

THE UNIVERSITY OF MICHIGAN
REGENTS COMMUNICATION
ITEM FOR INFORMATION

Received by the Regents
September 18, 2008

Subject: Litigation

September 2008

NEW CASES

1. Steve Lomske as Father and Next Friend of Minor Natalie Lomske v Permobil, Inc., Mystic Medical Equipment Inc. and Wheelchair Seating Service of the University of Michigan, Wayne County Circuit Court. (Judge John H. Gillis, Jr.) (Served August 15, 2008).

Plaintiff alleges that the University of Michigan's wheelchair seating service sold her a wheelchair in July 2004 which later became subject to a recall. Plaintiff claims the University had a duty to notify her of the recall. In June 2006 the defect failed, the chair collapsed and plaintiff broke her femur. Both the manufacturer and a firm providing maintenance on the wheelchair in early 2006 are additional defendants in the lawsuit.

2. Stephen C. Tripodi v University of Michigan-Flint. 68th Judicial District Court. (Filed July 18, 2008).

Plaintiff was a student at the Flint Campus. He claims that he was dismissed by the University because of false allegations made by fellow students who claimed that Plaintiff threatened the safety of a University professor. Plaintiff seeks reimbursement of his tuition and fees.

3. Paul Eilers v University of Michigan. Michigan Court of Claims. (Judge Joyce A. Draganchuk) (Filed May 23, 2008).

Plaintiff alleges that, while seeking medical treatment at the Livonia Center for Specialty Care, he slipped and fell on some liquid on the floor, causing a broken hip and other serious injuries. Plaintiff claims that the University was negligent and seeks damages, interest, court costs and attorney fees.

RESOLUTIONS

4. Jessica F. Jackson v Board of Regents of the University of Michigan. Michigan Court of Claims. (Judge James R. Giddings) (Filed October 8, 2007); Jessica F. Jackson v Michael Borts. Washtenaw County Circuit Court. (Judge David S. Swartz) (Filed October 11, 2007).

Ms. Jackson claims that a University of Michigan bus, driven by Defendant Michael Borts, rear-ended and struck her car, causing her severe bodily injuries, emotional damage, pain and suffering. She claims that the accident was caused by the bus driver's negligence and that the University failed to keep the vehicle in good working order. She seeks damages in excess of \$25,000 as well

as costs, interest and attorney's fees. The University filed a motion for summary disposition in the Court of Claims case, which was granted by the judge.

5. **Marlin Air, Inc. v The Board of Regents of the University of Michigan**, Michigan Court of Claims. (Judge Joyce Draganchuk) (Filed December 5, 2007).

Plaintiff was under contract with the University to provide fixed wing aero medical transport services. Following the tragic accident that resulted in the deaths of the pilots and medical personnel aboard one of the Marlin Air planes, the University terminated the contract with Marlin Air. Plaintiff claims that the University breached its contract and seeks damages, costs, interest and attorney fees. Settlement was reached between the parties and the case is concluded.

6. **Ruth Braun v Board of Regents of the University of Michigan**, Michigan Court of Claims. (Judge Beverley Nettles-Nickerson) (Served April 28, 2008).

Ms. Braun was employed by the University in the Office of Undergraduate Admissions. She claims that she was terminated from her position because she reported suspected violations of labor practices within the office. Plaintiff seeks damages, interest, costs and attorney's fees. The University filed a motion to dismiss, which was granted by the judge on July 23, 2008.

7. **Michigan Federation of Teachers & School Related Personnel v University of Michigan**, Washtenaw County Circuit Court. (Judge Timothy Connors) (Filed March 19, 2004).

This is an action for disclosure of records under the Michigan Freedom of Information Act. Plaintiff sent a FOIA request to the University seeking the names, addresses, phone numbers and employment information of all University employees. The University provided the information with the exception of those employees who have a "do not publish" request on file. Plaintiff seeks access to those records. The parties filed cross-motions for summary disposition. The University's motion was granted and plaintiff's motion was denied by Judge Connors. The judge ruled that the home phone numbers and addresses of employees who refused to give permission to the University to publish them are private and the University was correct in refusing to disclose them. Plaintiff filed an appeal with the Michigan Court of Appeals. Oral argument was heard on April 11, 2006. The Court of Appeals issued its opinion, reversing the decision of the trial court. The University sought and was granted leave to appeal to the Michigan Supreme Court. On July 16, 2008, the Court issued its ruling which expanded the definition of "information of a personal nature," the language of the FOIA privacy exemption. Based upon this modified definition, the Court reversed the Court of Appeals and reinstated the circuit court's grant of summary disposition in favor of the University.

8. **Bonnie J. Kannowski v University of Michigan**, United States District Court for the Eastern District of Michigan. (Judge Denise Page Hood) (Served June 26, 2003).

Plaintiff is a former employee of the University. She claims that she was wrongfully denied benefits under the University's long-term disability policy and seeks LTD benefits, attorney fees, costs and interest. Plaintiff voluntarily agreed to dismiss the case.

9. Barbara Kohl v University of Michigan Medical Center. Washtenaw County Circuit Court. (Judge Timothy Connors) (Filed March 18, 2005); Michigan Court of Claims (Judge James Giddings) (Filed April 26, 2005).

Plaintiff is a former employee who became disabled in 2002. She is enrolled in and receiving benefits under the University's long term disability program. Plaintiff claims that she is entitled to more benefits than what she is receiving. She seeks judgment in excess of \$25,000, together with costs, interest and attorney's fees. Plaintiff filed a companion case against the University in the Michigan Court of Claims. Settlement was reached between the parties and the case is dismissed.

10. Irene Coleman v Livonia Center for Specialty Care and John Doe. Wayne County Circuit Court. (Judge Susan D. Borman) (Filed May 21, 2008).

Ms. Coleman claims that she went to the University's Livonia Center for a colonoscopy. She alleges that the anesthesiologist administered medication into her IV and then touched her inappropriately. Her allegations include negligent hiring on the part of the University, assault and battery, and intentional infliction of emotional distress. She seeks damages, interest, costs and attorney fees. The University filed a motion for summary disposition, which was granted by the court. This case is concluded.

CASE UPDATES

11. James Colson v University of Michigan, Kevin Tremper and Ronald Wasserman. Washtenaw County Circuit Court. (Judge Timothy R. Connors) (Filed August 24, 2007). Michigan Court of Claims. (Judge Beverley Nettles Nickerson) (Filed August 23, 2007).

Plaintiff was employed as an Assistant Clinical Professor of Anesthesiology at the University. Dr. Colson claims that he was told about performance issues from time to time but was not given the opportunity review his file. In October 2005, Plaintiff was informed that his contract would not be renewed after August 31, 2006. Plaintiff's allegations include breach of contract, promissory estoppel, defamation against the named Defendants Tremper and Wasserman and age discrimination. He seeks damages in excess of \$25,000, costs, attorney's fees and reinstatement to his former position. On August 21, 2008, Plaintiff stipulated to dismiss three of his claims against the University: breach of contract, promissory estoppel and discharge in breach of public policy.

12. Mary C. Lee v University of Michigan-Dearborn and Robert L. Simpson. Michigan Court of Claims. (Judge James R. Giddings) (Filed March 13, 2006); removed to United States District Court, Western District of Michigan (Judge Hugh W. Breneman, Jr.) (April 27, 2006).

Plaintiff is a former student at the Dearborn campus who was expelled from campus for violations of the Code of Student Conduct. She claims that the University's hearing board and code appeals

council decisions were improper, that the University has breached its contract with her as a student, and that Dr. Simpson's denial to reconvene the code appeals council violated her due process rights. She seeks a review of the University's expulsion decisions, money damages, costs and attorney's fees. The case was removed to federal court and the University filed a motion for summary judgment. On September 28, 2007, Judge Brenneman ruled favorably on the University's motion in part, dismissing plaintiff's claims except for the breach of contract claim which was remanded to the Michigan Court of Claims. Plaintiff filed a notice of appeal to the Sixth Circuit Court of Appeals on the dismissal of her constitutional claims and her claim under the Michigan Administrative Procedures Act. On March 7, 2008 Judge Giddings granted the University's motion for summary disposition on plaintiff's breach of contract claim. Plaintiff appealed that decision to the Sixth Circuit Court of Appeals; that court affirmed the trial court's dismissal on August 12, 2008. Plaintiff also appealed Judge Giddings' ruling on her breach of contract claim, which is still pending before the court.

13. Pino Colone v Patrick Wardell, Hurley Medical Center and University of Michigan. Genesee County Circuit Court. (Judge Richard B. Yuille) (Filed June 14, 2007).

Plaintiff was employed by the University as an emergency room physician working at Hurley Hospital in Flint. He claims that he was a Whistleblower when he reported an incident to the State Nurse Licensing Board that he felt was inappropriate patient care. Plaintiff states that, subsequent to that report, he was retaliated against by both Hurley Hospital and the University when he was reassigned to work at another hospital. He seeks damages in excess of \$25,000, costs and attorney's fees. The University filed a motion for summary disposition as did Hurley Hospital/Patrick Wardell. Judge Yuille dismissed Plaintiff's conspiracy and public policy claims; the judge also dismissed the Whistleblower claim against Hurley Hospital but retained the Whistleblower claim against the University as well as the Elliott-Larsen retaliation claim against the University and Hurley.

14. 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 an Assistant Professor at the Law School. 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 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 filed a motion for summary disposition, which was taken under advisement before Judge Giddings and is currently pending.

15. 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).

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"), assert 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 claim that state actors will be prohibited from using policies to desegregate state universities, public employment and public contracting, thereby prohibiting state bodies from fulfilling federal mandates to desegregate. Plaintiffs also claim that public universities have a First Amendment right to determine their academic standards and to determine the criteria for admission to the university and that Proposal 2 violates this right by prohibiting public universities from considering race in their admissions policies. Plaintiffs seek declaratory relief that Proposal 2 is preempted by the federal civil rights acts, violates the First Amendment of the U.S. Constitution and violates the Equal Protection Clause of the Fourteenth Amendment. On December 17, 2006, the plaintiffs filed an amended complaint, which sets forth their arguments in greater detail. By January 31, 2007, all defendants filed their answer to BAMN's amended complaint.

A second case (*Chase Cantrell, et al. v Jennifer Granholm and Michael Cox*), filed on November 19, 2006 by students, prospective students, and faculty at the University of Michigan (collectively, "Cantrell Plaintiffs") brought suit against Governor Granholm – but *not* any state universities – contending that Proposal 2 violates the Equal Protection Clause of the Fourteenth Amendment. On January 5, 2007, with the agreement of all parties, the district court ordered the actions by the BAMN Plaintiffs and the Cantrell Plaintiffs (collectively, "Plaintiffs") be consolidated for all purposes.

Before consolidation of the cases, on December 11, 2006, the University of Michigan, along with Michigan State University and Wayne State University, sought a preliminary injunction precluding implementation of Proposal 2 to the Universities' admissions and financial aid policies through the end of the then-current admissions and financial aid cycles and otherwise seeking a declaration of rights and responsibilities under Proposal 2. The Attorney General then moved to intervene in the suit, and the Court granted the motion on December 14th. On December 18, 2006, the parties (the Attorney General, the Governor, the Universities, and the plaintiffs) stipulated their agreement to the Universities' requested injunctive relief through 12:01 am on July 1, 2007, and the Court entered the requested injunction the following day. On December 22, 2006, however, two proposed intervenors to the suit, Eric Russell (an applicant to the University of Michigan Law School and to the Wayne State University Law School) and Toward a Fair Michigan ("TAFM") filed an appeal to the Sixth Circuit challenging the district court's failure to rule on their motion to intervene and its issuance of the injunction granting temporary relief to the three defendant Universities. Russell and TAFM asked the Sixth Circuit to stay the injunction pending review of the merits of their appeal, and also sought a writ of mandamus compelling the district court to lift its injunction. While Russell and TAFM's motion was pending before the Sixth Circuit, on December 27th, the district court granted Russell's motion to intervene in the underlying litigation,

but denied TAFM's request to intervene, as well as all other pending motions seeking intervention (which had been filed by the City of Lansing, the Michigan Civil Rights Initiative, and the American Civil Rights Foundation.) On December 29, 2006, a three-judge panel of the Sixth Circuit granted the requested stay of the district court's injunction pending the Sixth Circuit's review of the merits of the appeal and dismissed the request for a writ of mandamus as moot. BAMN filed a petition with the Supreme Court (via Justice Stevens, as Circuit Justice for the Sixth Circuit) for review of the Sixth Circuit's decision to stay the injunction pending appeal. Justice Stevens referred the matter to the entire Supreme Court, which denied BAMN's petition on January 19, 2007. Russell's appeal therefore remained pending before the Sixth Circuit, although it ultimately became mooted as the end date for the original stipulated injunction approached.

Because Russell was offered admission to Wayne State University Law School, and denied admission to University of Michigan Law School, under Proposal 2-compliant policies, the Cantrell Plaintiffs filed a motion to dismiss Eric Russell from the litigation. The district court denied that motion in March 2007, but left open the possibility that the matter could be reconsidered when dispositive motions were heard following the close of discovery in September 2007. In April 2007, BAMN filed a second amended complaint, which the parties again answered. In May 2007, BAMN and the Cantrell Plaintiffs filed motions for class certification. Throughout this time period, the parties pursued discovery, largely from the three defendant Universities, and deposed several officials at each institution. In Fall 2007, Russell filed a motion to compel additional discovery, related to academic performance data, Bar passage rates, and USMLE results, from the defendant Universities, which the Universities opposed.

The Court did not permit dispositive motions to be filed until late Fall 2007. In October 2007, the three defendant Universities filed a motion seeking dismissal from the case because they were not necessary parties and because BAMN had no standing to raise First Amendment academic freedom claims against the Universities. The Cantrell Plaintiffs filed a motion again seeking dismissal of Eric Russell from the case, as well as a motion seeking summary judgment on their claims against Proposal 2. The Attorney General filed a motion seeking summary judgment upholding Proposal 2 as constitutional. The BAMN plaintiffs argued that a trial was necessary to determine the constitutionality of Proposal 2. On February 1, 2008, Jennifer Gratz, who had been the plaintiff in the Supreme Court lawsuit challenging the University of Michigan's undergraduate admissions policies and who served as executive director of the group that sponsored Proposal 2, filed a motion to intervene in the suit. Ultimately, the Court heard these various motions in February 2008.

On March 18, 2008, the Court issued a decision upholding Proposal 2 and dismissing the BAMN and Cantrell suits. The Court found that all plaintiffs (except the labor unions and a Proposal 2 petition circulator) generally had standing to bring their claims, but found that those 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 argued 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. On March 19th, BAMN filed an appeal to the Sixth Circuit to challenge the Court's ruling upholding Proposal 2.

The Court also, in a separate opinion also 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. On March 20th, both Eric Russell and Jennifer Gratz appealed the Court's rulings to the Sixth Circuit.

The University defendants cross-appealed the Court's denial of their motion to be dismissed from the case. Because the Cantrell plaintiffs filed a motion before the district court for reconsideration, all appeals to the Sixth Circuit are currently on hold.

Certain of the proposed intervenors (the Michigan Civil Rights Initiative Committee and the American Civil Rights Foundation) have petitioned the U.S. Supreme Court for review of the Sixth Circuit's denial of their motions to intervene. The Supreme Court asked the parties to the case for their views, and the University Defendants filed a brief opposing the petition.

16. David Andrew Nassar v Sgt. Pasquale Alessi. Macomb County Circuit Court. (Judge Peter J. Maceroni) (Filed May 29, 2007).

Mr. Nassar alleges that he was falsely accused of stealing books from the Graduate Library, that his home was searched and that he was handcuffed and arrested at his place of employment. Plaintiff claims that Sgt. Alessi (UM Department of Public Safety) used excessive and unreasonable force and violence. His allegations include gross negligence, false arrest and false imprisonment, assault and battery, and intentional infliction of emotional distress. He seeks damages in excess of \$25,000, costs, interest and attorney's fees. The University filed a motion for summary disposition.

Respectfully submitted,


Suellyn Scarnecchia
Vice President and General Counsel

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