

THE UNIVERSITY OF MICHIGAN  
REGENTS COMMUNICATION  
ITEM FOR INFORMATION

Subject: Litigation

July 2011

**RESOLUTIONS**

**Peggy Suess v University of Michigan-Flint.** Genesee County Circuit Court. (Judge Richard B. Yuille) (Served November 1, 2010).

Plaintiff worked as an administrative assistant at the School of Health Professions & Studies on the Flint Campus. Ms. Suess claims that she was discriminated against because of her age and that, after filing a complaint about that disparate treatment, she was discharged in retaliation. Ms. Suess seeks damages, lost wages, reinstatement to her position, costs and attorney fees. The case settled during court-ordered facilitation and is now concluded.

**QBE Insurance Corporation v Blue Cross and Blue Shield of Michigan, Michigan Catastrophic Claims Association, and Regents of the University of Michigan.** Wayne County Circuit Court. (Judge Daphne Means Curtis) (Filed March 23, 2011).

Plaintiff claims that an individual that was covered under a no-fault policy issued by QBE was involved in an auto/pedestrian accident. QBE claims that the University of Michigan hospital, where the insured was treated, received double-payment from both QBE and Blue Cross/Blue Shield for services provided to the insured and that QBE, as the excess insurer, should be reimbursed for the medical expenses it paid to UM on behalf of the insured. Resolution of the case was reached between the parties and the case is concluded.

**Stephen Tripodi v Regents of the University of Michigan.** Genesee County Circuit Court. (Judge Richard Yuille) (Served September 15, 2009).

Plaintiff claims that the University's Flint Campus denied him access to all of the University's student services, benefits and programs while he was a student in the fall of 2007, based on his gender. He claims that he has suffered depression, humiliation, and loss of reputation. He seeks damages in excess of \$40 million. The University filed a motion for summary disposition, which was granted by the judge. Plaintiff's appeal to the Michigan Court of Appeals was dismissed by the Court for failure to complete the appeal process.

**Board of Regents of the University of Michigan v Fidelity National Title Insurance Company.** Washtenaw County Circuit Court. (Judge David S. Swartz) (Served December 20, 2010).

The University filed suit against Fidelity National Title Insurance Company ("Fidelity") to retire liens relating to the University Health System's 2008 purchase of property in Brighton, Michigan. Special assessments for road and sewer construction had been levied upon the property prior to closing; the assessments were to have been paid prior to closing under the Purchase Agreement but were not. No exceptions for the unpaid assessments were included in the final Title Policy. Demand has been

made upon Fidelity under the title insurance policy but coverage has been denied. Settlement was reached between the parties and the case is concluded.

#### 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 black high school students in Michigan, college and graduate school students in Michigan, the AFSCME labor organization, and others (collectively, "BAMN Plaintiffs"), filed suit against, among others, the Regents of the University of Michigan. That suit 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, is preempted by Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972, and 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 – that contended 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 the 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. According to the Court, the Universities were proper parties to the action because the allegations regarding them stemmed from the same basic facts as those asserted in the case generally and because university action would be required to obtain the relief sought by the plaintiffs.

The Court also, in a separate opinion likewise 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 belated motion to intervene in the case. Finally, because the Court had granted summary judgment to the Attorney General, upholding Prop 2 against the plaintiffs' challenges, the Court denied the various pending discovery motions (such as those filed by Russell seeking additional discovery from the defendant Universities) and class certification motions as moot.

The Cantrell Plaintiffs filed a motion for reconsideration with the district court, but the district court ultimately denied that motion. Eric Russell filed a motion in the district court seeking attorneys' fees from the University; that motion was denied on June 17, 2010.

BAMN filed an appeal to the Sixth Circuit to challenge the Court's ruling upholding Proposal 2. The University defendants cross-appealed the Court's denial of their motion to be dismissed from the case. 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 issued a decision that 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. It is expected that en banc review of the Sixth Circuit panel decision will be sought.

Keith Yohn v Board of Regents of the University of Michigan, Peter Polverini, Paul Krebsbach and Mark Snyder. Michigan Court of Claims. (Judge Thomas L. Brown) (Filed October 7, 2008).

Professor Yohn's complaint alleges that Paul Krebsbach, Chair of the Biomedical and Materials Science Department in the School of Dentistry, is keeping a secret file on Dr. Yohn to force Plaintiff out of his tenured University appointment. He also alleges that Defendant Snyder committed misconduct by working on his intramural dental patients during work hours, causing Plaintiff to suffer anger and loss of sleep; Plaintiff complained to Dean Polverini and later filed a grievance of Snyder's misconduct. Dr. Yohn also complained that Dr. Krebsbach embarrassed him in front of his fellow faculty members at a faculty meeting, and that later an officer from DPS was sent to his home to ask him about some alleged threats made by Plaintiff at that meeting. Dr. Yohn seeks an order to expunge all evidence of the DPS incident report noted above, jail time for defendants Polverini and Krebsbach, \$3 million for mental anguish and suffering, and exemplary damages. The University's motion for summary disposition was granted by the court on June 24, 2009, thereby dismissing all of Plaintiff's claims with prejudice. Plaintiff contested the proposed order, and a hearing was held on September 2, 2009. The judge granted the University's motion to dismiss the entire case, denied Plaintiff's motion opposing the order of dismissal, denied with prejudice Plaintiff's motion to amend his complaint, and awarded the defendants \$36,000 in costs and fees. Plaintiff filed an appeal with the Michigan Court of Appeals. In addition, Plaintiff filed a motion for an immediate preliminary injunction, asking the Court of Appeals to prohibit defendant Snyder from performing certain of his duties. The Court of Appeals denied the motion for immediate preliminary injunction. Plaintiff filed an Application for Leave to Appeal Prior to Decision by Court of Appeals with the Michigan Supreme Court. On October 26, 2010, the Michigan Supreme Court denied plaintiff's application for leave to appeal. Plaintiff filed a motion in the Court of Appeals for peremptory reversal, which was denied by the court on February 16, 2011. On March 22, 2011, the Court of Appeals ruled unanimously in favor of the University and upheld the lower court's dismissal of Dr. Yohn's lawsuit. Plaintiff filed an application for leave to appeal to the Michigan Supreme Court. On May 17, 2011, the Court of Appeals granted the University's motion for attorney's fees in the amount of \$34,178.

Yohn filed a motion for reconsideration of the Court's order which the Michigan Court of Appeals denied on June 30, 2011.

**Peter J. Hammer** v Board of Regents of the University of Michigan. Michigan Court of Claims.  
(Judge James R. Giddings) (Served January 6, 2005).

Plaintiff is a former Assistant Professor at the Law School who was denied tenure in 2002. He alleges that he did not receive tenure because of his sexual orientation, claiming that he relied on the University's promises that he would not be discriminated against based upon his sexual orientation. Mr. Hammer also alleges that he was not given notice of non-reappointment consistent with the Standard Practice Guide and that because he had an academic appointment for a full eight years, he is entitled to *de facto* tenure pursuant to Regents Bylaw 5.09. Mr. Hammer seeks judgment in excess of \$25,000. The University filed a motion for summary disposition and a motion to dismiss, both of which were denied by Judge Giddings. The University filed an interlocutory appeal to the Michigan Court of Appeals. On January 25, 2007, the Court of Appeals vacated the orders of the Court of Claims and ordered Judge Giddings to reconsider the plaintiff's affidavits consistent with the court rules. The University and plaintiff filed motions and cross-motions for summary disposition; at oral argument in March 2008, the Court stated that it was denying the motions filed by both sides as to the claim of *de facto* tenure and took under advisement the University's motion to dismiss the discrimination claim. In December 2008, and again in November 2009, the Court of Claims granted plaintiff's request to reopen discovery for the purpose of taking additional deposition testimony. The Court of Claims heard additional oral argument on December 11, 2009, on the University's request for the dismissal of Hammer's claim of sexual orientation discrimination. On August 27, 2010, Judge Giddings dismissed Plaintiff's sexual orientation discrimination claim; the claim of *de facto* tenure will proceed to trial. Trial dates have been set for July 11 and 12, 2011.

Respectfully submitted,

  
Suellen Scarnecchia  
Vice President and General Counsel

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