Journal, Third Quarter 1986, at 21

A Manager's Guide to Tennessee Workers' Compensation Law (2d Ed. 1998)

So, You're In Human Resources, Now (1989)

Note, Directed Verdicts and New Trials-Their Relationship to the Right to Trial by Jury, 9 Mem. St. U L. Rev. 493 (1979)

Comment, Torts-Workmen's Compensation-Dual Capacity Doctrine Rejected, 8 Mem. St. U. L. Rev. 163 (1977)

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

9/24/2008- Employment Law Update, CLE, Tennessee Alliance for Legal Services (TALS)

9/28/2010- The Right to Language Interpreters in Court, CLE, TALS

10/14/2011- Everything I Know About Neuro-Science and Conflict Resolution, CLE, TALS

9/26/2012- Legal Services Technology Project Updates, CLE, TALS

Five years ago, I was just ending my six years of teaching Employment Law in the Masters in Human Resources program at Webster University.

I do one guest lecture per year at the University of Memphis School of Law Mediation course, where I speak on the comparison of arbitration and mediation. I also do occasional guest lectures in the Extern program and with the ADR students.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Not applicable

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each

example reflects your own personal effort.

Attached are:

A published arbitration decision that I rendered in C-E Minerals and United Steelworkers of America, Local 234, 2003 WL 25880576 (C.C.H.) (March 18, 2003), that reflects solely my effort (please note that the table in the Appendix was improperly reformatted by Westlaw)

A Motion For Relief From Stay that I filed in the United States Bankruptcy Court for the Southern District of New York, that reflects solely my effort, with the possible exception of some legal research done by a law student

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

My interest in serving as a judge dates back to law school. As soon as I began reading cases, I realized that my talents were best suited for the role of a judge. In the 1980's, when interviewed by the Memphis Business Journal as (at that time) a young lawyer, I was asked my career goal and replied that I hoped to serve as a judge. I respected that role enough, though, to realize that I needed tremendous experience before I sought it.

I understand law. It comes naturally to me, as does writing. I can quickly assimilate facts. I enjoy the process of briefing, argument, and decision. As an arbitrator, I consciously practiced and enjoyed the discipline of keeping an open mind throughout. I can make the decisions that need to be made. I understand the importance of every case to every person involved.

36. State any achievements or activities in which you have been involved which demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

I have worked at Memphis Area Legal Services, Inc. (MALS) for nearly nine years, on the front line of equal justice work. It has probably cost me literally (and conservatively) a half million dollars in potential income, but I do not regret a minute. While working at MALS, I have also volunteered at our Saturday Legal Clinic and in our fundraising campaign (neither of which is part of my job responsibility). I have taken pro bono cases from the Community Legal Center. Prior to joining MALS, I volunteered considerable time in the Citizens Dispute and MARRS programs (see item 10 above). I donate money to equal justice organizations including MALS, the Community Legal Center, and the Tennessee Justice Center. I serve as chair of the board of the Tennessee Alliance for Legal Services.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges,

etc. and explain how your selection would impact the court. ***(150 words or less)***

The Tennessee Court of Appeals has 12 judges, not more than four of whom can reside in any one grand division. It hears civil appeals from trial courts and from certain boards and commissions. This Court decides cases based on the record. The judges sit in panels of three in Jackson, Nashville, and Knoxville, and in other locations as necessary. I am applying for a vacancy in the Western Section.

My impact, I hope, would be to apply my talents and hard work on behalf of the people of Tennessee by approaching their cases in a learned, respectful, scholarly, and compassionate way

I would bring diversity in practice experience, having counted among my clients the full range from those in poverty to corporations listed on the Fortune 500. I could put myself in the shoes of every litigant and every attorney.

I would hold myself to the highest standards.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

The bulk of my participation in community services and organizations is in activities sponsored by organizations or governmental entities in the law, the legal system, or the administration of justice. In addition to those described in item 36 above, I volunteer time at the University of Memphis School of Law assisting the mock trial and mock mediation teams in preparing for competition. I am active in the National Bar Association (Ben F. Jones) chapter activities and support all of the organization's community endeavors, such as the annual doctors vs. lawyers basketball game, the mentoring program, food drives, etc. My wife and I teach children's Sunday school at our church, which we have done for the past nine years. I participate actively in the Memphis Area Legal Services, Inc. (MALS) fundraising campaign and in our community outreach.

I am mindful of Rules 3.1 and 3.7 of the Rules of Judicial Conduct and would comply with those. For instance, my fundraising activities for MALS would need to change. I would assess whether I should continue my role at the Tennessee Alliance for Legal Services. I would make sure that extrajudicial activities would not interfere or conflict with the obligations of judicial office. I would continue, as I have to date, to focus my community service on activities that concern the law, the legal system, and the administration of justice. I would continue to teach Sunday School.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

I would like to emphasize my gifts in legal research, analysis, and writing. While I was still a law student, I was approached by the faculty at the University of Memphis School of Law and invited to teach Legal Method. I think that says something about their assessment of my talents in the areas of research, analysis, and writing. In every firm setting in which I have worked, I have always been a "go-to" person for assistance in these areas.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

I would certainly follow the oath of office in upholding the Constitution of the United States of America and the Constitution of the State of Tennessee. And, I would never consider disregarding the law simply because I disagree with it. If my duties called upon me to render a judgment on whether or not a statute or rule is enforceable, I would make that decision based on my obligations as a judicial officer and without regard for any personal agreement or disagreement that I might have.

In carrying out my duties as a licensed attorney, I give very little thought to whether I agree or disagree with the law. As a practicing attorney, I also took an oath about supporting the Constitutions and I place that oath above my personal views to the point where I cannot think of an example where I had difficulty meeting that oath because of any personal disagreement with the law. I have no problem arguing for the extension, modification, or reversal of existing law or the establishment of new law, when permitted.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

Michael A. Faulk, Attorney at Law; Solo Practitioner, The Faulk Law Office; 112 E. Main Blvd., P.O. Box 2080, Church Hill, TN 37642; (423) 357-8088 (office); mike@faulklaw.com

Sandra P. Slaughter; Manager Access, Data Integrity & Technology; Memphis Area Legal Services, Inc.; [redacted]

Harrison D. McIver, III, Attorney at Law; Executive Director, Memphis Area Legal Services, Inc.; 109 N. Main, Suite 200, Memphis, TN 38103; (901) 255-3447 (office) [redacted]; hdmciver@malsi.org

Kirk Bailey Chairman, CEO & President, Magna Bank; 6525 Quail Hollow, Suite 513,

Memphis, TN 38120; (901) 259-5639; Kirk.bailey@magnabank.com
Robert L. Green, Attorney at Law; Allen, Summers, Simpson, Lillie, & Gresham, PLLC; 80 Monroe Avenue, Suite 650, Memphis, TN 38103; (901) 575-3221; rgreen@allensummers.com

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Western Section of the Court of Appeals of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: June 18, 2013.

/s/Frank S. Cantrell
Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

TENNESSEE JUDICIAL NOMINATING COMMISSION
511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the state of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission and to the office of the Governor.

Frank S. Cantrell
Type or Printed Name

/s/Frank S. Cantrell
Signature

June 18, 2013
Date

006661
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

CCH-LAA P 03-2 ARB P 3525, 2003 WL 25880576 (C.C.H.)

CCH Labor Arbitration Awards

Labor Arbitration Awards: 1986 - Present

Ruling: Admin-Decision

***1 03-2 ARB ¶ 3525 C-E MINERALS AND UNITED STEELWORKERS OF AMERICA, LOCAL 234**

03-2 ARB ¶ 3525, Case No. 02-13634-8

March 18, 2003

An employer did not violate a bargaining agreement when it did not pay vacation to employees who were laid off seven and one-half months or more in a consecutive period. The record supported an interpretation of a particular work requirement providing that if an employee had a layoff of more than six consecutive months during the eligibility year in question, that employee did not earn vacation for that eligibility year. The arbitrator concluded that the parties to the agreement expected that there would be some work requirement in the eligibility year in order to earn vacation for the following vacation year. Thus, the grievance was sustained in part and denied in part.

Charles P. Roberts, III, for the Employer. C. G. ‘Boomer’ Lanham, for the Union.

C-E Minerals and **United Steelworkers of America, Local 234**
03-2 ARB ¶ 3525. **FRANK** S. **CANTRELL**, Arbitrator. Selected through FMCS. Case No. 02-13634-8. Hearing held in Greeneville, Tennessee, on December 12, 2002. Award issued on March 18, 2003.

Charles P. Roberts, III, for the Employer. C. G. ‘Boomer’ Lanham, for the Union.

[Text of Award]
Cantrell, Arbitrator: Whether the Company violated the Agreement by denying vacation time and pay to certain [FN2] employees who had been laid off, and, if so, what shall be the proper remedy?

PERTINENT PROVISIONS OF THE AGREEMENT

General Purpose of Agreement

> The general purpose of the Agreement is in the mutual interest of employer and employees to provide for the operation of the Company‘s plant, located in Greeneville, Tennessee, under methods which will further to the fullest extent possible the safety of the employees, efficiency of the operation, quality, and quantity of output and further, to record the terms of Agreement between parties arrived at through collective bargaining with respect to wages, hours of employment, and other expressed conditions contained herein. It is recognized by this agreement to be the duty of the Company and the Union to fully cooperate for the advancement of said conditions.
> ***

ARTICLE IV MANAGEMENT RIGHTS

Except as otherwise specifically provided for in this Agreement, the Company retains all rights to employ, to post and enforce rules, to discipline and/or discharge any member of the Union for just cause, to determine the extent to which its property shall be operated or shut down, discontinue departments in whole or in part, to establish, change or terminate jobs, to arrange or rearrange duties, to assign the work the Company requires to be performed, or otherwise to manage and conduct the business of the employer, all of which rights are specifically reserved to the employer. It is further agreed that all inherent management functions and prerogatives which the Company has not expressly modified or restricted by specific provision of this Agreement are retained and vested exclusively in the Company.

ARTICLE V SENIORITY

***2** ***

***Section 2*:**

a. An employee shall continue to accumulate seniority in cases of proven sickness and sick leave for a maximum of two (2) years.

b. An employee will accumulate his seniority for all time that employee is off because of work related injury.

***

d. An employee shall continue to accumulate seniority while on a leave of absence not to exceed ninety (90) calendar days in any twelve-month (12) period.

***

***Section 4*:**

Continuous service shall end and an employee shall lose all seniority rights if he:

***

(6) Is not recalled after a continuous layoff of twenty-four (24) months….

***

***Section 5*:**

Plant seniority shall be considered as the total length of continuous employment in the Greeneville, Tennessee, Plant.

***

ARTICLE VII REDUCTION AND RECALL

***Section 1*:**

The principle of seniority will govern in the event a layoff becomes necessary.

***

ARTICLE XVII GRIEVANCE PROCEDURE AND ARBITRATION

***Section 1*:**

All grievances or complaints concerning violations or non-compliance with this Agreement shall be adjusted in the following manner….

***

***Step 4*:**

… The decision of the arbitrator will be final and binding on both parties.

***

***Section 5*:**

The arbitrator under this Agreement shall not have the right to alter or amend any provision of this contract or add to or subtract from it.

***

ARTICLE XXII VACATION

(a) Vacation entitlement of employees shall be as follows: After one (1) year service, one (1) week vacation; after three (3) years service, two (2) weeks vacation; after eight (8) years service, three (3) weeks vacation; after fifteen (15) years service, four (4) weeks vacation.

(b) Credited years of service will be computed on the basis of the employee‘s anniversary date of hire.

***Section 2*:**

For each week of vacation entitlement, an employee shall receive forty (40) hours pay at his regular hourly rate.

***Section 3*:**

… Employees will receive their vacation pay prior to their scheduled vacations.

***Section 4*:**

Employees with only one (1) week of vacation working on a twelve (12) hour shift will receive forty (40) hours vacation pay but will have the opportunity to have four (4) consecutive scheduled shifts off as excused time for vacation….

***Section 5*:**

An employee may take his allotted vacation time at his discretion by giving a written notice with a minimum of five (5) working days.

***Section 6*:**

Vacation time will be considered from the employee‘s anniversary date of hire to anniversary date with a four (4) month extension in the event that all vacation days have not been used within the year.

****

BACKGROUND AND FACTS

The facts in this case are largely undisputed and are hereinafter summarized.

At the Greeneville, Tennessee facility, the Company produces a fused silica for use in the electronics industry, the refractories industry, and the investment casting industry. At the time that the most recent version of the collective bargaining agreement was entered, in 2000, and for at least three years before then, the Company was producing product at near capacity. There was no change adopted in that version of the collective bargaining agreement or proposed by the Company in those negotiations concerning proration of vacation or concerning any requirement that employees work any certain number of hours in order to earn vacation. In fact, there was no change to the language in Article XXIII of that version of the collective bargaining agreement. The same vacation language has been in the collective bargaining agreement since 1987.

***3** Plant Manager [A] was a member of the Company negotiating team for the negotiations that led to the most recent version of the collective bargaining agreement. He has been with the Company since July of 1997. Before that, his most recent position was with an employer whose collective bargaining agreement, which [A] assisted in administering, had a provision requiring employees to work a certain number of hours in order to earn vacation.

While there had been at least one layoff, in approximately 1996, there apparently had not been any between then and 2000. Beginning in early 2001, business started declining. Between then and the date of the hearing, there have been layoffs, recalls, and more layoffs. With respect to the individuals involved in this matter, the history of layoffs and recalls, from the beginning of 2001 until the date of the hearing, is set forth in the Appendix to this Opinion and Award.

Under Article XXIII of the Agreement, vacation is earned from anniversary date to anniversary date of one year (what I will at times call the eligibility year) and may be taken from anniversary date to anniversary date (plus four months) of the following year (which I will at times call the vacation year). Employees do not earn any vacation, then, until their first anniversary date (i.e. the first year of employment is an eligibility year, but not a vacation year). Section 1(a) of Article XXIII sets forth the amount of vacation that employees receive, from one to four weeks, based upon years of service. Vacation pay is available to employees any time after it is earned. Employees are not required to take vacation time at the same time that they receive vacation pay. While the Agreement states that employees may be required to take their vacation time during an annual plant shutdown, this requirement has not been observed, at least since [A] has been working at the Company. The Agreement does not expressly state whether or not an employee is required to work any particular amount during an eligibility year in order to earn vacation. It is also silent on whether or not an employee earns vacation while on layoff. The vacation program is administered, in the clerical sense, by Human Resource Clerk [B].

The present dispute arose when [B] notified [A] that employee [C], who was laid off from April 11, 2001 until April 29, 2002, had requested vacation pay for the eligibility year that had ended in March of 2002. [C] had worked a total of five weeks [FN3] during the eligibility year in question.

[A] asked [B] to go back probably about 25 people on the seniority list and tabulate dates of layoff and recall, as well as whether or not she had paid them vacation. [B] did as instructed and the result demonstrated that the Company had paid vacation to some people who had been laid off for up to "approximately six months from a consecutive standpoint" during the eligibility year. While [B] does not have decision making authority as such, she had apparently made, in effect, these previous determinations without discussion with [A]. The Company had not paid vacation yet to anyone who had been laid off seven and one-half months or more in a consecutive period. The record does not expressly indicate whether or not any or all of these previous occasions had been during [A]'s tenure at the Company. In the layoff that occurred in approximately 1996, definitely prior to [A]'s arrival at the Company, at least four people were laid off for "approximately a maximum of six months" and [A], according to his research, believes that they were probably paid for their entire vacation.

***4** [A] notified the Union of the issue and the parties tried [FN4] , unsuccessfully, to work it out. As noted above, a grievance was filed and processed pursuant to the Agreement. The Company twice responded in writing to the grievance. The Step 2 answer was as follows:

> The Company's position is that vacation is an earned benefit through active service in the year prior to when the vacation benefit is applied. If an employee is on layoff, they are not in active service to [the Company]. All employees with a continuous layoff greater than six months are not eligible for a full vacation benefit. This grievance is denied.

The Step 3 response was, "The company considers vacation to be an earned benefit and not awarded to laid off employees."

In the meantime, for the employees and eligibility years at issue (see Appendix), the Company did not pay vacation. All of the employees at issue in this matter have worked at least some on or after the year end date of the eligibility year in question. There are other employees who have been laid off during eligibility years and have not since been recalled, but those instances are not at issue in this matter.

A couple of other situations have arisen due to the layoffs, and have been resolved by the parties. One involves vacation time off for those who had earned vacation and received vacation pay prior to a layoff, but had not yet taken their vacation time off at the time of the layoff. If the ordinary time for taking that particular vacation ran out (or perhaps nearly ran out) during the layoff, they were given an additional four months after their return to work within which to take that time off.

Another situation that arose and was solved dealt with personal days. Article XXX of the Agreement provides for five personal days per year. The Agreement does not expressly state whether or not an employee is required to work any particular amount during a year in order to earn personal days. It is also silent on whether or not an employee earns personal days while on layoff. The Agreement does provide that personal days are prorated for new employees. Initially the Company announced that it would prorate personal days of employees who were laid off and then returned, similar to a new hire. After discussions between the parties, though, it was agreed that employees recalled with five or more months remaining in the calendar year would be eligible for the full five personal days and that those recalled with less than five months left in the year would be eligible for one day for each month left in the year (Co. Ex. C).

The Agreement is also silent on the question of health insurance coverage during layoffs. The Company has handled health insurance for laid off employees at least two different ways. During one layoff, the Company extended health insurance for the first 90 days of the layoff. In a subsequent layoff, the Company continued health insurance to the end of the month in which the layoff occurred.

***5** The Agreement expressly provides, at Article XXII, Section 2, that holiday pay is for employees not "laid off in a reduction in force." The Company does not pay holiday pay to laid off employees.

POSITIONS OF THE PARTIES

The Union contends as follows:

> The Agreement contains no hourly requirement for earning vacation and no language for prorating of vacation. Therefore, the Agreement is clear and unambiguous that the employees involved in this matter are entitled to full vacation pay and time for the years at issue in this matter.

The Company is incorrect in its position that an employee laid off six months or more does not accrue seniority for vacation. Article XXIII, Section 1(a) and (b) of the Agreement is plain. Article V, Section 4(6) defines when an employee's seniority stops accruing, which is when the employee is not recalled after a continuous layoff of 24 months. Article XVII, Section 5 provides that the Arbitrator has no right to alter or amend any provision of the Agreement or add to or subtract from it.

The Company had the opportunity to propose changes in the vacation language in the negotiations that led to the most recent collective bargaining agreement. Yet, there were no changes to the vacation language in that document. [A] was involved in those negotiations and testified that, through his work for a previous employer, he was familiar with ways of administering vacation in which employees would be required to work a certain amount of time (hours or months) in order to receive vacation.

The situation with the prorating of personal days is not comparable, because the word prorated appears in the personal days language in the Agreement, but not in the vacation language. That is why the Union agreed to the prorating of personal days as set forth in Co. Ex. 3.

The Arbitrator should rule in the Union's favor and grant all lost money and vacation due any employee who deserves it.

The Company contends that:

> The Union believes that vacation time and pay is earned simply by being an "employee" as of each anniversary date, even though the employee may have been on layoff status for all, or substantially all, of the employee's preceding vacation year. The Company, however, believes that vacation must be earned by working at least some substantial part of the vacation year.

Contrary to the Union's contention, Article XXIII, Section 1 is not dispositive of how laid off employees earn or become eligible for vacation pay. This section merely defines the number of weeks of vacation to which an otherwise eligible employee would be entitled and the Company has not subtracted time spent on layoff for such purposes. Vacation eligibility, however, is left unanswered by this section of the Agreement. If the Union's position, that this section addresses eligibility, were accepted, an employee would earn vacation only on the first, third, eighth, and fifteenth anniversary dates, but would get no vacation for any other year of employment.

***6** The U.S. Supreme Court's decision in *Foster v. Dravo Corp.*, though not identical to the present case, is instructive. The assumption is that vacations must be earned by working, not mere association with the Company, and the burden is on the Union to establish a clear intent to the contrary. There is no clear intent to the contrary here, either in the language of the Agreement or in the bargaining history.

If vacation were earned by mere association with the Company, some employees in the present matter would receive vacation for years in which they performed no work. Under the Union's argument, there would be no logical reason to even require that an employee ever return to work in order to claim vacation for years on layoff, since vacation would be earned simply by having continuing seniority rights. This is counterintuitive and should not be accepted without the clearest of language.

The intent of the parties must be derived from the entire Agreement. The vacation article suggests in several ways that vacation is connected to working and to taking a break from work. The fact that employees retain seniority rights for 24 months does not suggest otherwise.

The Union concedes that no other economic terms (wages, holiday pay, personal days, or insurance benefits) accrue while employees are on layoff. Although it would have been helpful if the parties had spelled out the criteria for earning vacation, their silence does not automatically vest vacation benefits.

There is a gap in the contract that must be filled. Arbitrators have complete authority to fill gaps in contracts, even when the agreement precludes the arbitrator from modifying, amending, or adding to the agreement. The U.S. Supreme Court has recognized this, as have the lower courts. The Arbitrator should fill the gap here by adopting a 6-month requirement. This would be an implied term of the Agreement. Under such a requirement, none of the employees involved in the present matter would be eligible for vacation for the eligibility year ending in 2002.

Five employees ([D], [E], [F], [G], and [H]), however, worked more than 6 months in their first year of employment, were laid off before their first anniversary date in 2001 and received no vacation for that eligibility year, even though they were later recalled. The four who were recalled before their second anniversary ([D], [E], [F], and [G]) should receive vacation for their first year of employment. The fifth employee ([H]), who was not recalled until after his second anniversary, should not, because once a vacation year has passed, an employee cannot recapture it.

Alternatively, the Agreement could be interpreted to include a pro-rata requirement. There is some precedent for this in the situation involving personal days.

The grievance should be denied insofar as it requests vacation for the eligibility year that ended in 2002, since the involved employees did not work a minimum of six months in that eligibility year. [D], [E], [F], and [G], but not [H], should be held to have earned vacation pay for the eligibility year that ended in 2001. Alternatively, vacation benefits should be prorated in accordance with the schedule in the Company's brief.

DISCUSSION

***7** When an arbitrator is called upon to interpret and apply a collective bargaining agreement in a particular situation, the goal is to do so in accordance with the intent of the parties. The intent of the parties can be easier or more difficult to determine, depending upon the particular situation. The parties in the present case, for instance, could have expressly provided in the Agreement that an employee is required to work a certain amount in the eligibility year in order to earn vacation. That would have made it easier to determine the intent of the parties in this case, perhaps to the point that there would have been no need for an arbitration. They did not, however, include such an express requirement. The Union argues that this means that there is no such work requirement. The Arbitrator disagrees. The absence of such a provision may be relevant, but it is not dispositive. The parties could also have expressly provided in the Agreement that an employee earns vacation while on layoff. That, likewise, would have made it easier to determine the intent of the parties in this case, perhaps to the point that there would have been no need for an arbitration. They did not, however, include that express provision either.

In fact, the Arbitrator agrees with the Company that Section 1 of Article XXIII covers the matter of how much vacation an otherwise eligible employee will receive and does not address the question of how an employee becomes eligible for vacation in a particular year. For that matter, Article XXIII does not expressly address the eligibility question at all. [FN5] There is, then, a gap in the Agreement on the question of eligibility.

As the Company pointed out in its statement at the hearing and in its brief, it is not unusual for arbitrators to be faced with contractual gaps and to be asked to fill those gaps. In fact, the U. S. Supreme Court, in *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960), expressly recognized that such gaps might exist in collective bargaining agreements and that it was the role of the arbitrator to fill them. *Id.* at 580.

While the Court, in that case and in others, has recognized that those gaps may be filled in by reference to various sources, in addition to the express provisions of the contract (*Id.* at 580-82), gap filling must be done by interpretation and application of the collective bargaining agreement. *United Steelworkers of America v. Enterprise Wheel & Car Corp.* , 363 U.S. 593, 597 (1960). In words quoted perhaps as often as any others in this field, the Court has provided that the arbitrator "does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Id.* at 597. It is with a full appreciation for both an arbitrator's authority and its limitations that this discussion is undertaken.

***8** As noted above, it is recognized that an arbitrator may look beyond the precise words of a collective bargaining agreement in order to ascertain intent. For instance, as the Company aptly points out in this case, if the Arbitrator were literally confined to nothing but the words of the document, then employees under Article XXIII would only get four vacations the whole time that they worked at the Company. They would get one after their first, third, eighth, and fifteenth anniversary dates. That would dispose of the claims of every employee in this case for vacation in the eligibility year ending in 2002, as it was not the first, fourth, eighth, or fifteenth anniversary for any of them. Yet, clearly, the parties did not intend for employees to get only four vacations in their careers. The point, though, is not that the "four vacations in a career" argument would be a good or a bad one, but that intent is sometimes found beyond an over literal, hypertechnical interpretation of the document.

It is well recognized that the rules of interpretation of contracts include the principle of giving words their plain and normal meanings, as well as the principle of recognizing the purpose of the involved provision. Here, we are dealing with vacation. Thus, the plain and normal meaning of vacation, as well as the purpose of a vacation provision, can assist in interpretation.

While *Foster v. Dravo Corp.*, 420 U.S. 92 (1975), a case cited by the Company here, is distinguishable because of the express work requirement in the agreement in that case, it is instructive on the plain and normal meaning of vacation and on the general purpose of a vacation provision. The Court in *Foster* recognized "the common conception of a vacation as a reward for and respite from a lengthy period of employment." *Id.* at 101. While there are two components to a vacation, the time away from work and the pay; at its heart, a vacation is more about the time away from work than it is about the pay. This is simple enough to illustrate using the non laid off employee as an example. What distinguishes a vacation from a usual work week is not the pay; the non laid off employee could get that by working. What is different about the vacation is the time away from work. It is a much needed change of scenery or diversion from work. The pay comes into the equation to allow the employee to take the time away from work without suffering economic hardship.

Of course, this view of vacation is not universal. There are those who would argue that vacation is simply another part of the economic package contained in the employment arrangement, just another form of wages. *See e.g. The Common Law of the Labor Agreement: Vacations*, 5 Indus. Rel. L.J. 603, 604-06 (1983).[FN6] If that were the case, then holidays would presumably fall in that same category. Under that theory, though, is Thanksgiving primarily a day to spend with loved ones, or is it just another day's pay? The better side of the debate is the one expressed in the preceding paragraph, and recognized in *Foster*, that a vacation is an opportunity for an employee to take time away from work after a lengthy period of employment, without suffering economic hardship. That, then, is the plain and normal meaning of vacation and the purpose of a vacation provision.

***9** The employee who has been laid off during most or all of the eligibility year has not had that lengthy period of employment, but has, instead, had a lengthy period without work. This is not the employee's fault, but it is just a fact. And it is not to say that being laid off is like a vacation; far from it. A layoff is probably far more stressful than work. If an employee has been laid off for most or all of the eligibility year, though, work, not time away from work, is the change of scenery or diversion that he or she needs during the following year. Certainly that individual needs the pay, probably more than the employee who worked throughout the eligibility year. If that individual has been recalled, though, pay, in the form of normal wages, will result from the work performed during the following year. If that individual has not been recalled, then it is the layoff, not any vacation time away from work, that is causing the economic hardship. As real as that hardship is, under the plain and normal meaning of vacation, and under the purpose of a vacation provision, vacation pay is not designed to remedy that hardship. Applying the plain and normal meaning of vacation and the purpose of a vacation, then, supports the idea that, absent language to the contrary, the parties to the Agreement expected that there would be some work requirement in the eligibility year in order to earn vacation for the following vacation year.

Whether the use of the dictionary definition of words is viewed as an adjunct to determining the plain and normal meaning or whether it is a separate method of interpretation, it is helpful in interpretation. According to *Funk and Wagnalls Standard College Dictionary* (1963), a vacation is, "an interlude, usually of several days or weeks, from one's customary duties, as for recreation or rest; a holiday." Likewise, *Merriam Webster's Collegiate Dictionary* (10th ed. 1993) defines it as, "a respite or time of respite from something" or "a period of exemption from work granted to an employee for rest and relaxation." These dictionary definitions (one likely from before the language of Article XXIII was agreed upon and one from after) support both the idea that an employee must be working at the time in order to earn vacation and the idea that the core function of a vacation is the time away from work, not the pay. On that latter note, neither of those dictionaries mentions pay in the definition of vacation.

Another recognized tool in interpretation of contracts is to adopt the interpretation that results in a reasonable (or more reasonable), rather than unreasonable (or less reasonable), interpretation. [FN7] Tools of interpretation are not applied in a vacuum. Here, given the plain and normal meaning of vacation, the reasonable (or at least more reasonable) interpretation is that there would be some work requirement involved in earning a vacation. Looking again at *Foster*, the Court's analysis there supports this idea. In that case, the Court distinguished between "benefits and advancements that would necessarily have accrued by virtue of continued employment" (sometimes referred to as continued association with the employer) and those that require "more than simple continued status as an employee." 420 U.S. at 97. Sure enough, the Court in *Foster* had the luxury of a collective bargaining agreement with an express work requirement. Yet, when considering the argument there that the employee had earned vacation while not working, the Court reasoned that such an argument was so "sharply inconsistent" with the common conception of a vacation that it should prevail "only where it clearly appears that vacations were intended to accrue automatically as a function of continued association with the company." *Id.* at 101. The Court found no such showing there and there is none here.

***10** The idea of a "showing" of intention provides a convenient opportunity to discuss the burden of proof in the present case. Since this case involves contract interpretation (as opposed to discharge) that burden is on the Union. Thus, it is not for the Company here to prove that there is a work requirement, but it is for the Union to prove that there is not one. If the proof is in equipoise, then the Union has not satisfied that burden. *SuperValu Stores, Inc.*, 98-1 ARB ¶ 5087, p. 5510 (1997). Frankly, the proof here on whether or not there is a work requirement is not in equipoise. The weight of the proof is in favor of the Company's argument that there is a work requirement. Even if that were not the case, though, even if the weight of the two arguments were closer than it is, the fact that the Union bears the burden of proof would support a finding, absent the greater weight of proof to the contrary, that there is a work requirement under the vacation provision of the Agreement.

Another fundamental rule of interpretation is that agreements should be construed as a whole. Of particular importance in that regard is Article IV of the Agreement, Management Rights. It is important because if vacation rights exist, it is by virtue of contract. Where the Agreement is silent on whether or not there is a work requirement, it is relevant to recognize that Article IV provides, "Except as otherwise specifically provided for in this Agreement, the Company retains all rights to employ … or otherwise to manage and conduct the business of the employer, all of which rights are specifically reserved to the employer. It is further agreed that all inherent management functions and prerogatives which the Company has not expressly modified or restricted by specific provision of this Agreement are retained and vested exclusively in the Company." Regardless of one's view of the retained rights theory generally, this is strong language supporting a finding that the Company, in this case, had the right to enforce a work requirement under the vacation provision.

Also along the lines of looking at the Agreement as a whole, the Company asks the Arbitrator to consider the fact that employees on layoff do not earn wages, holiday pay, personal days, or insurance benefits. Actually, though, there is something in that argument for either side. True enough, Article XXVI (Insurance) and Article XXVIII (Wages) are silent (like Article XXIII) on the question and, yet, the parties seem to agree that laid off employees do not earn wages or insurance benefits. This supports the Company's point of view. On the other hand, though, Article XXII (Holidays) expressly provides that holiday pay is for employees who are not laid off. That would support the argument in favor of the Union that if the parties meant for employees not to earn a particular benefit while on layoff, they knew how to say so. The personal days situation does not really seem to favor either party. The Agreement is silent on the subject, but as pointed out earlier, the parties have apparently reached a subsequent understanding on how to handle personal days for laid off employees. All in all, reference to the wage, holiday pay, personal days, and insurance benefits treatment of laid off employees appears to be a draw.

***11** The Union argues that Article V supports its point of view, because that article provides that employees do not lose

seniority until they have been laid off for 24 continuous months. According to the Union, this provision refutes the Company‘s argument that employees do not accrue seniority while on layoff. Whether or not Article V would refute that argument is, however, not before this Arbitrator, because the Company is not arguing in this case about whether or not employees accrue seniority during a layoff of fewer than 24 continuous months. The Company has stated, for purposes of this arbitration, that they do not deduct time spent on layoff for purposes of determining how many weeks of vacation an employee will be entitled to receive, if otherwise eligible. What the Company argues is that vacation must be earned, in a particular eligibility year, by working at least some substantial part of that year. Article V does not refute that argument.

The Union points out that the Company had the opportunity to propose changes in the vacation language in the negotiations that led to the most recent collective bargaining agreement and that there were no changes to the vacation language in that document. They note that [A] was involved in those negotiations and testified that, through his work for a previous employer, he was familiar with ways of administering vacation in which employees would be required to work a certain amount of time (hours or months) in order to receive vacation. From this, the Union asks the Arbitrator to infer that there is no work requirement under the vacation provision. As discussed below, the Arbitrator does believe that the negotiations that led to the most recent collective bargaining agreement have a bearing on what the work requirement is for purposes of the employees and eligibility years involved in this arbitration. The Arbitrator does not, however, accept the notion that what occurred or did not occur in those negotiations overcomes the other evidence and arguments that support a finding of a work requirement in the vacation provision of the Agreement.

The Union also argues that the situation involving the parties' agreement on personal days is distinguishable from the question of vacation. As covered earlier, I agree that what the parties did with respect to personal days does not influence the outcome of this arbitration.

It is true, as the Union points out, that Article XVII provides that the Arbitrator “shall not have the right to alter or amend any provision of this contract or add to or subtract from it.” The Arbitrator is not doing any of those prohibited things. [FN8] Instead, the Arbitrator is interpreting and applying the Agreement to determine, expressly in accordance with Article XVII, Section 1, whether or not there has been a violation or non-compliance with the Agreement.

The right to a vacation arises, if at all, from the Agreement. The Arbitrator finds that the Union has not proved that it is a violation of the Agreement to recognize a work requirement under Article XXIII. The Arbitrator finds, instead, that, for purposes of this arbitration, Article XXIII does contain a work requirement.

***12** That finding, however, does not fully conclude this matter. There is still the question of whether or not the employees involved in this matter satisfied that work requirement for the eligibility years at issue.

The Company, both at the hearing and in the formulation of the second issue in its brief, invites me to go further and provide the parties with some guidance for the future on how to interpret and apply Article XXIII. I decline that invitation and limit this discussion to a determination concerning the employees and eligibility years involved in this grievance. This is not meant to discourage the parties from choosing to allow this Opinion and Award to influence how they interpret and apply the Agreement in the future. Nor is it meant to affect, one way or the other, the precedent value, if any, of this Opinion and Award in any future disputes. *See generally* Elkouri & Elkouri, *How Arbitration Works*, Chapter 11 (5th Ed. 1997).

Looking, then, at the employees and eligibility years involved in this case, it makes sense to divide the situations into those that involve eligibility years that ended in 2001 and those that involve eligibility years that ended in 2002. There are five employees involved in this case who did not receive vacation pay for eligibility years that ended in 2001. They are [D], [E], [F], [G], and [H]. Each of the five worked in excess of forty weeks during the eligibility year that ended in

2001. The Company concedes that all but [H] should receive vacation for that year. For that reason and based on the analysis of the 2002 eligibility year-end situations below, the Arbitrator agrees and the grievance will be sustained with respect to [D], [E], [F], and [G] for the eligibility years ending in 2001.

The Company distinguishes [H] from the other four, with respect to the eligibility year that ended in 2001, because the other four were all recalled prior to their anniversary date during the vacation year that ended in 2002, while [H] was not. This distinction, however, does not dictate a different result for [H]. Under the Agreement, each vacation year actually lasts 16 months. [H] was called back within that 16 months. For that reason and based on the analysis of the 2002 eligibility year-end situations below, the grievance will be sustained with respect to [H] for the eligibility year ending in 2001. I do not reach the question of what the outcome would have been if [H]'s recall had not occurred during that 16 months.

That leaves the question of the eligibility years at issue that ended in 2002. Since the Company does not concede that vacation is due in any of those situations and since the amount worked in those situations ranges quite a bit, further analysis of the particular work requirement is necessary.

The Company suggests a six month requirement. The bases for that are apparently [A]'s experience at his former employer, his discussions with other employers, and his knowledge of the 1250 hour requirement under the Family and Medical Leave Act (FMLA).

***13** Whether or not any of those factors would ordinarily suffice to establish a six month requirement, the custom or past practice of the parties and the events of the negotiations that led to the most recent collective bargaining agreement should be taken into account in this case. [A] testified that there had been some layoffs at the Company in approximately 1996. The record is not perfectly clear on whether or not there were other layoffs between that time and the negotiation of the most recent collective bargaining agreement. Be that as it may, when the parties entered the negotiations for the most recent collective bargaining agreement, the Union had a reasonable expectation of how vacation would be handled for laid off employees, based upon how it had been handled in past situations, particularly the layoff that had occurred in approximately 1996. The fact that the Union apparently did not attempt to secure language in those negotiations that expressly covered the topic of vacation for laid off employees must be viewed in light of that expectation.

It also appears from [A]'s testimony, although again it is not crystal clear, that there are some employees who were recalled from layoffs that occurred after the negotiation of the most recent collective bargaining agreement in situations that are not involved in this arbitration. While those situations would not have impacted the Union's position in the negotiation of the most recent collective bargaining agreement, they, too, are evidence of the continuing development of custom or past practice between these two parties.

For purposes of this arbitration, it is this custom or past practice, developed both before and since the negotiations that led to most recent collective bargaining agreement, that will primarily determine the particular work requirement. The proof at the hearing was that in the layoff that occurred in approximately 1996, at least four employees who were laid off for approximately a maximum of six months were probably paid their entire vacation. In situations since then, employees who were laid off up to approximately six consecutive months had received vacation, while some who were laid off approximately seven and one-half consecutive months had not.

The record as a whole supports an interpretation of the particular work requirement, for purposes of this arbitration, that provides that if an employee had a layoff of more than six consecutive months during the eligibility year in question, that employee did not earn vacation for that eligibility year. If, however, the employee did not have a layoff of more than six consecutive months during the eligibility year in question, that employee did earn vacation for that eligibility year. [FN9]

I find that only one of the involved employees, [I], did not have a layoff of more than six consecutive months during the eligibility year that ended in 2002. [FN10] The grievance will, therefore, be sustained as to him, but otherwise denied as to the eligibility years that ended for the involved employees in 2002. I have not missed the fact that several of the other employees may have worked more than [I] during their eligibility years that ended in 2002. Each of them, though, had a layoff during that eligibility year of more than six consecutive months. [I] reached his anniversary date in 2002 before his layoff exceeded six consecutive months.

***14** While custom or past practice, and expectations of the parties based on that custom or practice, are the primary bases for reaching this interpretation regarding the particular work requirement, there is additional support for that interpretation. First of all, to the extent that Article IV of the Agreement reserved any right in the Company to determine the work requirement, this interpretation is consistent with the Company's determination, as reflected in the Company's Step 2 answer (see Jt. Ex. 2).

Secondly, this interpretation is reasonable and within the common conception of what it means to work enough during a year to earn benefits that are earned on an annual basis. For example, as [A] pointed out in his testimony, the FMLA relies upon a 1250 hour requirement. Similarly, under the Employee Retirement Income Security Act (ERISA), there is a 1000 hour requirement for vesting of certain benefits. 29 U.S.C. § 1053(b)(2)(a). It should be specifically noted, however, that this discussion of the FMLA and ERISA is not undertaken in order to graft those statutory requirements on to the Agreement. The interpretation of the Agreement in this matter is based on the words of the Agreement itself and on the intent of the parties in using the words of the Agreement.

The Company suggested the possibility of adopting an interpretation that called for prorating vacation. The Arbitrator declines to do so.

As noted in the preceding section, this Opinion and Award is not reached without full consideration of the position and arguments by the Company and the Union. Nor is it reached without full appreciation of the hardship that is placed upon employees by layoff.

AWARD

Having heard or read all of the evidence and arguments in this case, and in light of the above Discussion, the Grievance is sustained to the extent that it seeks vacation for [D], [E], [F], [G], and [H] for their eligibility years ending in 2001 and to the extent that it seeks vacation for [I] for his eligibility year ending in 2002. The Company is directed to pay to each of those individuals the amount of vacation pay set forth in Article XXIII, based on each such individual's years of service as of the year-end anniversary date for that particular eligibility year. If any of those individuals has returned to work or returns to work (prior to a loss of seniority pursuant to Article V, Section 4), the Company is directed to allow that employee the opportunity to take a corresponding amount of vacation time set forth in Article XXIII, such vacation time off to be taken by the later of four months after the date of this Opinion and Award or four months after such return to work. In all other respects, the grievance is denied.

The Arbitrator will retain jurisdiction of the Grievance until April 17, 2003 to resolve disputes, if any, regarding the remedy directed herein. A request to the Arbitrator to exercise jurisdiction must be in writing as to the exact issue and must be received by the Arbitrator no later than April 17, 2003 at 4:00 p.m. (CDT). Such request should be served by the requesting party on the other party at the same time that it is submitted to the Arbitrator. In the event of a timely request, the Arbitrator's jurisdiction will be extended so long as is necessary for the Arbitrator to resolve the issues raised in such request. It is within the sole discretion of the Arbitrator to determine whether the issue presented by such request is within the jurisdiction of this provision pertaining to the Arbitrator's retention of jurisdiction.

***15** Dated *March 18*, 2003

AFFIRMATION

I, **Frank** S. **Cantrell**, affirm, with full knowledge of the penalties for perjury, that the above document is my Opinion and Award, and that I am the Arbitrator who executed the same.

Appendix

Name	Hired	Eligibility yr. end at issue	Laid off	Recalled	Suspended	Laid off	Recalled [FNi]	Laid off	Amount worked [FNii]
[R] ...	3/3/99	3/3/02	4/11/01	5/29/01	7/16/01	8/17/01	3/17/02	10/18/02	13 weeks
[Q] ...	3/10/99	3/10/02	4/11/01	5/29/01	7/16/01	8/17/01	3/17/02	10/18/02	12 weeks
[P] ...	5/5/99	5/5/02	4/11/01	5/29/01		8/17/01	3/18/02	10/18/02	19 weeks
[O] ...	5/21/99	5/21/02	4/11/01	5/29/01		8/17/01	3/11/02	10/18/02	22 weeks
[N] ...	5/21/99	5/21/02	4/11/01	5/29/01	7/16/01	8/17/01	3/13/02	10/18/02	18 weeks
[M] ...	5/24/99	5/24/02	4/11/01	5/29/01		8/17/01	3/18/02	10/18/02	22 weeks
[L] ...	6/7/99	6/7/02	4/11/01	5/29/01		8/17/01	4/1/02	10/18/02	21 weeks
[I] ...	2/2/00	2/2/02	4/11/01	6/4/01		8/17/01	4/22/02	10/18/02	21 weeks
[K] ...	2/21/00	2/21/02	4/11/01				4/29/02	10/18/02	7.5

									weeks
[C] ...	3/9/00	3/9/02	4/11/01				4/29/02	10/18/02	5 weeks
[J] ...	3/22/00	3/22/02	3/22/01				4/29/02	10/18/02	None
[D] ...	5/1/00	5/1/01	3/22/01				4/29/02	10/18/02	46 weeks, 3 days
[D] ...	5/1/00	5/1/02	3/22/01				4/29/02	10/18/02	2 days
[E] ...	5/1/00	5/1/01	3/22/01				4/22/02	10/18/02	46 weeks, 3 days
[E] ...	5/1/00	5/1/02	3/22/01				4/22/02	10/18/02	1 week, 2 days

Appendix

Name	Hired	Eligibility yr. end at issue	Laid off	Recalled	Suspended	Laid off	Recalled [FNi]	Laid off	Amount worked [FNii]
[F] ...	5/8/00	5/8/01	3/22/01				5/6/02	10/18/02	45 weeks

						, 3 days
[F] ...	5/8/00	5/8/02	3/22/01	5/6/02	10/18/02	2 days
[G] ...	5/29/00	5/29/01	3/22/01	5/28/02	10/18/02	42 weeks, 1 day
[G] ...	5/29/00	5/29/02	3/22/01	5/28/02	10/18/02	1 day
[H] ...	6/8/00	6/8/01	3/22/01	7/15/02	10/18/02	41 weeks
[H] ...	6/8/00	6/8/02	3/22/01	7/15/02	10/18/02	None

_____

FNi. The 2002 recall date reflected in Jt. Ex. 5 differed slightly, at times, from the date reflected in the Company brief. The dates in the Company brief appeared to be taken from Co. Ex. A & B, meaning that Co. Ex. A & B may not always appear to correspond with Jt. Ex. 5. The difference was never more than a week. In most, but not all cases, where the 2002 recall dates differed, the date reflected in the Company brief was the earlier. I do not believe that the difference is material to the outcome of this matter. Where they differed, I used the earlier date in the last 'Recalled' column above.
FNii. The 'Amount worked' column is designed to reflect the amount worked in the eligibility year at issue. My calculations of the amount worked differed slightly, at times, from those reflected in the Company brief, both of which differed slightly, at times, from those reflected in Jt. Ex. 3. The difference was never more than a week and two days. In most, but not all, cases where the calculations differed, the calculation reflected in Jt. Ex. 3 was the highest of the three. I do not believe that the difference is material to the outcome of this matter. Where any of the three calculations differed, I have chosen the highest of the three for use in the 'Amount worked' column above.

FN2. The word 'certain' is not meant to denote any sort of discrimination issue. It is used to indicate that the parties agree on which employees and eligibility years are at issue.

FN3. See endnote ii on the Appendix for an explanation of the amounts worked as set forth in the Appendix, in the text above, and elsewhere in this Opinion and Award.

FN4. I do not consider the substance of either party's settlement offers to be material to the outcome of this matter. To the extent that the substance of those offers is reflected in any Exhibits, testimony, or argument, I considered such Exhib-

its, testimony, and argument only for the purpose of understanding the dispute.

FN5. A contrary finding (that Article XXIII, Section 1 does address eligibility, as well as length of vacation) would not help the Union. The use of the phrase ‘year(s) service’ or ‘years of service,’ if it referred to eligibility, would tend to support the idea that there is a work requirement. *See Frye Copysystems, Inc.*, 65 LA 1249 (1975).

FN6. Even accepting the view that vacation is just another form of wages would not necessarily further the Union‘s cause in this case, because the question of how those ‘wages' are earned would still need to be resolved. (*See, e.g. Reichold Chemicals, Inc.*, 66 LA 745, 749 (recognizing the general rule that ‘vacation pay is a form of wages payable when earned and earned when worked.’))

FN7. This is at least related to the tool of interpretation sometimes expressed as avoiding an interpretation that would lead to absurd or nonsensical results. The characterization in the text above, rather than this more colorful one, is chosen purposefully. This is an attempt to avoid confusion between the argument and the interpretation. It is not ‘absurd’ or ‘nonsensical’ to argue that employees who have been laid off for a long period of time could use a week or two of pay. An interpretation of the Agreement that provides for vacation pay without a work requirement, though, is not as reasonable as an interpretation that recognizes a work requirement.

FN8. If accepting the Company‘s position that there is a work requirement would be in violation of the quoted language from Article XVII, it is hard to see how accepting the Union‘s position that laid off employees earn vacation would not equally be. More importantly, though, as pointed out in the text, the Arbitrator does not violate the quoted language by interpreting and applying the Agreement.

FN9. The consecutive component is based upon the Company‘s written Step 2 answer and [A]‘s testimony about the past instances. I draw no distinction between the word consecutive, as testified to by [A], and continuous, as used by the Company in the Step 2 answer (See Jt. Ex. 2).

FN10. Determining who was or was not laid off for more than six consecutive months in the eligibility year ending in 2002 is a little bit complicated by the fact that the evidence does not always agree on dates of layoff and recall, amounts worked, etc. For instance, Co. Exs. A & B do not appear to always correspond to Jt. Ex. 5 on dates of recall in 2002. Similarly, Jt. Ex. 3, my calculations, and the Company brief (which I realize is not evidence) do not always agree on the amount that each employee worked during a given year. I do not believe, however, that any of these differences affect the outcome of this matter.

CCH-LAA P 03-2 ARB P 3525, 2003 WL 25880576 (C.C.H.)

END OF DOCUMENT

HEARING DATE AND TIME: October 31, 2012 at 10:00 a.m. E.T.
OBJECTION DEADLINE: October 24, 2012 at 4:00 p.m. E.T.

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
Hostess Brands, Inc., *et al*[1].	:	Case No. 12-22052 (RDD)
Debtors.	:	(Jointly Administered)

MOTION OF LORAINE GARMON
FOR RELIEF FROM STAY PURSUANT TO 11 U.S.C. § 362(d)
AND FEDERAL RULE OF BANKRUPTCY PROCEDURE 4001

To the Honorable Robert D. Drain,
United States Bankruptcy Judge

Loraine Garmon ("Ms. Garmon"), by and through counsel of record, as creditor hereby moves pursuant to 11 U.S.C. § 362(d) and Bankruptcy Rule 4001 for an order substantially in the form annexed to this Motion as **Exhibit A**, for relief from the stay in this matter as to her claims, which are fully covered by insurance.

[1] The Debtors are the following six entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Hostess Brands, Inc. (0322), IBC Sales Corporation (3634), IBC Services, LLC (3639), IBC Trucking, LLC (8328), Interstate Brands Corporation (6705) and MCF Legacy, Inc. (0599).

BACKGROUND

1. On January 11, 2012, the Debtors commenced their reorganization cases by filing voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code. The Debtors' Chapter 11 cases have been consolidated and are being administered jointly for procedural purposes only.

2. The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. On January 18, 2012, the United States Trustee for the Southern District of New York (the "U.S. Trustee") appointed an official committee of unsecured creditors, pursuant to section 1102 of the Bankruptcy Code (the "Creditor Committee"). On January 30, 2012, the U.S. Trustee amended the membership of the Creditors Committee.

4. Founded in 1930, Hostess is one of the largest wholesale bakers and distributors of bread and snack cakes in the United States. The Debtors operate 36 bakeries, 565 distribution centers, approximately 5,500 delivery routes and 570 bakery outlet stores throughout the United States.

5. Ms. Garmon, a former employee of Hostess Brands, Inc. and/or Interstate Brands, filed timely claims against both such debtors, listed in the Court's Claims Register as Claim Numbers 318[2], 408, and 409.

[2] Debtors objected to Claim No. 318 in Omnibus Objection No. 2, filed August 21, 2012, on the grounds that it had been amended by Claim Nos. 408 and 409 which would survive that Objection. Ms. Garmon did not file a response to that Objection, based upon the representation in the Objection that Claim Nos. 408 and 409, as Surviving Claims, would not be affected. The Objection to Claim No. 318 was sustained by Order of this Court dated September 26, 2012.

6. By the provisions of 11 U.S.C. §362(a), all persons are enjoined and stayed from commencing or continuing any suit against the Debtors, subject to relief that can be granted from the stay, pursuant to 11 U.S.C. § 362(d).

JURISDICTION

7. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157(b)(2)(G) and 1334(b). Motions to terminate, modify or annul the automatic stay are core proceedings under 28 U.S.C. § 157(b)(2)(G).

FACTS IN SUPPORT OF REQUESTED RELIEF

8. On May 8, 2009, Ms. Garmon filed a timely Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC). A copy of that Charge is attached to this Motion as **Exhibit B**. The Charge was assigned No. 490-2009-01821 by the EEOC. The Respondent named in the Charge is Interstate Brands Corporation, which is the entity that had issued Ms. Garmon's Separation Notice in 2009.

9. On September 28, 2011, the EEOC found reasonable cause to believe that the Respondent had discharged Ms. Garmon and denied her a reasonable accommodation because of her disability in violation of the Americans With Disabilities Act Amendments Act (ADAAA). The EEOC further found reasonable cause to believe that Ms. Garmon was discriminated against on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964, as amended (Title VII). A copy of that Determination is attached to this Motion as **Exhibit C**.

10. Following the Determination, the EEOC attempted conciliation with the Debtors as required by Section 706(b) of Title VII and the ADAAA. While that process was pending, the Debtors filed the petitions commencing this bankruptcy proceeding. Thereafter, by Notice dated

January 23, 2012, the EEOC determined that conciliation had been unsuccessful. A copy of that Notice is attached to this Motion as **Exhibit D**.

11. On May 9, 2012, the EEOC issued a Notice of Right to Sue, based on Conciliation Failure. A copy of that Notice of Right to Sue is attached to this Motion as **Exhibit E**.

12. In order to determine whether or not to Ms. Garmon has grounds for relief from the automatic stay in this matter, counsel for Ms. Garmon inquired of counsel for the Debtors as to whether or not the Debtors had Employment Practices Liability Insurance (EPLI) that would cover Ms. Garmon's allegations. The policy kindly produced by counsel for the Debtors as the applicable policy reflects a "Continuity/Retroactive Date" of 02/03/2009. A copy of the relevant portions of that insurance policy are attached to this Motion as **Exhibit F**.[3]

13. Because the policy produced by the Debtors had a "Continuity/Retroactive Date" of February 3, 2009 and because the allegations in Ms. Garmon's EEOC charge included events occurring October 27, 2008 and March 3, 2009, counsel for Ms. Garmon requested the policy that was in effect for the period of 1/1/2008 to 2/2/2009. Counsel for the Debtors has confirmed that the policy in effect for that period is identical to the policy previously produced.

14. The applicable policy provides a separate EPLI limit of liability of $20,000,000 (and a policy aggregate limit of $40,000,000). Although there is a Retention/Deductible listed of $500,000, there are "Financial Insolvency" provisions in the policy as follows:

a) In Section 2 (h) of the Employment Practices Liability (EPL) Coverage Section of the policy, "Financial Insolvency" of the insured Company (the Debtors here) is defined

[3] Portions of pages 3 and 6 of the policy, not relied upon by Ms. Garmon in this Motion, have been modified or deleted by Policy Endorsements. Specifically, subsection (m)(6) on page 3 and portions of the first and third paragraphs at the top of page 6 have been modified by Policy Endorsements. While not attached to this Motion, those Policy Endorsements and the entire policy, including all endorsements, can be provided to the Court upon request.

to include, "(ii) the filing of a petition under the bankruptcy laws of the United States of America."

b) Section 5 of the EPL Coverage Section of the policy, states, "[I]n the event that the Company [the Debtors here] is unable to pay the applicable Retention amount due to Financial Insolvency, then the Insurer shall commence advancing Defense Costs and pay any other covered Loss within the Retention…."

15. The combined effect of the limits of liability and the provision for payment of the Retention by the insurer in the event of a bankruptcy is that coverage, defense, and payment of Ms. Garmon's damages would be accomplished without the use of any funds of the Debtors.

LEGAL AUTHORITY FOR REQUESTED RELIEF

16. According to 11 U.S.C. § 362(d), "On request from a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—(1) for cause …."

17. If the proceeds of a liability insurance policy are not property of a debtor's estate, those proceeds can be paid out by the insurer without violating the automatic stay. In re Global Holdings Ltd., 469 B.R. 177, 187 (Bankr. S.D.N.Y. 2012). The proceeds of a liability insurance policy that provides coverage both for the debtor and its directors and officers[4] are not property of a debtor's estate except, perhaps, to the extent that "depletion of the proceeds would have an adverse effect on the estate to the extent the policy actually protects the estate's other assets from diminution." In re Global Holdings Ltd., 469 B.R. 177, 191 (Bankr. S.D.N.Y. 2012) citing In re Downey Fin. Corp., 428 B.R. 603 (Bankr. D. Del. 2010). Here, there is no such danger for at

[4] The EPLI policy here includes coverage for the Directors and Officers. See **Exhibit F,** Section 2 (g), (k), and (l) (page 3).

least three reasons: 1) the $20,000,000 limits of liability ($40,000,000 aggregate) are not threatened by Ms. Garmon's claims (according to the claims filed with this Court, the Debtors' liability to Ms. Garmon at that time was just over $450,000); 2) the proceeds of an EPLI policy of a debtor are of no value to the estate except as they are used to pay covered claims (which actually reduces demands on the estate); and 3) even a complete depletion of the proceeds of an EPLI policy would not result in diminution of the estate's other assets as any remaining claimants would simply have claims against the estate, the same as they would have if the EPLI policy proceeds had never been called upon.

18. It is likely unnecessary to even decide whether or not the proceeds of the EPLI policy are assets of the estate, since cause exists to lift the stay. In re Global Holdings Ltd., 469 B.R. 177, 191 (Bankr. S.D.N.Y. 2012). While this Court uses the 12-point test articulated in Sonnax Indus., Inc. v. Tri Component Prods Corp., 907 F.2d 1280, 1286 (2d Cir. 1990), not all of the factors apply in every case, and cause is a broad and flexible concept determined on a case-by-case basis. In re M.J & K Co., Inc., 161 B.R. 586 (Bankr. S.D.N.Y. 1993).

19. Among the factors (numbered here as they are in Sonnax) met in the present case are: 1) Relief from the stay will result in partial or complete resolution of the issues. 2) Ms. Garmon's discrimination case has no connection with the bankruptcy case and coverage, defense, and payment of her claims, from insurance proceeds purchased by the Debtors for that very purpose will not interfere with the bankruptcy case. 4) Under 28 U.S.C. 157(b)(5) cases with tort type damages, including cases under Federal discrimination statutes (In re Ice Cream Liquidation, Inc., 281 B.R. 154, 162 (Bankr. D. Conn.), are to be tried in the district courts. 5) Under the terms of the policy, the Debtors' insurer has assumed full responsibility for defending (and paying) the claims of Ms. Garmon. 7) Litigation of this case in the Western District of

Tennessee would not prejudice the interest of other creditors. 10) The interests of judicial economy and the expeditious and economical resolution of litigation are served by having Ms. Garmon's case filed and heard in the Western District of Tennessee, where she resides, where she was employed by the Debtors, where the cause of action arose, and where all or nearly all of the witnesses and exhibits can be accessed. 13) The impact of the stay on Ms. Garmon is tremendous in that it prevents her from resolving and being compensated for a claim that is totally covered by insurance proceeds purchased by the Debtors for this very purpose.

20. The automatic stay in this matter is not designed to protect third parties, such as the EPLI insurance carrier. Tucker v. American Intern. Group, Inc., 745 F.Supp. 53, 63 (D. Conn. 2010). Neither the automatic stay nor a discharge injunction are designed to protect a third party insurer. Id. at 64. If it did, the insurer would be unjustly enriched by escaping liability that it was compensated to cover.[5] Id. at 65. Ms. Garmon should be permitted to pursue her claims, fully covered by the EPLI policy in the United States District Court for the Western District of Tennessee in order to prevent a windfall in favor of the EPLI insurance carrier. In re White, 73 B.R. 983, 985 (Bankr. D.D.C. 1987).

21. Because the Notice of Right to Sue was issued to Ms. Garmon by the EEOC after the commencement of this bankruptcy case, the time for filing suit is extended, pursuant to 11 U.S.C. § 108, until 30 days after notice of termination of the stay. Because of the relatively short time for filing suit under 11 U.S.C. § 108, Ms. Garmon requests that this court order that the 14-day stay of the order granting relief from the stay not apply in this case.

[5] As shown in Exhibit F, the Debtors paid nearly $300,000 for the most recent version of the EPLI policy, after the petition was filed in this case.

22. Pursuant to Local Rule 9013-1(a) Ms. Garmon respectfully requests that she be excused from filing a memorandum of law in that the statutory basis and legal authorities that support her requested relief are set forth in this motion.

23. Ms. Garmon waives the 30 day hearing provision in 11 U.S.C. § 362(e)(1).

RELIEF REQUESTED

24. Wherefore, Ms. Garmon respectfully requests that the Court enter an order pursuant to 11 U.S.C. § 362(d) and Bankruptcy Rule 4001 substantially in the form annexed to this Motion as **Exhibit A**, for relief from the stay in this matter as to her claims, which are fully covered by insurance.

Dated: Memphis, TN
October 9, 2012

Respectfully submitted,

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