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THE UNIVERSITY OF MICHIGAN  
REGENTS COMMUNICATION  
ITEM FOR INFORMATION

Subject: Litigation

May 2014

NEW CASES

Drew Sterrett v. Heather Cowan, Jay Wilgus, Stacey Vander Velde, Theodore Spencer, Susan Pritzel, Mikiko Senja, E. Royster Harper, Malinda Matney, Anthony Walesby, and Laura Blake Jones. United States District Court, Eastern District of Michigan. (Judge Denise Page Hood) (Filed April 23, 2014).

Plaintiff is a former student at the University of Michigan. His claims arise out of disciplinary and other alleged actions taken against him by Defendants on the basis of sexual misconduct. Plaintiff alleges he was deprived of his protected liberty and property interests, and not afforded due process. His two-count complaint includes claims of 42 USC Section 1983 – Fourteenth Amendment Due Process against all defendants, and First Amendment Free Speech against Defendants Cowan, Vander Velde, and Wilgus. Plaintiff seeks equitable relief as well as compensatory damages, exemplary damages, punitive damages, interest, costs, attorney and expert witness fees.

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." 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. On March 25, 2013, the U.S. Supreme Court agreed to hear the case during its next Term, which effectively continues the stay of the Sixth Circuit *en banc* decision. On August 21, 2013, the University and Michigan State University filed a joint brief to the U. S. Supreme Court arguing that petitioning the governing boards of UM and MSU is a political process, and that the record does not support the Attorney General's suggestion that UM and MSU could achieve the educational benefits of diversity solely through race-neutral alternatives imported from other states. On April 22, 2014, the Supreme Court overruled the Sixth Circuit, with the plurality opinion concluding that there was no basis to find Prop 2 unconstitutional. The Court's ruling means that Prop 2 remains in effect, and the University must continue to comply with its strictures.

Linda Martinson v Lee K. Roosevelt, Joanne Motino Bailey, Kathy Dunnuck. Washtenaw County Circuit Court. (Judge Melinda Morris) (Filed October 31, 2008). AND Linda Martinson v Jodi Danhof, Sarah Choinard, Erin Flatley and Catherine Scott. Washtenaw County Circuit Court. (Judge Melinda Morris) (Filed November 7, 2008). AND Linda Martinson v Sarah Soroosh Vandergoot. Washtenaw County Circuit Court. (Judge Melinda Morris) (Filed November 9, 2008). AND Linda Martinson v Regents of the University of Michigan, Carol Loveland-Cherry, Judith Lynch-Sauer and Bonnie Hagerty. United States District Court, Eastern District of Michigan. (Judge Paul D. Borman) (Served October 5, 2009).

Plaintiff was enrolled in the School of Nursing second career nursing program. After she was dismissed from the program, she claimed that her classmates and a faculty member (the named defendants in the State

court actions) made defamatory statements to third parties regarding Plaintiff, and that School of Nursing administrators relied upon those false statements to support her expulsion from the program. Plaintiff's state court action included defamation and intentional infliction of emotional distress against each of the Defendants. She sought damages in excess of \$25,000 plus costs and interest. By stipulation of the parties, the three state court cases were dismissed without prejudice when Plaintiff filed a fourth lawsuit in the U.S. District Court for the Eastern District of Michigan, naming the Regents as well as administrators at the School of Nursing.

In her federal lawsuit, Plaintiff's allegations include various theories alleging violations of federal and state due process rights. Plaintiff sought declaratory judgment stating that her expulsion from the School of Nursing is null and void, damages, interest, costs, and attorney's fees. Defendants filed a motion to dismiss and a motion for summary judgment. Judge Borman issued a written opinion dated September 28, 2011 granting the motion in part and denying the motion in part. Judge Borman dismissed all the claims against the University of Michigan and all claims against the individual defendants except for the federal procedural due process claim against the individual defendants. Plaintiff prematurely filed a notice of appeal to the Sixth Circuit Court of Appeals regarding the partial dismissal of her complaint. On August 16, 2012, Judge Borman granted the University's motion for summary judgment and dismissed plaintiff's complaint with prejudice. Plaintiff filed an appeal to the Sixth Circuit Court of Appeals. On April 4, 2014, the Sixth Circuit Court of Appeals affirmed the District Court's dismissal. On April 18, 2014, Plaintiff petitioned the Sixth Circuit for a rehearing *en banc*.

Senta Reyes v University of Michigan, Dr. Merle Jarda, Dr. Patricia Bauer, and Dr. Marilyn Woolfolk. Washtenaw County Circuit Court. (Judge Archie C. Brown) (Filed January 25, 2012); AND Senta Reyes v University of Michigan, Dr. Merle Jaarda, Dr. Patricia Bauer and Dr. 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, 2013, the parties stipulated to the dismissal of the 42 U.S.C. Section 1981 claim, 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. On April 2, 2013, the parties stipulated to dismiss the University and named defendant, Dr. Marilyn Woolfolk, with prejudice. On July 18, 2013, Judge Edmunds granted Defendant's Motion to Dismiss the last remaining named defendant, Dr. Bauer, which concludes the federal case. On April 7, 2014, Plaintiff filed a First Amended Complaint in the Washtenaw County case dropping Dr. Merle Jaarda as a named defendant. Plaintiff also drops the race discrimination claim, and adds a gender claim under the Elliott Larsen Civil Rights Act.

Polytorx, LLC a Michigan Limited Liability Company v Antoine Naaman, Sherif El-Tawil, Dong Joo Kim, Ju Young Kim, Ji Yong Kim, and Sambo Construction Machine Co., LTD. Washtenaw County Circuit Court. (Judge Carol Kuhnke) (Filed May 13, 2013)

Plaintiff has been a licensee of University patents since June 26, 2003. Plaintiff claims the defendants, a current and former faculty member, have tortiously interfered with plaintiff's business relationships. Plaintiff



alleges that defendants engaged in research and activities using the licensed patent rights that were in conflict with the license and collaborating in misappropriation of confidential information and trade secrets that resulted in a patent application being issued in Korea to Sambo Construction. On July 25, 2013, Defendants filed a Motion for Summary Disposition that was denied on March 3, 2014. On March 24, 2014, Defendants filed an Application for Interlocutory Appeal. On April 21, 2014, Plaintiff filed a Motion in Opposition to Defendants' Application for Interlocutory Appeal.

Joan Scheske v University of Michigan Health System. United States District Court, Eastern District of Michigan. (Judge Nancy Edmunds) (Filed August 5, 2013)

Plaintiff was a market research analyst lead for the Department of Surgery for the University of Michigan Health System. Plaintiff states she reported to management that there was a discrepancy between her role, title, and compensation, and that this discrepancy was based on her gender. Plaintiff claims similarly situated male employees, who performed similar functions, were properly titled and compensated at the director level, and she was not. Plaintiff further alleges that her supervisors subjected her to gender-based discriminatory behavior. Her three-count complaint includes claims of Gender Discrimination, Retaliation, and Violation of the Equal Pay Act. Plaintiff seeks back pay, punitive damages, reinstatement or back and front-pay in lieu of reinstatement, interest, costs, and attorney's fees. On April 29, 2014, the parties stipulated to the dismissal of Plaintiff's Gender Discrimination and Equal Pay Act claims, with prejudice.

#### CASE RESOLUTIONS

No case resolutions to report this month.

Respectfully submitted,



Timothy G. Lynch  
Vice President & General Counsel

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