

Received by the Regents
February 21, 2013

THE UNIVERSITY OF MICHIGAN
REGENTS COMMUNICATION
ITEM FOR INFORMATION

Subject: Litigation

February 2013

NEW CASES

Joseph Gant v The University of Michigan Hospital and AFSCME, Local 1583. United States District Court, Eastern District of Michigan. (Judge Sean F. Cox) (Filed December 6, 2012)

Plaintiff was a Custodian for Environmental Services at the University Hospital. He alleges that he was discharged from his position without cause and in retaliation for filing an EEOC charge alleging race discrimination. The complaint also alleges that Plaintiff's Union AFSCME, Local 1583 breached its duty of fair representation in processing Plaintiff's grievance relating to his discharge and discrimination complaint. Plaintiff seeks \$2,000,000.00 in damages. Defendant University filed a motion to dismiss that is pending before the court.

Kendra Atwell v The University of Michigan. United States District Court, Eastern District of Michigan. (Judge Avern Cohn) (Filed December 12, 2012).

Plaintiff was an Administrative Specialist for the Thompson Center for Learning and Teaching on the Flint Campus until she was placed on Reduction in Force ("RIF") in May 2011. Plaintiff alleges she was suspended, forced to transfer, laid off and rejected for re-hire on account of a perceived disability, because (1) she took FMLA leave and (2) in retaliation for her participation in an investigation of an alleged HIPAA violation. Her three-count complaint includes claims under the Family and Medical Leave Act, the Michigan's Persons with Disabilities Civil Rights Act, and the Michigan Whistleblower Protection Act. She seeks reinstatement and/or back pay, front pay damages *in lieu* of reinstatement, interest, costs and attorney's fees.

Jennifer Dibbern v The University of Michigan, a Domestic Nonprofit Corporation, the Board of Regents of The University of Michigan, a public constitutional body corporate, Mary Sue Coleman, President of The University of Michigan, an individual acting in her official capacity, Rachel S. Goldman, in her individual and official capacity, Tresa Pollock, in her individual and official capacity and Peter Green, in his individual and official capacity. United States District Court, Eastern District of Michigan. (Judge Sean F. Cox) (Filed December 21, 2012)

Plaintiff was a Graduate Student in Materials Science Engineering at the University. She alleges she was dismissed from the Graduate Program in December 2011 after reporting incidents of peer-to-peer sexual and gender-based harassment in the College of Engineering and retaliated against for attempting to remedy a sexually hostile environment. Plaintiff further alleges the University failed to meet its obligations under Title IX by willfully and knowingly allowing a sexually hostile educational environment to continue. Plaintiff's twelve-count complaint includes claims under Title IX, 42 U.S.C. Section 1983 and the Elliot-Larson Civil Rights Act, as well as claims for negligence, breach of fiduciary duty, emotional distress and invasion of privacy. Plaintiff seeks damages, costs and attorney's fees. On January 25, 2013, Plaintiff filed an Amended Complaint adding Peter Green as a named defendant and dropping the claims for negligence, breach of fiduciary duty, and emotional distress.

CASE UPDATES

Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), et al. v Jennifer Granholm, Regents of the University of Michigan, Board of Trustees of Michigan State University, Board of Governors of Wayne State University and Trustees of any other public college or university, community college, or school district. United States District Court, Eastern Division of Michigan. (Judge David M. Lawson) (Filed November 8, 2006).

In 2006, Plaintiffs, including BAMN, The Rainbow PUSH Coalition, a number of high school students in Michigan, college and graduate school students in Michigan, the AFSCME labor organization, and others (collectively, "BAMN Plaintiffs"), filed suit against a list of universities in the State, including the Regents of the University of Michigan. Plaintiffs asserted that Proposal 2, which prohibits preferential treatment on the basis of race, gender, national origin, and ethnicity in public education, public employment, and public contracting, violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and is preempted by Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972. Plaintiffs further alleged that Proposal 2 violates the Universities' First Amendment right to determine their academic standards and to determine the criteria for admission by prohibiting public universities from considering race in their admissions policies. This suit was later consolidated with another suit brought by students, prospective students, and faculty at the University of Michigan (collectively, "Cantrell Plaintiffs") against Governor Granholm – but not any state universities – contending that Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment.

On March 18, 2008, the Court issued a decision upholding Proposal 2 and dismissing the BAMN and Cantrell suits. The Court found that Plaintiffs had not shown that Proposal 2 was unconstitutional under any of their theories. The Court therefore granted summary judgment to the Attorney General, who had intervened in the case to argue that Proposal 2 was constitutional. The Court granted the Universities' motion to dismiss BAMN's claim that Proposal 2 violated First Amendment principles of academic freedom, agreeing that that right is for the Universities to assert (or not), but otherwise denied the Universities' motion to be dismissed from the case: in the Court's view, the allegations against the Universities stemmed from the same basic facts as those asserted in the case generally and university action would be required to obtain the relief sought by the plaintiffs; accordingly, the Court held, the Universities were proper parties to the litigation.

The Court in a separate opinion issued on March 18, 2008, found that Eric Russell (the law school applicant who had intervened in the case) no longer had a unique interest and dismissed him from the litigation. The Court likewise denied Jennifer Gratz's motion to intervene in the case. Finally, because the Court granted summary judgment to the Attorney General, upholding Prop 2 against Plaintiffs' challenges, the Court denied the various pending discovery motions and class certification motions as moot.

The Cantrell Plaintiffs filed a motion for reconsideration with the district court, which ultimately denied the motion. Eric Russell moved for attorney's fees from the University; that motion was denied on June 17, 2010.

BAMN filed an appeal to the Sixth Circuit, and the Universities cross-appealed the denial of their motion to be dismissed. Both Eric Russell and Jennifer Gratz appealed the Court's rulings to the Sixth Circuit. Jennifer Gratz later filed a motion to withdraw as an appellant, which motion was granted on March 23, 2009, and the Sixth Circuit determined that Eric Russell could participate only as an amicus. The Sixth Circuit panel heard oral argument of the parties' appeals, including the Universities' cross-appeal seeking dismissal from the case, on November 17, 2009.

On July 1, 2011, the Sixth Circuit panel reversed the grant of summary judgment to the Attorney General, found Proposal 2 unconstitutional, and ordered the grant of summary judgment to the BAMN and Cantrell plaintiffs. The Sixth Circuit panel affirmed the decision to dismiss Eric Russell from the suit, and also affirmed the decision to keep the University defendants in the suit. On September 9, 2011, the Sixth Circuit Court of Appeals issued an order stating that the entire court would reconsider the July 1, 2011, decision of the three-judge panel; oral argument was in March 2012.

On November 15, 2012, the Sixth Circuit *en banc* declared Proposal 2 unconstitutional as it relates to public education (specifically, public university admissions). The majority held that Proposal 2 creates for minorities a "comparative structural burden [that] undermines the Equal Protection Clause's guarantee that all citizens ought to have equal access to the tools of political change." Michigan's Attorney General declared his intent to file a petition for certiorari seeking U.S. Supreme Court review, and petitioned the Sixth Circuit to stay its ruling. On November 28, 2012, Michigan's Attorney General filed a petition seeking U.S. Supreme Court review of the Sixth Circuit's decision. On November 30, 2012, the Sixth Circuit granted the Michigan Attorney General's earlier request for a stay of its decision, putting the ruling on hold at least until the Supreme Court decides whether it will hear the case.

Alex A. Lemerand v Kevin Sheldon Hartman. Washtenaw County Circuit Court. (Judge Timothy Connors) (Filed May 29, 2009); Alex Lemerand v Regents of the University of Michigan. Michigan Court of Claims. (Filed June 1, 2009).

Plaintiff claims that, on June 19, 2006, he was driving in Ann Arbor when his vehicle was struck from the rear by a University of Michigan vehicle driven by UM employee Kevin Hartman. Mr. Lemerand alleges that Mr. Hartman was negligent by driving at an excessive rate of speed, was unable to stop, and failed to drive with due care and caution, among other violations of the Motor Vehicle Code of the State of Michigan. Plaintiff claims that, as a result of the accident, he has suffered serious and permanent injuries and disfigurements. He seeks damages, costs, attorney's fees and interest. Plaintiff filed a companion case in the Michigan Court of Claims against the University; that case was consolidated with the Washtenaw County case pending before Judge Connors. On May 27, 2010, Judge Connors granted the University's motion for summary disposition based upon plaintiff's failure to comply with the notice requirement of the Court of Claims. On August 5, 2010, the judge granted the motion for summary disposition for the individual defendant Kevin Hartman, concluding the case. Plaintiff filed an appeal to the Michigan Court of Appeals. On October 20, 2011, the court issued its opinion that upheld the lower court's dismissal of the case. On November 30, 2011, the Plaintiff filed an application for review with the Michigan Supreme Court; the Supreme Court entered an order on April 23, 2012, holding this appeal in abeyance until *McCahan v Regents* is decided. On August 20, 2012, the Michigan Supreme Court issued its decision requiring strict compliance with the notice provisions in the Court of Claims Act. On December 5, 2012, the Michigan Supreme Court denied Plaintiff's Application For Leave to Appeal.

Joseph Dean Vigil v Regents of the University of Michigan, Edie Goldenberg, Christina Whitman and Anna Kirkland. United States District Court, Eastern District of Michigan. (Judge Patrick J. Duggan) (Served January 3, 2011).

Mr. Vigil is a former Ph.D. candidate in Political Science. He alleges that he was removed from the program for allegedly not defending his dissertation within six years of becoming a candidate. His allegations include violations of the First Amendment right to free speech, due process, breach of contract, defamation, and discrimination based on his race and ethnicity. Plaintiff seeks damages, interest, costs, attorney's fees, and reinstatement to Rackham. On July 28, 2011, judgment was entered granting Defendants' motion to dismiss with prejudice all of Plaintiff's claims except Plaintiff's breach of contract claim, which was dismissed without prejudice. Plaintiff filed an appeal to the Michigan Court of Appeals that was granted in part on December 6, 2012. The Court of Appeals affirmed the dismissal of the defamation claim; affirmed the dismissal of the personal injury and civil rights claims based on alleged lack of support while he was enrolled in the doctoral program; and vacated the dismissal regarding the breach of contract claim and

Plaintiff's personal injury and civil rights claims related to his dismissal of the program in 2007. The case has been remanded to the district court for adjudication of the remaining claims.

Aiman Farhoud and Souhar Farhoud v Darice Rosario. Washtenaw County Circuit Court. (Judge Timothy P. Connors) (Filed August 1, 2011).

Plaintiff, Aiman Farhoud, is a patient care technician at the University of Michigan Hospital. Defendant, Darice Rosario, is a nurse co-worker. Plaintiff Farhoud alleges that Defendant made false accusations against him when she told her supervisors that he advised a co-worker, "go do this procedure before I kill somebody." Plaintiff alleges that Rosario's accusations resulted in his being subjected to investigation by UMH security personnel (after which he was cleared of any wrongdoing) as well as suffering embarrassment, humiliation, mortification, depression, sleeplessness, anxiety, missed time from work, damage to his reputation in the workplace and his community, and lost wages and benefits. Plaintiff Souhar Farhoud (Aiman's wife) claims damage to her reputation in the community, emotional distress, humiliation, mortification, embarrassment, sleeplessness, and anxiety. Plaintiffs seek judgment in excess of \$25,000 plus costs, interest, and attorney's fees. At a December 15, 2011 hearing, Judge Connors granted the Defendant's motion to dismiss the case in its entirety and with prejudice. Plaintiff filed a claim of appeal to the Michigan Court of Appeals on February 10, 2012. The University filed its brief in the Court of Appeals on September 26, 2012. Oral argument is set for February 12, 2013.

Senta Reyes v The University of Michigan, Dr. Merle Jaarda, Dr. Patricia Bauer, and Dr. Marilyn Woolfolk. United States District Court, Eastern District of Michigan. (Judge Nancy G. Edmunds) (Filed December 1, 2011); AND **Senta Reyes v University of Michigan, Merle Jarde, Patricia Bauer, and Marilyn Woolfolk.** Washtenaw County Circuit Court. (Judge Archie C. Brown) (Filed January 25, 2012); AND **Senta Reyes v University of Michigan, Merle Jaarda, Patricia Bauer and Marilyn Woolfolk.** Michigan Court of Claims. (Judge Paula J.M. Manderfield) (Filed March 26, 2012).

Plaintiff was a Dental School student who was dismissed for unsatisfactory academic progress while she was attempting to complete the remediation of her second year as a condition of continued enrollment after she had been previously dismissed for unsatisfactory academic progress. Plaintiff alleges deprivation of her rights to free speech, due process, and equal protection under the U.S. and Michigan Constitutions; racial discrimination; promissory estoppel/detrimental reliance; and breach of contract. Plaintiff claims she has suffered economic damages (including future lost wages and earning capacity), embarrassment, humiliation, outrage, anxiety, mental anguish, and mental and emotional distress. She seeks damages in excess of \$75,000, plus costs, interest, and attorney's fees. Plaintiff filed her state court claims in Washtenaw County Circuit Court. Her counts include violation of the Elliott Larsen Civil Rights Act, violations of due process and equal protection under the Michigan Constitution, promissory estoppel, and breach of contract. On January 15, 2012, the parties stipulated to the dismissal of 42 USC Section 1981 and the race discrimination claim in the federal case. The parties also stipulated to dismiss named defendant Dr. Merle Jaarda. On January 24, 2013, Defendants filed a motion for summary disposition in the federal case.

Douglas M. Smith v Regents of the University of Michigan. Washtenaw County Circuit Court. (Judge David S. Swartz) (Filed June 13, 2012).

Plaintiff claims that the Board of Regents violated the Michigan Open Meetings Act when it announced its choice of a law firm to conduct an external evaluation of the handling of a report of a resident physician suspected of possessing child pornography, allegedly without having announced or held a special public meeting to choose that law firm. Plaintiff also alleges that, when he filed a Freedom of Information Act request for documents to show how the Regents chose the consultants, the response from the University was untimely, informed him that much of the responsive material would be exempt from disclosure, and informed him that a fee deposit would be required. Plaintiff asks the court to

compel the University to disclose the public records that he requested and seeks damages, attorney's fees, and costs. The University filed a motion for summary disposition, which was argued before Judge Swartz on October 31, 2012. At that hearing, the court concluded that it was unable to decide the motion without the benefit of an evidentiary hearing. On November 30, 2012, Defendant filed a Motion for Reconsideration.

Regents of the University of Michigan v St. Jude Medical, Inc. United States District Court, Eastern District of Michigan. (Judge Avern Cohn/Magistrate Judge Laurie J. Michelson) (Filed July 2, 2012).

In 1997, the University licensed to St. Jude Medical, Inc. its rights to patents and other technology related to chemical compositions for treating bio-prosthetic tissues. St. Jude has been paying royalties to the University for a number of years, but last year stopped paying, claiming that the University's patents and technology do not cover all of the St. Jude products and that therefore the company was entitled to a credit on amounts previously paid. The University filed this lawsuit to recover the royalties that are currently owed, and to protect the University's ability to receive the future royalties to which the University is entitled. Defendant St. Jude filed its Answer with the court, including a counterclaim that the University should have to repay all the royalties since 1998. The University replied to Defendant's counterclaim, denying liability because the claim, among other things, is barred by the Michigan Court of Claims Act. On November 9, 2012, St. Jude Medical filed a Petition for Inter Partes Review at the U.S. Patent Office, seeking reexamination of the patentability of the claims in one of the patents licensed to St. Jude. The University filed an amended complaint for procedural reasons. On December 17, 2012, St. Jude Medical filed an Answer adding a count seeking declaratory judgment claiming the University's patent is invalid. On December 27, 2012, the University filed a motion to dismiss Defendant's counterclaim given Defendant's failure to file notice with the Michigan Court of Claims as required by Michigan law. On December 31, 2012, the University filed a summary judgment motion seeking an affirmative finding of liability on the license agreement. Defendant filed its opposition to the University's motion to dismiss on January 17, 2013, and the University filed a reply on January 31, 2013.

Melissa Hoagland v The University of Michigan and Rita McPherson. United States District Court, Eastern District of Michigan. (Judge Patrick J. Duggan) (Filed August 24, 2012).

Plaintiff was employed in the Health System until her discharge on December 20, 2011, for job abandonment. She alleges that the University failed to accommodate her disability, discriminated against her based on her disability, and retaliated against her, all in violation of the Americans with Disabilities Act and the Michigan's Persons with Disabilities Civil Rights Act. Plaintiff seeks lost wages, damages, attorneys' fees, costs, interest, and full reinstatement to her previous employment. Defendant filed a motion for summary disposition that was granted in part on December 17, 2012. Judge Duggan ruled that Plaintiff could not bring a federal ADA claim against the University for money damages. He also ruled that Rita McPherson could not be sued in her individual capacity under the ADA. Judge Duggan declined Defendants' request for the Court not to exercise supplemental jurisdiction over Plaintiff's state claims. Plaintiff sought leave to amend her complaint to add disability discrimination and retaliation claims under the Rehabilitation Act against the University and named defendant, Rita McPherson, in her official capacity. Plaintiff's motion for leave to file an amended complaint was granted.

Donald Pines v The University of Michigan. Wayne County Circuit Court. (Judge Patricia Fresard) (Served September 11, 2012).

Plaintiff worked as a billing clerk at the University Hospital. He alleges that, after he complained to his supervisors that he was being sexually harassed by a co-worker, the University engaged in a pattern of harassment and discipline ultimately resulting in Plaintiff being placed on an unpaid medical leave in November 2008. Plaintiff alleges that the University denied him subsequent positions for which he applied and ultimately released him from his employment. Plaintiff brought claims under Michigan's Persons with

Disabilities Civil Rights Act, including a claim of Retaliation for Filing a Sexual Harassment Charge. Plaintiff seeks lost wages, lost benefits, emotional damages, interest, costs and attorney's fees. On December 14, 2012, Judge Fresard granted in part Defendant's motion for summary disposition by dismissing the retaliation claim. On January 4, 2013, the University filed an application for leave to appeal the trial court's denial of the University's motion for summary disposition on the Michigan's Persons with Disabilities Civil Rights Act claim.

Guey-Fang Chao v Board of Regents of the University of Michigan. Washtenaw County Circuit Court (Judge David Swartz) (Served January 16, 2013)

Plaintiff was employed in the College of Engineering as an Accountant Intermediate until August 2, 2010. She claims she was discriminated against and constructively discharged in violation of Michigan's Persons with Disabilities Civil Rights Act. Plaintiff seeks damages, reinstatement, interest, costs and attorney's fees. Plaintiff originally filed a similar claim in federal court alleging violations of the Americans with Disabilities Act. That action was voluntarily dismissed after the University raised the sovereign immunity defense.

CASE RESOLUTIONS

Brian Daniels v The University of Michigan. Washtenaw County Circuit Court. (Judge Archie C. Brown) (Served November 30, 2011).

Plaintiff is employed in the Department of Public Safety. Plaintiff claimed that, following an injury and subsequent surgery, he was assigned to restricted duty for 18 months after which time he was told by his department that, since he could no longer perform his duties as a police officer, he could look for another job or take a pay cut. Plaintiff stated that he was reclassified as a parking enforcement officer at a reduction in pay. Plaintiff alleged that female employees were treated differently and sought damages, lost wages, interest, costs and attorney's fees. The University filed a motion for summary disposition that was granted by Judge Brown on January 7, 2013 with prejudice. This case is concluded.

Shalanda M. Golden v Regents of the University of Michigan. Michigan Court of Claims. (Judge Rosemarie E. Aquilina) (Filed December 8, 2011).

Plaintiff alleged that she slipped on ice located in a University of Michigan-Flint parking structure. Plaintiff claimed she sustained multiple injuries and alleged the University was in violation of statutory obligations and maintenance. Plaintiff claimed that, as a result of the injuries, she sustained loss of earnings and earning capacity, became obligated for past and future medical expenses, and would experience future pain and suffering. Plaintiff sought unspecified damages, plus costs, interest, and attorney's fees. The University filed a motion for summary disposition. The parties participated in facilitation and settlement was reached as a result. This case is concluded.

Trucking Specialists, Inc. v Simone Contracting Corporation, LaBelle Electric Services, University of Michigan, Western Surety Company. Washtenaw County Circuit Court. (Judge Archie C. Brown) (Served January 4, 2012).

This lawsuit arises out of a claim by Plaintiff ("TSI") that it had not been paid by a subcontractor (Simone Contracting) for the trucking services it provided on a University electrical duct project. TSI claimed breach of contract against Simone in the amount of \$49,478.14 plus interest, as well as claims against Western Surety Company's payment bond for that amount. Plaintiff claimed unjust enrichment against the University

of Michigan and LaBelle Electric Services. Plaintiff sought \$49,478.14 plus damages, interest, costs and attorney's fees. The University was dismissed from the case on March 15, 2012, but the case remained pending for resolution among the remaining parties. Those parties resolved their disputes in December, 2012 and the University made its final construction payment in January 2012 to the appropriate parties pursuant to their settlement. This case is now closed.

Respectfully submitted,



Timothy G. Lynch
Vice President & General Counsel

February 2013